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NO. 55902-8-I

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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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DONALD HARRY,

Appellant,

v.

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

Respondents.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## TABLE OF CONTENTS

I.	ISSUE.....	1
II.	STATEMENT OF THE CASE.....	1
III.	STANDARD OF REVIEW.....	4
IV.	SUMMARY OF ARGUMENT.....	5
V.	ARGUMENT .....	6
	A. Under RCW 51.32.180(b), the Rate of Compensation Effective in 1974 Applies Here Because Harry’s Occupational Disease Became Partially Disabling in 1974.....	6
	1. The “Schedule of Benefits” Establishes a Worker’s Permanent Partial Disability Award.....	6
	2. The plain language of RCW 51.32.180(b) sets the schedule of benefits as of the date the occupational disease became “partially disabling.” .....	8
	B. Occupational Hearing Loss Within One Claim Is a Single Disease, Not “Separate and Pathologically Distinct Occupational Diseases.” .....	11
	1. Hearing loss in an industrial insurance claim is a single disease. ....	12
	2. <i>Kilpatrick</i> does not support Harry’s incremental theory.....	16
	3. <i>Pollard</i> and <i>Brooks</i> did not legally determine that noise exposure creates separate and pathologically distinct diseases. ....	18
	4. The Board treats occupational hearing loss as a single disease within a claim and has expressly	

rejected Harry's incremental schedule of benefits scheme.....	22
5. Harry's proposed incremental system is not only legally flawed, but is unworkable.....	24
C. Harry's Novel Theory Is Inconsistent With Other Statutes.....	27
D. The Superior Court Properly Dismissed Harry's Claims on Summary Judgment. ....	31
VI. CONCLUSION.....	37

## TABLE OF AUTHORITIES

### Cases

<i>Allan v. Dep't of Labor &amp; Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	33
<i>Bennerstrom v. Dep't of Labor &amp; Indus.</i> , 120 Wn. App. 853, 86 P.3d 826, <i>review denied</i> , 152 Wn.2d 1031 (2004).....	4, 5
<i>Blackburn v. Workers' Comp. Div.</i> , 212 W. Va. 838, 575 S.E.2d 597 (2002).....	12
<i>Boeing Co. v. Heidi</i> , 147 Wn.2d 78, 51 P.3d 793 (2002).....	passim
<i>Clauson v. Dep't of Labor &amp; Indus.</i> , 130 Wn.2d 580, 925 P.2d 624 (1996).....	30
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	8, 15
<i>Dennis v. Dep't of Labor &amp; Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	14, 15
<i>Dep't of Labor &amp; Indus. v. Allen</i> , 100 Wn. App. 526, 997 P.2d 977 (2000).....	4
<i>Dep't of Labor &amp; Indus. v. Landon</i> , 117 Wn.2d 122, 814 P.2d 626 (1991).....	8, 16
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	33
<i>In re Marriage of Olivares</i> , 69 Wn. App. 324, 848 P.2d 1281 (1993).....	34
<i>Ivey v. Dep't of Labor &amp; Indus.</i> , 4 Wn.2d 162, 102 P.2d 683 (1940).....	4, 37

<i>Kilpatrick v. Dep't of Labor &amp; Indus.</i> , 125 Wn.2d 222, 883 P.2d 1370, 915 P.2d 519 (1994).....	11, 12, 16, 17
<i>McDonald v. Dep't of Labor &amp; Indus.</i> , 104 Wn. App. 617, 17 P.3d 1195 (2001).....	4
<i>McIndoe v. Dep't of Labor &amp; Indus.</i> , 144 Wn.2d 252, 26 P.3d 903 (2001).....	10
<i>Olympia Brewing Co. v. Dep't of Labor &amp; Indus.</i> , 34 Wn.2d 498, 208 P.2d 1181 (1949), <i>overruled on other grounds</i> <i>by Windust v. Dep't of Labor and Indus.</i> , 52 Wnd.2d 33, 323 P.2d 241 (1958).....	34
<i>Page v. Dep't of Labor &amp; Indus.</i> , 52 Wn.2d 706, P.2d 663 (1958).....	10, 34, 36
<i>Phillips v. Dep't of Labor &amp; Indus.</i> , 49 Wn.2d 195, 298 P.2d 1117 (1956).....	22
<i>Pollard v. Weyerhaeuser</i> , 123 Wn. App. 506, P.3d 545 (2004), <i>review denied</i> , 154 Wn.2d 1014 (2005).....	passim
<i>Ruse v. Dep't of Labor &amp; Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	34
<i>Salesky v. Dep't of Labor &amp; Indus.</i> , 42 Wn.2d 483, 255 P.2d 896 (1953).....	4, 37
<i>Senate Republ'n Campaign Comm. v. Pub. Disclosure Comm'n</i> , 133 Wn.2d 229, 943 P.2d 1358 (1997).....	16
<i>Sepich v. Dep't of Labor &amp; Indus.</i> , 75 Wn.2d 312, 450 P.2d 940 (1969).....	4, 33, 37
<i>Simpson Timber Co. v. Wentworth</i> , 96 Wn. App. 731, 981 P.2d 878 (1999).....	14
<i>Soundgarden v. Eikenberry</i> , 123 Wn.2d 750, 871 P.2d 1050 (1994).....	25

<i>Windust v. Dep't of Labor &amp; Indus.</i> , 52 Wn.2d 33, 323 P.2d 241 (1958).....	34
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1998).....	32

**Statutes**

Laws of 1971, Ex. Sess., ch. 289, § 10.....	7, 24, 35
Laws of 1979, ch. 104, § 1 .....	7, 25, 36
Laws of 1986, ch. 58, § 2.....	7, 25, 36
Laws of 1993, ch. 520, § 1 .....	7
RCW 49.17 .....	30
RCW 49.17.060(2).....	31
RCW 49.17.120 .....	31
RCW 51.08.140 .....	14, 35
RCW 51.08.150 .....	9
RCW 51.16.040 .....	27
RCW 51.28.025 .....	31
RCW 51.32.080 .....	7, 26, 36
RCW 51.32.080(1).....	10
RCW 51.32.080(1)(b)(ii) .....	7, 24, 25
RCW 51.32.080(2).....	6

RCW 51.32.080(3)(a) .....	10
RCW 51.32.080(7).....	28
RCW 51.32.160 .....	22
RCW 51.32.180 .....	2, 8, 27
RCW 51.32.180(b).....	passim
RCW 51.52.100 .....	4, 37
RCW 51.52.104 .....	4, 33, 34
RCW 51.52.115 .....	4, 33, 37

**Rules**

CR 56(c).....	5, 37
WAC 296-14-350(3).....	8, 29
WAC 296-20-01002.....	10
WAC 296-20-19000.....	25
WAC 296-20-19020.....	10
WAC 296-20-2015.....	10
WAC 296-817-100.....	31
WAC 296-817-400.....	31

**Board Decisions**

<i>In re Eugene Williams,</i> BIIA Dec. 953780, 1998 WL 226194, (1998).....	10, 12, 26
<i>In re Carl Heidi,</i> Dckt. No. 961511, 1998 WL 226281, (BIIA 1998).....	passim

*In re Gerald Woodard*,  
Dckt. No. 0322924, 2004 WL 3218290, (BIIA 2004)..... passim

*In re Leonard Roberson*,  
BIIA Dec. 890106, 1990 WL 127253 (1999)..... 22

*In re Paul Brooks*,  
BIIA Dec., 0217331, 2003 WL 22722450 (2003) ..... 18, 21, 22

**Other Authorities**

American Medical Association,  
*Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993)..... 10

## I. ISSUE

The date an occupational disease first becomes “partially disabling” provides the date for the schedule of benefits used to determine rate of compensation for permanent partial disability awards. RCW 51.32.180(b). Donald Harry’s industrial insurance claim for occupational hearing loss covered the time period of 1968 through 2001. In 1974, an audiogram first revealed a hearing loss disability, subsequent audiograms revealed additional hearing loss.

Did Harry’s hearing loss first become disabling in 1974, such that the 1974 schedule of benefits applies to determine his rate of compensation?

## II. STATEMENT OF THE CASE

Buse Timber and Sales, Inc., employed Donald Harry from 1968 until Harry’s retirement in March 2001. BR Harry 11, 16.<sup>1</sup> This employment exposed him to loud noises, which caused occupational hearing loss. BR Harry 13-14; BR Riddell 12; BR 18. Dr. Riddell, a specialist in otolaryngology, diagnosed Harry’s occupational disease as “relatively symmetrical down-sloping sensory neural hearing loss.” BR Riddell 11.

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<sup>1</sup> “BR” refers to the Certified Appeal Board Record, with testimony referenced by witness name.

Harry's hearing loss gradually progressed over the 33 years he worked for Buse Timber. BR Harry 22; BR Lipscomb 32. His continued exposure to noise caused this progression. BR Riddell 23.

As part of Buse Timber's hearing conservation program, Harry received 21 audiograms, tests for hearing loss, beginning in 1974. Ex. 2; BR Lipscomb 15. The 1974 audiogram showed hearing loss in his left ear. *Id.* at 49. By 1985, Harry had hearing loss in his right ear. BR Lipscomb 52.

Harry did not seek treatment for his hearing loss until 2001. BR Harry 23. In April 2001, he filed an occupational disease claim for his hearing loss with the Department of Labor and Industries (Department). BR 18. An audiogram in August 2001 showed hearing loss equal to 38.13% of the complete loss of hearing in both ears. BR 18.

In January 2002, the Department issued an order directing Buse Timber to pay Harry a permanent partial disability award equal to 38.13% of the complete loss of hearing in both ears as found on the August 2001 audiogram. BR 18. The order found that the date of injury was August 26, 1974, such that the schedule of benefits applicable on August 26, 1974 applied to determine the rate of compensation for the award. BR 18.<sup>2</sup>

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<sup>2</sup> For occupational disease claims, the date listed under "date of injury" in a Department order references the date that is used to determine the applicable schedule of benefits under RCW 51.32.180.

Harry appealed to the Board of Industrial Insurance Appeals (Board). In a proposed decision, the industrial appeals judge found that Harry did not demonstrate that the August 26, 1974 audiogram was invalid. BR 18 (Finding of Fact No. 3). The industrial appeals judge also found, in the singular, that Harry had “*an* occupational hearing loss.” BR 18 (Finding of Fact No. 2) (emphasis added). Harry petitioned the full three-member Board for review of the proposed decision. BR 2. He did not object to the finding that he had “*an* occupational hearing loss.” BR 2. The Board denied his petition for review and adopted the proposed decision as its final decision. BR 1.

Harry appealed to superior court. CP 84. Buse Timber moved for summary judgment, arguing that Harry failed to present evidence that the 1974 audiogram was invalid. CP 66. Similar to his arguments at the Board, Harry asserted that the 1974 audiogram was invalid and that alternatively each audiogram should be used to determine the schedule of benefits. CP 52; BR 9. On February 16, 2005, the superior court granted Buse Timber’s motion for summary judgment. CP 7. Harry appeals to this Court.

Harry has not assigned error to the factual findings of the Board. Appellant’s Brief (AB) 1. The unchallenged findings of fact are verities on appeal. *Dep’t of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997

P.2d 977 (2000). Verities include the Board's findings that Harry failed to present evidence that the 1974 audiogram was invalid and that he had "an occupational hearing loss." BR 18.

### III. STANDARD OF REVIEW

The Board's review of a Department order is *de novo*, and the Board enters findings of fact and conclusions of law based on the evidence heard by the Board. RCW 51.52.100; RCW 51.52.104; *see McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001). The superior court reviews a Board of Industrial Insurance Appeal's decision *de novo*, but solely on the evidence and testimony presented to the Board. RCW 51.52.115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); *Salesky v. Dep't of Labor & Indus.*, 42 Wn.2d 483, 484-85, 255 P.2d 896 (1953); *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940).

The superior court decided this case on summary judgment. On review of a summary judgment order, the appellate court's inquiry is the same as the superior court. *See Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 856, 86 P.3d 826, *review denied*, 152 Wn.2d 1031 (2004). Summary judgment is appropriate when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter

of law. CR 56(c); *Bennerstrom*, 120 Wn. App. at 856. The court reviews a summary judgment de novo. *Id.* at 856. Review of questions regarding statutory interpretation, as here, is de novo as well. *Bennerstrom*, 120 Wn. App. at 867.

#### IV. SUMMARY OF ARGUMENT

Under RCW 51.32.180(b), the date used to determine the rate of compensation for permanent partial disability awards is the date the occupational disease first becomes “partially disabling.” Harry does not contest the validity of his 1974 audiogram, which first showed a hearing loss disability. Because his hearing loss first became partially disabling in 1974, the schedule of benefits in effect in 1974 applies to determine his rate of compensation.

Harry asserts that the amount of his permanent partial disability award should be determined by the incremental amounts of impairment shown on each of his audiograms over the time period of 1974 through 2001 using each schedule of benefits effective at the time of each audiogram. This proposed scheme is counter to the plain language of RCW 51.32.180(b), which does not provide for such an incremental approach to determining permanent partial disability awards. Within the context of a single claim, hearing loss is one disease process and thus is a

single occupational disease under RCW 51.32.180(b). Harry's continual gradual decline in hearing during the time covered by his single claim does not constitute separate and pathologically distinct diseases.

Additionally, Harry did not properly preserve his theory for multiple schedules of benefit based on different audiograms. The record contains no medical testimony that he had separate and pathologically distinct diseases during the time period of 1974 through 2001.

## V. ARGUMENT

### A. **Under RCW 51.32.180(b), the Rate of Compensation Effective in 1974 Applies Here Because Harry's Occupational Disease Became Partially Disabling in 1974.**

#### 1. **The "Schedule of Benefits" Establishes a Worker's Permanent Partial Disability Award.**

By creating a new scheme to establish the rate of compensation for his disability, Harry attempts to increase his permanent partial disability award. Under the Industrial Insurance Act, two factors determine the monetary award a worker receives for a permanent partial disability. The first factor is the worker's impairment amount, expressed as a percentage of total impairment of that body part or system. RCW 51.32.080(2). Harry does not dispute the finding of 38.18% binaural hearing loss, as established in his August 28, 2001 audiogram, to determine his permanent partial disability award.

The second factor is the rate of compensation for the type of disability, which is calculated using the schedules established by RCW 51.32.080. RCW 51.32.080 provides the base dollar amount for disability for complete loss of hearing; for partial loss of hearing the percentage amount is calculated using this base amount.

Each year the Department sets a new schedule of benefits indexed to the consumer price index. RCW 51.32.080(1)(b)(ii). The Legislature established this mechanism in 1993. Laws of 1993, ch. 520, § 1. Before 1993, the Legislature periodically enacted schedules of benefits. The schedules of benefits potentially relevant to this case are the July 1, 1971, March 23, 1979, and July 1, 1986 schedules, and the annual schedules from 1993 through 2001. Laws of 1971, Ex. Sess., ch. 289, § 10; Laws of 1979, ch. 104, § 1; Laws of 1986, ch. 58, § 2; RCW 51.32.080(1)(b)(ii). During the time period covered by Harry's claim, 1974 through 2001, there have been 12 different schedules of benefits.

The standard in RCW 51.32.180(b) determines which schedule of benefits to use to establish the rate of compensation for an occupational disease claim.

**2. The plain language of RCW 51.32.180(b) sets the schedule of benefits as of the date the occupational disease became “partially disabling.”**

In relevant part, RCW 51.32.180 unambiguously 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); *see also* WAC 296-14-350(3).<sup>3</sup>

Courts do not construe unambiguous statutory language. *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999). Harry did not receive treatment until 2001, thus the focus in this case is on the “partially disabling” language. Under the plain language of RCW 51.32.180(b), to determine the “rate of compensation” for his “claim[],” the question is

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<sup>3</sup> WAC 296-14-350(3) uses the rate of compensation applicable at the “date of manifestation.” “Date of manifestation” is defined, consistent with RCW 51.32.180(b), as the date the disease requires treatment or becomes partially or totally disabling, whichever occurs first. The phrase “date of manifestation” has had different historical meanings. In *Landon*, the Court rejected the use of the date of exposure to determine the date for the compensation rate, and used a test for the “date of manifestation” of the disease. *Dep’t of Labor & Indus. v. Landon*, 117 Wn.2d 122, 128, 814 P.2d 626 (1991). The *Landon* rule applied to cases before 1988. 117 Wn.2d at 124 n.1 (limiting decision to occupational disease claims filed before July 1988). This is because the Legislature amended RCW 51.32.180(b), effective July 1988, to set the rate of compensation as of the date the disease first requires treatment or becomes disabling.

when did Harry's occupational disease first become "partially disabling."

Harry asserts that RCW 51.32.180(b) cannot be interpreted using its plain language, claiming the statute is purportedly unclear as to when a disease becomes partially disabling. AB 8-9. This is incorrect for two reasons. First, Harry's reliance on *Pollard v. Weyerhaeuser*, 123 Wn. App. 506, 98 P.3d 545 (2004), *review denied*, 154 Wn.2d 1014 (2005), to argue ambiguity is misplaced. AB 9, n.1. The *Pollard* Court did not focus on the "partially disabling" language in RCW 51.32.180(b), and did not find this ambiguous. *Pollard* considered a different factual circumstance, a worker with two consecutive industrial insurance claims for hearing loss. Harry has only one. Because RCW 51.32.180(b) did not address the circumstance of a second claim for the same occupational disease not causally related to the first claim, the Court found an ambiguity. 123 Wn. App. at 512-13. But once the Court concluded that the second claim represented a wholly new disease process for a new period of exposure, the *Pollard* Court established the rate of compensation by using the plain language of RCW 51.32.180(b). *Pollard*, 123 Wn. App. at 513.

Second, the phrase "partially disabling" in the context of hearing loss is unambiguous. Permanent partial disability is a loss of bodily function. RCW 51.08.150; *McIndoe v. Dep't of Labor & Indus.*, 144

Wn.2d 252, 257, 262, 26 P.3d 903 (2001); *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 328 P.2d 663 (1958). Hearing loss is a specified, scheduled disability. RCW 51.32.080(1). The amount of impairment is determined by using the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993); WAC 296-20-2015; WAC 296-20-19020.<sup>4</sup> *See also* RCW 51.32.080(3)(a).

The AMA Guides evaluate hearing loss at four of the frequencies basic to speech intelligibility, 500, 1000, 2000, and 3000 Hz. BR Lipscomb 10. *See* AMA Guides, at 224; *In re Eugene Williams*, BIIA Dec. 953780, 1998 WL 226194, at \*2-4 (1998) (discussing AMA Guides and dynamics of hearing loss). Hearing loss in frequencies below and above those levels is not considered. The AMA Guides do not recognize the existence of any compensable hearing loss until an individual's average hearing loss exceeds 25 decibels at the four frequencies tested. Thus, hearing loss first becomes disabling for the purposes of RCW 51.32.180(b) when the average loss exceeds 25 decibels across the frequencies specified in the AMA Guides. BR Lipscomb 34. *See Boeing*

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<sup>4</sup> Former WAC 296-20-01002, amended 2002, provided for determining the amount of hearing loss by "utilizing a nationally recognized impairment rating guide." WAC 296-20-2015, effective in 2004, specifically requires use of the AMA Guides for hearing loss. *See also* WAC 296-20-19020, effective in 2002. In 2001, the Department used the fourth edition of the AMA Guides.

*Co. v. Heidy*, 147 Wn.2d 78, 83, 51 P.3d 793 (2002). Here Harry's hearing loss was partially disabling in 1974 because his 1974 audiogram demonstrated an average loss of above 25 decibels over the first four AMA frequencies. BR Lipscomb 34; BR 18.

**B. Occupational Hearing Loss Within One Claim Is a Single Disease, Not "Separate and Pathologically Distinct Occupational Diseases."**

RCW 51.32.180(b) on its face contemplates a single rate for the occupational disease that is the subject of the claim: it provides that "the rate of compensation" for a "claim" shall be established as "of the date" "the disease" requires medical treatment or becomes disabling "whichever occurs first." Limited exceptions to this have evolved in case law in fact-specific areas. *See Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 229-31, 883 P.2d 1370, 915 P.2d 519 (1994) (asbestos exposure causes three separate and pathologically distinct diseases, asbestosis, lung cancer and mesothelioma, each with different latency periods); *Pollard*, 123 Wn. App. at 512 (1982 and 1999 hearing loss claims were for two separate and pathologically distinct hearing losses). Progressive hearing loss within the context of a single claim does not fall within the ambit of these fact-specific scenarios. Only if a worker can demonstrate separate and pathologically distinct occupational diseases may the worker claim

separate dates for the rate of compensation. *See Kilpatrick*, 125 Wn.2d at 230-31.

**1. Hearing loss in an industrial insurance claim is a single disease.**

For the purposes of setting a rate of compensation under RCW 51.32.180(b) in a claim, hearing loss caused by noise exposure during the time period in an industrial insurance claim is a singular disease process. *In re Gerald Woodard*, Dckt. No. 0322924, 2004 WL 3218290, \*2-\*3 (BIIA 2004); *In re Carl Heidy*, Dckt. No. 961511, 1998 WL 226281, \*10 (BIIA 1998). Occupational hearing loss is caused by repeated exposure to sound levels between 85 and 140 decibels that progressively weaken and finally kill the tiny hair cells in the ear. *Pollard*, 123 Wn. App. at 509-10; *Williams*, 1998 WL 226194, at \*2-4. Damage to hearing is permanent: “[o]nce the hair cells in the cochlea are destroyed, the cells cannot be rejuvenated. Thus, once the damage is done, one’s hearing can get neither better nor worse because of noise exposure.” *Pollard*, 123 Wn. App. at 512 (quoting *Blackburn v. Workers’ Comp. Div.*, 212 W. Va. 838, 847, 575 S.E.2d 597 (2002)). “[O]nce a noise exposure stops, so does the progression of hearing loss.” *Id.*

Although audiograms can measure hearing loss with varying degrees of accuracy, hearing loss is a single disease. Indeed, Harry was

diagnosed with only one disease: “sensory neural hearing loss.” BR Riddell 11. Harry notes that the “total disease” does not stop progressing until the worker is removed from the work conditions causing the disease. AB 9. Harry seems to suggest that, because hearing loss is progressive in that continued exposure to noise causes additional hearing loss, and because the amount of that hearing loss is quantifiable within the employment period covered by a claim, this requires additional schedules of benefits. *See* AB 9, 10, 14. But the Supreme Court in *Heidy v. Boeing* specifically rejected treating progressive hearing loss as different from any other occupational disease under RCW 51.32.180(b). 147 Wn.2d at 88-90.

In *Heidy*, the Board had attempted to impose a knowledge prong to establish when the disease became partially disabling. The Board attempted this addition to the statutory test because a worker may not necessarily be aware that his or her condition has become disabling given the gradual progression of hearing loss. The Supreme Court rejected the Board’s concern over the circumstances posed by hearing loss, “[n]onetheless, that is exactly what the term ‘partially disabling’ does when applied to workers afflicted by a progressive condition with easy to miss symptoms.” 147 Wn.2d at 88. Notwithstanding the progressive and

sometimes hidden nature of hearing loss, the Court applied the express terms of RCW 51.32.180(b) to decided that the rate of compensation is established when “the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first.” *Heidy*, 147 Wn.2d at 88 (quoting RCW 51.32.180(b)).

Hearing loss is not unique in its progressive nature with repeated exposure. An occupational disease is a “disease or infection as arises naturally and proximately out of employment.” RCW 51.08.140. A disease that arises naturally is one that is a “natural consequence or incident of distinctive conditions of his or her particular employment.” *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Distinctive conditions from the course of employment can endure the length of the claim and such continued exposure often causes the occupational disease to progress. *E.g., Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 737-39, 981 P.2d 878 (1999) (prolonged standing on cement floor over several years caused foot condition).

A worker may seek treatment for the disease after exposure to such a distinctive condition, and then may seek additional treatment for the disease after an additional exposure to the distinctive condition of employment. *E.g., Wentworth*, 96 Wn. App. at 734 (worker first sought

treatment in 1989, then in 1992, and after respite from work in 1994 returned to work but could no longer tolerate standing). Alternatively, the continued exposure may cause increasing levels of disability. This can occur during an open claim or it could have occurred before the worker files a claim for benefits. *See, e.g., Dennis*, 109 Wn.2d at 469, 483 (38 years of continued use of tin snips exacerbated pre-existing osteoarthritis).

Under Harry's theory, when a worker has an occupational disease, each new exposure that caused the need for treatment or caused disability would require a new schedule of benefits. But this reasoning is counter to the explicit language in RCW 51.32.180(b), which directs that "the date *the disease* requires medical treatment or becomes . . . disabling, which occurs *first*" establishes the schedule of benefits for the occupational disease. This directive regarding the date the "disease" "first" requires treatment or becomes disabling is unambiguous. *Cf. Heidi*, 147 Wn.2d at 88. This Court should therefore interpret the statute based on its plain language (*Davis*, 137 Wn.2d at 964), and reject Harry's request at AB 20 for liberal construction. Even assuming, *arguendo*, that ambiguity exists, courts do not use liberal construction to read out language in a statute or to construe a statute in an unrealistic or strained manner. *Senate Republ'n*

*Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

**2. *Kilpatrick* does not support Harry's incremental theory.**

Harry relies on *Kilpatrick* to argue for multiple schedules of benefits. AB 13. *Kilpatrick* developed a rule to address the unique factual circumstances of asbestos exposure, in which the distinctive conditions of employment proximately caused three separate and distinct diseases: asbestosis, lung cancer, and mesothelioma. See *Kilpatrick*, 125 Wn.2d at 229-31. Each disease has a different latency period, with a period of years between the onset of disability under each. The Court noted that “[e]ach 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.” 125 Wn.2d at 230. The Court applied the holding in *Landon*, 117 Wn.2d at 123, that the date of manifestation is used to determine the rate of compensation, not the date of exposure to the harmful material. This was developed because the diseases that occur after asbestos exposure can take 20 years to become symptomatic. *Landon*, 117 Wn.2d at 125. The *Kilpatrick* Court held that the date when the individual's pathologically distinct disease manifested was the date to determine the rate of compensation. 125 Wn.2d at 232.

The *Kilpatrick* Court specifically rejected an argument that this approach would represent a “symptom-by-symptom” date of manifestation rule, because the *Kilpatrick* Court was addressing the circumstances of latent occupational diseases, where “years after the original asbestos-related condition, each worker suffered the onset of entirely different disease with its own set of symptoms and treatment.” 125 Wn.2d at 231. In essence, Harry advocates for the rejected “symptom-by-symptom” approach with his scheme of a different schedule of benefits for each incremental increase in hearing loss. 125 Wn.2d at 231. But he cannot show “an entirely different disease” with “unique pathology.” See *Kilpatrick*, 125 Wn.2d at 230-31. As contrasted with *Kilpatrick*, in which three different types of diseases were diagnosed (asbestosis, lung cancer, and mesothelioma), here Harry had only one disease, namely “sensory neural hearing loss.” BR Riddell 11.

It was one thing for the *Kilpatrick* Court to hold that different rates of compensation may apply a worker with two or three distinct diseases due to asbestos exposure; it is quite another for Harry to assert that the Legislature intended that every time an audiogram is performed (and the death of more hair cells is detected), a new disease exists.

**3. *Pollard and Brooks* did not legally determine that noise exposure creates separate and pathologically distinct diseases.**

Harry asserts that *Pollard* and the Board decision *In re Paul Brooks*, BIIA Dec., 0217331, 2003 WL 22722450 (2003), “legally determined” that each “exposure to occupational noise is a separate and distinct occupation[al] disease and thus a new schedule of benefits should be applied.” AB 9, 14. No such legal determination exists in these cases. Harry misinterprets *Pollard* and *Brooks*, both of which were decided within the context of two separate, unrelated claims.

In *Pollard*, the claimant worked at Weyerhaeuser from 1961 to 1999. He filed a claim in 1982 for occupational hearing loss. He received a permanent partial disability award for a 10 % hearing loss using the schedule of benefits applicable in 1982. 123 Wn. App. at 508. Between 1982 and 1999, Pollard’s work exposed him to additional hazardous noise. According to several audiograms conducted by Weyerhaeuser, his hearing deteriorated. *Id.* at 509. In 1999, he filed another workers’ compensation claim. By then his hearing loss was 45.9%. The Department allowed the claim and awarded additional permanent partial disability. *Pollard*, 123 Wn. App. at 509. The Department used the 1999 schedule of benefits, and not the 1982 schedule of benefits.

The Court held that “Pollard’s 1982 and 1999 claims were for two separate and distinct hearing losses[.]” 123 Wn. App. at 514. The 1999 claim was an entirely separate claim for benefits, a separate exposure, and a separate impairment from the 1982 claim. 123 Wn. App. at 510, 512. The two claims were “two causally independent, ‘pathologically distinct’ diseases.” 123 Wn. App. at 513.

Harry dismisses the critical distinction between *Pollard* and his case, namely that Harry filed a claim that represents one period of exposure as contrasted to *Pollard*, which had two separate time periods of exposure to occupational hearing loss and two separate claims for these exposures. AB 14. He incorrectly asserts that in “*Pollard*, the court is very clear that it is relying on the audiograms as establishing dates of disability.” AB 14.

First, before the *Pollard* Court were “several audiograms conducted by Weyerhaeuser” taken during the time period of the second claim, 1982 to 1999. The Court did not use multiple audiograms and order multiple schedules of benefits for the 18-year period. Rather, the Court applied the single 1994 schedule applicable to the new claim under RCW 51.32.180(b) for the hearing loss exposure during the course of the second claim from 1982 to 1999. *Pollard*, 123 Wn. App. at 513.

Second, the *Pollard* Court does not dismiss as inconsequential RCW 51.32.180(b)'s reference in the singular to the "claim," as Harry asserts at AB 14. The explicit context of the *Pollard* case was "an entirely separate claim for benefits." 123 Wn. App. at 510, 513.

Third, the *Pollard* Court was entirely cognizant of the circumstance of two workers with multiple audiograms, one of whom files two claims and one of whom files one claim for the same time period. 123 Wn. App. at 513-14. The Court had no difficulty with the circumstance of one claim using a single schedule of benefits for progressive hearing loss:

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

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

Finally, the Court in *Pollard* carefully limited application of its ruling to the facts before it, which involved two separate unrelated claims, because the case's resolution turned on its fact-specific nature. 123 Wn. App. at 514.

Again, in *Brooks*, the Board considered similar facts to *Pollard*, but did not hold that multiple audiograms equate to multiple schedules of benefits within one claim. In *Brooks*, there were two occupational disease claims for hearing loss. The Board determined that the second claim was not a worsening or an aggravation of the claimant's earlier claim. *Brooks*, 2003 WL 22722450, at \*4. The Board rejected the argument that, because the new claim involved the same type of disease process present in a prior claim, therefore the schedule of benefits used in the prior claim applied to the new claim. *Id.* at \*4. The Board treated the earlier claim as a different disease process because, but for the additional exposure to noise, the claimant would not have additional hearing loss. 2003 WL 22722450, at \*4. Significantly, when the Board remanded the case back to the Department to determine the appropriate schedule, it did not instruct use of more than one schedule for the increase in disability that occurred between 1988 and 2001.

Thus, Harry's assertion that both *Brooks* and *Pollard* made legal determinations that progressive hearing loss within one claim includes separate and pathologically distinct diseases is simply not reflected by the actual holdings of these cases. Because of the nature of hearing loss, in *Pollard* and *Brooks*, the Court, the Board, the Department, and the

workers did not and could not legally treat the second claim as a worsening of the same claim.<sup>5</sup> *Pollard*, 123 Wn.2d at 512; *Brooks*, 2003 WL 22722450, at \*4. In *Pollard* and *Brooks*, claims interrupted the progression of the hearing loss, which resulted in separate awards for permanent partial disability. This provided the statutory construct in which to assess the disability caused by the exposure to hearing loss during the relevant time periods consistent with RCW 51.32.180(b). This does not mean that each moment of incremental hearing loss is a separate and pathologically distinct disease within a single claim as a matter of law.

**4. The Board treats occupational hearing loss as a single disease within a claim and has expressly rejected Harry's incremental schedule of benefits scheme.**

The Board has addressed and rejected the theory that Harry raises here. In *Gerald Woodard*, 2004 WL 3218290, at \*2-\*3; *In re Carl Heidy*, 1998 WL 226281, at \*10. In *Woodard*, the claimant first showed occupational hearing loss in 1988, a subsequent audiogram in 1992

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<sup>5</sup> A worker may reopen a claim if there has been a worsening or aggravation of the occupational disease proximately caused by the distinctive condition of employment. See RCW 51.32.160. In *Pollard* and *Brooks*, the workers legally could not reopen their previous claims because, for each, a new exposure to occupational noise, not the exposure in the previous claims, exclusively caused the increased hearing loss. The workers therefore could not demonstrate worsening or aggravation under RCW 51.32.160. See *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956) (worsened condition must be proximately caused by injury); *In re Leonard Roberson*, BIIA Dec. 890106, 1990 WL 127253 (1999) (discussing standards for deciding if occupational disease is new claim or aggravation of previous claim). Under these circumstances, it would have been legally and factually inconsistent to insist on the schedule of benefits for the previous claim.

showed additional hearing loss. The Board applied the *Pollard* decision and *Pollard's* discussion regarding the medical nature of hearing loss to these facts, and rejected use of multiple schedules of benefits for Woodard's claim. 2004 WL 3218290, at \*2. The Board held that the relevant time period for determining when the disease first became disabling is the "duration of the disease process" for the claim, stating:

If Mr. Woodard had filed a claim in 1988 after his hearing loss was identified, his compensation would have been based on the schedule of benefits in effect in 1988, and any subsequent claim would have used the schedule of benefits in effect when the additional exposure resulted in a need for treatment or became disabling. But Mr. Woodard only has one claim. *The relevant time period for the administration of that claim is the duration of the disease process for which the claim was filed; in other words, the hearing loss that was identified in 1988.*

*Woodard*, 2004 WL 3218290, at \*3 (emphasis added). Thus, under *Woodard*, hearing loss first becomes disabling when identified in the first audiogram that is the relevant time for the claim. The schedule of benefits applies to "duration of the disease process" within that claim, notwithstanding that it is continued exposure that causes the disease process. *Id.* at \*3.

In *Carl Heidy*, the Board expressly rejected Harry's incremental benefits theory. 1998 WL 226281, at \*10. In *Carl Heidy*, the claimant worked at Boeing from 1951 to 1989. *Id.* at \*14. He filed a hearing loss

claim in 1995. The award was paid using a single schedule of benefits. Heidi had 24 audiograms in the years between 1975 and 1995. 1998 WL 226281, at \*17. Heidi argued that each additional increment of hearing loss should be given its own schedule of benefits. The Board found no support under the Industrial Insurance Act or case law for this proposition.<sup>6</sup> 1998 WL 226281, at \*10. The Board rejected the argument that hearing loss was not a single disease, but multiple diseases. 1998 WL 226281, at \*10.

The Board appropriately treats occupational hearing loss within one claim as a singular disease process and appropriately rejects the incremental approach advocated by Harry.

**5. Harry's proposed incremental system is not only legally flawed, but is unworkable.**

Implementation of a graduating schedule of benefits with each audiogram, as suggested by Harry, would create an administrative and legal morass. The 12 choices for schedules of benefits during the time frame (1974 through 2001) of Harry's claim are 1971, 1979, 1986, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001. *See* RCW 51.32.080(1)(b)(ii); Laws of 1971, Ex. Sess., ch. 289, § 10; Laws of 1979,

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<sup>6</sup> The Board's decision in *Heidy* was appealed to superior court and eventually decided in *Heidy v. Boeing Co.*, 147 Wn.2d 78. The incremental schedule of benefits theory was not pursued on appeal.

ch. 104, § 1; Laws of 1986, ch. 58, § 2. In other cases, there could be many more options for schedules of benefits because RCW 51.32.080(1)(b)(ii) sets a new rate of compensation each year. Harry argues that his 21 audiograms should be used under the 12 different schedules of benefits. AB 5.

This would create a complicated system, with an undue administrative burden, to determine what proportion of hearing loss occurred under a given schedule of benefits. More importantly, such a complicated system cannot be instituted without specific authorization by the Legislature. Harry's argument is nothing more than an improper request for judicial legislation. *See Soundgarden v. Eikenberry*, 123 Wn.2d 750, 766, 871 P.2d 1050 (1994) ("We do not accept that invitation to engage in judicial legislation.").

Hearing loss results in only one award for that disease in a claim. *See Woodard*, 2004 WL 3218290, at \*3. When a claim is closed after treatment is completed (such as provision of hearing aids), there is a determination that a worker has reached maximum medical improvement, and the claimant may receive an award for permanent partial disability. WAC 296-20-19000. "Impairment for hearing loss is determined by use of the AMA Guides; in the case of binaural loss, there is a single award, stated as a percent of [the] complete loss of hearing in both ears."

*Woodard*, 2004 WL 3218290, at \*3 (internal quotations omitted). *See* RCW 51.32.080. As a practical matter, RCW 51.32.080 does not provide for a mechanism for calculating multiple impairment awards for the same disease with multiple schedules using the incremental approach advocated by Harry.

Moreover, Harry's proposed scheme would not benefit workers because it would be predicated on potentially unreliable industrial audiograms. Industrial audiograms such as the ones that Harry received from Buse Timber require scrutiny to determine whether they are valid.<sup>7</sup> Although no per se ban prohibits the use of industrial audiograms in determining permanent partial disability and their validity is determined on an individualized basis, the preferred measure is an independent, clinically reliable audiogram. Industrial audiograms are "carefully scrutinized to determine whether appropriate testing protocol was followed." *Williams*, 1998 WL 226194, at \*9. *See also Heidi*, 147 Wn.2d at 87-88.

Under current law, selecting a schedule of benefits is already a complex inquiry, as the Board observed in *Heidy*, "[c]hoosing a single schedule of benefits for an occupational disease requires the selection of a

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<sup>7</sup> Harry devoted the bulk of his witness examination and briefing at the Board and at superior court to support his contention that his industrial audiograms were not valid because of insufficient proof of reliability. *See* BR 2-7; CP 52-58.

date specific from, often times, numerous possibilities.” 1998 WL 226281, at \*10. The difficulty arises in part because of the variability that can be present in a series of audiograms taken over the years.<sup>8</sup> BR Lipscomb 13-15. Variable readings, particularly readings that show a lower number after a higher number, may indicate unreliability given that hearing loss does not improve. Therefore, audiograms must be subjected to close scrutiny by experts and fact-finders to decide whether the audiogram has reliable readings.

Establishing a new schedule with each small change in subsequent audiograms would create unneeded confusion. The validity of each of the audiograms in question would be subject to litigation.

**C. Harry’s Novel Theory Is Inconsistent With Other Statutes.**

Harry notes that workers who are disabled by occupational diseases should be paid in the same way as those who sustain industrial injuries. AB 15-16. In general this is true. *See* RCW 51.16.040; RCW 51.32.180. But separate rules govern the selection of the appropriate

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<sup>8</sup> Audiograms have a standard variation of a plus or minus 5-decibel variability. BR Lipscomb 13-14. The results also vary if the test taker did not use proper testing procedures. Generally Harry’s audiograms were consistent, but over time the audiograms demonstrated some variability up and down. BR Lipscomb 32; BR Riddell 22. As Dr. Lipscomb testified, there was “some variability up and down, probably attentive to the fact that he may not have been out of noise for all that long, so the higher frequencies would be affected.” BR Lipscomb 32. At the 1974 audiogram test, he had been out of hearing for the standard 16 hours. BR Lipscomb 44.

schedule of benefits for an occupational disease as opposed to an industrial injury. *Compare* RCW 51.32.180(b) (date disease first required treatment or became disabling sets rate of compensation) *with* RCW 51.32.080(7) (date of injury sets rate of compensation). RCW 51.32.180(b) expressly states this, providing that occupational diseases are treated the same as industrial injuries for the purposes of compensation, “*except*” as specifically provided in the statute, namely use of the first date of treatment or disability.

Harry poses a hypothetical of a worker with two knee injuries incurred on two different occasions who would have a different schedule of benefits for the second knee injury. AB 16. Harry states that there is no difference between this scenario and occupational hearing loss. AB 16. But this begs the question of whether hearing loss on a single claim can be divided up into separate and pathologically distinct diseases for the purpose of setting the schedule of compensation under RCW 51.32.180(b).

Harry also asserts that applying a single compensation rate creates an “absurd result [by] establishing a schedule of benefits based on a date of manifestation that is before the disability fully manifests itself.” AB

16.<sup>9</sup> This argument attacks the very essence of RCW 51.32.180(b). Often in occupational disease cases, a worker seeks treatment before disability caused by the disease “fully manifests” itself, or the disease becomes manifested in part before it becomes “fully manifest[ed].” Whether disease is “fully manifest[ed]” or not, RCW 51.32.180(b) establishes the rate of compensation at the date of first treatment or when the disease becomes partially or totally disabling.

Harry argues that the worker is disadvantaged by the timing of the claims, arguing that he should not be paid at 1974 dollars based on his 1974 audiogram. AB 17, 13-14. But the Legislature established the requirement that the rate of compensation is based on the date the disease first became disabling, and any arguments for changing this should be directed to the Legislature. Moreover, the Court in *Pollard* addressed such concerns by noting that a worker has the legal opportunity to file multiple claims for occupational hearing loss benefits. 123 Wn. App. at 513-14. *See also Woodard*, 2004 WL 3218290, at \*3.

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<sup>9</sup> The Department assumes that Harry uses the phrase “fully manifest[ed]” in an everyday, non-legal sense of “manifest.” Presumably this is to reflect the progressive nature of hearing loss disability, in which the hearing loss, after it becomes partially disabling, increases over time with continued occupational noise exposure. Harry’s non-legal usage must be distinguished from the legal phrase “date of manifestation.” WAC 296-14-350(3) defines “date of manifestation” in a singularly threshold sense, consistent with RCW 51.32.180(b), as the date of first treatment or the date when the disease becomes partially or totally disabling, whichever occurs first.

Harry also relies on *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996), for the proposition that a worker should not be affected by the timing of his audiogram notwithstanding the explicit directives in RCW 51.32.180(b). AB 18. *Clauson* is patently distinguishable as it involved issues regarding separately compensating two claims in the event of a pension in one claim and a permanent partial disability award in another. 130 Wn.2d at 586 (fact that hip claim closed one week after back claim closed with pension or total permanent disability did not preclude permanent partial disability award for hip claim).

Harry suggests that this case will discourage employers from performing audiograms that would alert a worker to his or her hearing loss. AB 2, 5, 18-19. This makes no sense. The statute provides that the compensation is determined as of the date that the disease becomes disabling. RCW 51.32.180(b). This gives the employer an incentive to test for hearing loss in work environments in which hearing loss is a known problem in order to establish the date the disease became disabling. The employer has further incentive to require protective gear to protect against any further exposure to noise.

Moreover, regulations under the Washington Industrial Safety and Health Act, RCW 49.17, mandate employers to perform audiograms as part of hearing conservation programs. See WAC 296-817-100; WAC 296-817-400. The Department may institute enforcement actions if employers fail to comply with these regulations. RCW 49.17.060(2), .120.

As Harry notes at AB 18, employers are required to report injuries. RCW 51.28.025. Harry received copies of each of the 21 audiograms. BR Harry 21. No legal authority exists that implies that not discussing the import of these audiograms with a worker should result in a different schedule of benefits. Harry was not precluded from consulting a physician or an attorney.

**D. The Superior Court Properly Dismissed Harry's Claims on Summary Judgment.**

The superior court properly affirmed the Board's decision that Harry failed to present evidence to contradict the determination that his occupational disease was partially disabling on August 26, 1974. BR 1, 18. As found by the Board, insufficient evidence demonstrated that the 1974 audiogram was invalid, therefore the audiogram date established the date that Harry's disease became partially disabling. BR 18. On appeal Harry does not challenge the validity of the 1974 audiogram. AB 1.

Harry asserts that the Board (and presumably the superior court) “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.” AB 24. Harry claims that he met his burden of proof to establish a prima facie case by raising an “entirely legal issue” and that he did not have to “present actual evidence” to support his theory. AB 23-24. This is incorrect. To defend a summary judgment motion, a party must present both a valid legal theory and a factual record to support it, which Harry has not done. As discussed above, Harry’s legal theory fails as a matter of law. Occupational hearing loss constitutes one disease for the purpose of establishing the rate of compensation for his claim under RCW 51.32.180(b). RCW 51.32.180(b) does not provide for incremental benefit schedules for an occupational disease within a single claim.

But even assuming that Harry has presented a valid legal theory, he did not create an evidentiary record that allows for the relief he seeks. The party moving for summary judgment has the burden of showing that no genuine issue of material fact exists, but this does not relieve the nonmoving party of the burden of producing evidence that would support a genuine issue for trial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-

26, 770 P.2d 182 (1998). An adverse party may not rest upon mere allegations or conclusory statements. *Young*, 112 Wn.2d at 225-26; *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). A party must develop the evidentiary record to support the party's claims at the Board hearing. The superior court considers a workers' compensation case solely on the Board record. RCW 51.52.115; *Sepich*, 75 Wn.2d at 316.

The industrial appeals judge made a finding that Harry had sustained, in the singular, "an occupational hearing loss." BR 18. Thus, Finding of Fact No. 2 found one disease applicable to Harry's occupational disease claim. Harry did not take exception to this finding at the Board as required by RCW 51.52.104, and has waived any further challenge to it. *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (arguments not made in petition for review to the Board are waived). Harry did not make the specific argument that he had more than one occupational disease. BR 2, 9-10.

Certainly, the Board did not make an express finding that Harry had separate and pathologically distinct diseases. BR 18. "The absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that

issue.” *In re Marriage of Olivares*, 69 Wn. App. 324, 334, 848 P.2d 1281 (1993). A claimant who appeals a Department decision has the burden of proof. *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 34 Wn.2d 498, 504, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep’t of Labor and Indus.*, 52 Wn.2d 33, 39-40, 323 P.2d 241 (1958). Harry made no objection regarding the lack of finding on the material issue as to whether he had separate and pathologically distinct diseases and therefore he has “waived all objections . . . not specifically” detailed in his petition for review. *See* RCW 51.52.104.

In any event, the otolaryngologist diagnosed Harry with only “sensory neural hearing loss.” BR Riddell 11. Harry was not diagnosed with any other disease. The record contains no medical testimony that he had separate and pathologically distinct diseases during the time period of 1974 through 2001. Contrary to Harry’s implication at AB 21, liberal construction, even if it applies here, does not cure his failure to have any evidence of more than one disease. Although courts liberally construe the Industrial Insurance Act in favor of the employee, the employee retains the responsibility of presenting competent medical testimony establishing by a preponderance of the evidence the existence of an occupational disease.

*See* RCW 51.08.140; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 6, 977 P.2d 570 (1999); *Page*, 52 Wn.2d at 710-12.

Harry argues that the audiograms that span his work at Buse Timber from 1974 to 2001 should be used to determine his amount of impairment and the rate of compensation for each time period covered by the audiogram. He points to the general testimony that the audiograms demonstrate that there was a slow progression of hearing loss. *E.g.*, AB 14. Dr. Lipscomb testified that Harry had a continual gradual decline in his hearing over a period of several years. BR Lipscomb 32. There is also testimony that the consistent pattern on the audiograms taken between 1974 through 2001 indicated that the audiograms were generally reliable. BR Lipscomb 21, 40; BR Riddell 22. This general testimony is insufficient to support Harry's claimed relief.

Beyond the general testimony, there is specific testimony regarding the findings for only some of the audiograms. The audiogram documents themselves were not entered into the record as substantive evidence. They were attached to Dr. Riddell's deposition only for illustrative purposes. BR 14 (Board admitted audiograms only as illustrative exhibits); BR Riddell 13. The record contains testimony regarding the 1974 audiogram, an October 17, 1977 audiogram, a 1978 audiogram, a September 11, 1979 audiogram, a

1980 audiogram, a 1982 audiogram, and a 1985 audiogram. BR Lipscomb 43-45, 51-53. There is also evidence regarding the 2001 audiograms. BR 56. The audiograms test results in the record (dated 1979 through 1985, and 2001) are those for the schedules of benefits in effect in 1971 and 1979, and those in 2001. Laws of 1971, Ex. Sess., ch. 289, § 10; Laws of 1979, ch. 104, § 1; Laws of 1986, ch. 58, § 2; RCW 51.32.080. During the time period of 1971 through March 1979, there were four audiograms. During the time period of March 1979 through July 1986, there were three audiograms. But no medical witness opined as to which audiogram to use during these time periods, nor did any medical witness calculate the amount of permanent partial disability that would apply during each time period. Such testimony is required to prove the amount of permanent partial disability. *Page, 52 Wn.2d at 710-12* (medical witness required to testify regarding impairment amount).

Moreover, while there is testimony regarding his audiograms in 2001, the record lacks evidence regarding the time period of 1986 to 2000. Absolutely no testimony establishes the specific findings shown on audiograms between the years of 1986 and 2000. For these years, there is a complete deficit of medical testimony regarding impairment amounts for any given time period.

Harry requests remand for a factual determination under his proposed new scheme for determining the schedule of benefits. AB 24. Given the absence of legal authority and evidence to support Harry's theory, the superior court properly granted summary judgment. CR 56(c). Harry seems to suggest that remand may be granted to present additional factual evidence to support his theory. AB 24-25. No legal authority allows him to receive a second chance to present evidence that he failed to present when he had his opportunity. See RCW 51.52.100, .115; *Sepich*, 75 Wn.2d at 316; *Ivey*, 4 Wn.2d at 163-64; *Salesky*, 42 Wn.2d at 484-85.

## VI. CONCLUSION

Accordingly, for the reasons stated in this brief, and also for the reasons stated in the Brief of Respondent Buse Timber, to which the Department of Labor and Industries concurs, this Court should affirm the superior court's February 15, 2005 order granting summary judgment that affirmed the Board's July 3, 2003 decision, thereby affirming the Department's January 14, 2002 order.

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RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of July, 2005.

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NO. 55902-8-I  
COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON

DONALD HARRY,

Appellant,

v.

BUSE TIMBER & SALES, INC., AND  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondents.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the 29<sup>th</sup> day of July, she caused to be delivered via legal messenger the Department's Brief of Respondent and this certificate of service to:

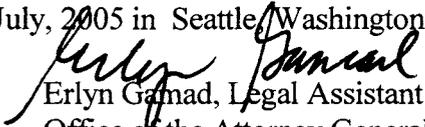
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Signed this 29<sup>th</sup> day of July, 2005 in Seattle, Washington by

  
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