NO. 331814

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALEXANDR RUMYANTSEV,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

PAUL M. CRISALLI
Assistant Attorney General
WSBA No. 40681
Office Id. No. 91018
500 Fifth Ave., Suite 2000
Seattle, WA 98104
(206)464-7740

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I. INTRODUCTION

A worker has one year from an injury to file an application for benefits with the Department, but the worker has two years from a doctor's diagnosis for an occupational disease. Occupational diseases are more likely to become apparent over time. For that reason, occupational diseases must arise out of the distinctive conditions of the worker's employment, while industrial injuries do not.

Alexandr Rumyantsev worked for TRA Industries, Inc. dba Huntwood Industries. It is unclear what he did for Huntwood, but it appears to involve gluing wood and boards. Rumyantsev presented no evidence about his job duties.

Rumyantsev sustained two injuries in 2010, when he hit his head twice while working, but he waited over three years to file an application for benefits with the Department. He mentioned only the injuries, and that they resulted in loss of hearing, eye pain, and migraines.

Substantial evidence shows that Rumyantsev did not present evidence of his specific job duties nor demonstrate that his head injuries constituted distinctive conditions of his employment. Substantial evidence also shows that Rumyantsev's application did not put the Department on notice that he claimed he had noise-induced occupational hearing loss, where the application never mentions noise. This Court should affirm.

II. ISSUES

A. Does substantial evidence support the superior court's finding that two injuries to Rumyantsev's head were not distinctive conditions of his employment?

B. Does substantial evidence support the superior court's finding that Rumyantsev's application for benefits did not put the Department on notice that he was claiming that he had an occupational disease of noise-induced hearing loss?

III. STATEMENT OF THE CASE

A. In Spring 2010, Rumyantsev Worked as a Laborer for Huntwood When He Sustained Two Industrial Injuries That Only Required First Aid

Rumyantsev worked for Huntwood as a laborer. BR Alexandr at 8. Ex 2.[1] On March 19, 2010, he cleaned some equipment when he hit his head on a spring-loaded arm on a gluing machine, causing a laceration. BR Alexandr at 9-10; Ex 2. The employer provided first aid, and Rumyantsev continued working. BR Alexandr at 10-11. Rumyantsev did not go to the doctor or seek any other treatment at that time. BR Alexandr at 10-12. He filled out an accident report for his employer. BR Alexandr at 11; Ex 2. He did not file a claim with the Department. BR Alexandr at 11.

On May 13, 2010, Rumyantsev sustained another injury, when a co-worker accidently hit his head with a board. BR Alexandr at 13; Ex 5. The employer again provided first aid, and Rumyantsev again continued

[1] "BR" refers to the Board's certified appeal board record. This brief references witness testimony by BR, last name, and page number.

working. BR Alexandr at 14. Rumyantsev did not go to the doctor or seek other treatment. BR Alexandr at 14. He again completed an accident report for his employer but did not file a claim with the Department. BR Alexandr at 14-15; Ex 5.

B. In 2013, Rumyantsev First Filed a Claim With the Department, and the Claim Only Mentioned the Two Injuries in 2010, But the Department Denied the Claim Because He Did Not File It Within One Year of the Injuries

Huntwood laid off Rumyantsev in September 2011. BR Alexandr at 21-22. In August 2012, Rumyantsev and his wife went to a doctor about filing a claim with the Department, bringing forms with them. BR Vera at 45-46. The doctor did not pay attention to them, so they left with the forms. BR Vera at 46-47.

In October 2012, Rumyantsev first saw Dr. Lanie Cox for treatment of diabetes, high blood pressure, depression, a heart condition, headaches, and neck and foot pain. BR Cox at 5-6. Rumyantsev filed no claim after this visit. BR Cox at 6-7; Ex 1.

Dr. Cox saw Rumyantsev on several occasions between October 2012 and May 2013. BR Cox at 5, 7-8, 16-22, 27-28. On May 9, 2013, Rumyantsev brought the forms to Dr. Cox, who helped him complete the application for benefits that listed the two dates in 2010 as the dates of

injury. BR Cox at 7; Ex 1. The form was faxed to the Department. BR Thomas at 10-11; Ex 1.

The application for benefits lists two dates of injury, "3/19/10" and "05/13/10." Ex 1. In describing how the injury occurred, the application explained that he hit his head twice, which resulted in loss of vision and hearing problems. Ex 1. In the section signed by Dr. Cox, she diagnosed "loses hearing for both ears, needs also to have aid of hearing." Ex 1. She also stated that he had migraines and eye pain. Ex 1.

The Department denied Rumyantsev's application, finding that Rumyantsev failed to file his claim within one year of the day when the alleged injury occurred. Ex 3. The Department reconsidered the order and found that it was correct. Ex 4.

C. Rumyantsev Appealed to the Board, Where He Presented No Evidence About His Specific Job Duties, and the Board Affirmed

Rumyantsev appealed to the Board. BR 36-37. Although he testified about his injuries, he never explained what work he did for Huntwood. BR Alexandr at 9-15. Although he generally described the circumstances of his injuries, he did not present evidence about his specific job duties. BR Alexandr at 9-15. But both he and his wife testified that he suffered vision, memory, and hearing problems after he was hit in the head. BR Alexandr at 19, 23; BR Vera at 44, 48-49. Rumyantsev also

posited that areas at Huntwood were noisy, which required wearing ear protection. BR Alexandr at 18. As a result, since 2008, Huntwood had tested Rumyantsev's hearing annually, and that same year, Rumyantsev was treated for hearing loss. BR Alexandr at 32.

Dr. Cox testified that she had no specialized training in brain injuries. BR Cox at 23. The medications she prescribed could affect Rumyantsev's memory. BR Cox at 23. She referred Rumyantsev to several specialized doctors, including a neurologist, but she did not follow up on the results. BR Cox at 23-25.

Dr. Cox opined that no objective evidence showed that Rumyantsev had brain trauma, but that Rumyantsev had delayed effects of work-related injuries. BR Cox at 29. Dr. Cox was unaware of any noise studies from Huntwood or anything about Rumyantsev's job duties except that he claimed he had been exposed to noise. BR Cox at 25-26. Based on that information, she opined that Rumyantsev had delayed effects of work-related injuries. BR Cox at 29.

After hearing all the evidence, the industrial appeals judge issued a proposed decision and order affirming the Department's order. BR 26-34. The industrial appeals judge found that Rumyantsev did not file his application for benefits with the Department for injuries sustained on March 19, 2010, and May 13, 2010 within one year of the injuries. BR 33.

The industrial appeals judge also found that Rumyantsev's application for benefits did not put the Department on notice that he was alleging an occupational disease for noise-induced hearing loss. BR 34. The three-member Board denied Rumyantsev's petition for review and adopted the proposed decision and order as its own final decision. BR 1.

D. After a Bench Trial, the Superior Court Affirmed, Finding That the Two Injuries Were Not Distinctive Conditions of Rumyantsev's Employment and That He Did Not Put the Department on Notice That He Claimed to Have an Occupational Disease of Noise-Induced Hearing Loss

Rumyantsev appealed to superior court. After a bench trial, the court ruled for the Department, finding that Rumyantsev did not timely file his application for benefits. CP 46. The court found that there was no testimony regarding Rumyantsev's specific job duties. CP 45. "The March 19, 2010, and May 13, 2010 injuries to Mr. Rumyantsev's head do not constitute distinctive conditions of employment." CP 46. As a result, his brain injury "did not arise naturally and proximately out of the distinctive conditions of his employment" with Huntwood. CP 46. The court also found that Rumyantsev's application for benefits did not put the Department on notice that he had an occupational disease of noise-induced hearing loss. CP 46. Rumyantsev appeals.

IV. STANDARD OF REVIEW

In workers' compensation cases, this Court does not follow the standards of review under the Administrative Procedures Act, but applies its ordinary standards of review of superior courts' decisions. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 34.05.030(2)(a), (b); RCW 51.52.140. It reviews the superior court's decision, not the Board's. *Rogers*, 151 Wn. App. at 179-81. While this Court reviews legal issues de novo, it reviews the superior court's factual findings for substantial evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Rogers*, 151 Wn. App. at 180. The Court views the evidence in the light most favorable to the non-appealing party. *Ruse*, 138 Wn.2d at 5; *Rogers*, 151 Wn. App. at 180.

Rumyantsev incorrectly asks the Court to review this matter as it would for a summary judgment decision. App. Br. at 7. But the superior court's findings of fact, conclusions of law, and judgment indicate that this matter was not decided on summary judgment, but by bench trial. CP 44-47. And none of the briefing before the superior court seeks summary judgment relief. CP 8-20, 22-32, 34-42.

Persons seeking industrial insurance benefits must prove their entitlement to such benefits. *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942); *Robinson v. Dep't of Labor & Indus.*,

181 Wn. App. 415, 427, 326 P.3d 744, *review denied*, 337 P.3d 325 (2014). While the Industrial Insurance Act is liberally construed, such construction "only applies in favor of persons who come within the Act's terms" and "does not apply to defining who those persons might be." *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884, 729 P.2d 63 (1986). Liberal construction does not apply to factual questions. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

V. ARGUMENT

Rumyantsev did not timely file his application for benefits within one year of his industrial injuries, so the Department correctly denied his claim. Although the application for benefits might have been timely if the injuries were an occupational disease, an occupational disease must be caused by the distinctive conditions of the worker's employment. Substantial evidence supports the superior court's findings that Rumyantsev presented no evidence regarding his specific job duties and that the injuries are not distinctive conditions of his employment. Failing to show an occupational disease, the application was untimely.

Substantial evidence also supports the superior court's finding that Rumyantsev did not put the Department on notice that his claim was for the occupational disease of noise-induced hearing loss. The only reference in the application to any cause of the hearing loss was the two 2010 head

injuries. And as the Board mentioned, denial of this application does not preclude Rumyantsev from filing a claim for the noise-induced hearing loss. This Court should affirm.

A. Substantial Evidence Shows that Rumyantsev Failed to Timely File His Application, So the Department Correctly Denied It

Substantial evidence shows that Rumyantsev failed to file his application within one year of his injuries, as required by RCW 51.28.050. While a worker may file an application within two years of notice that the worker has an occupational disease, an occupational disease is a condition caused by distinctive conditions of the worker's employment. RCW 51.28.055; RCW 51.08.140. Substantial evidence shows that Rumyantsev did not sustain an occupational disease because he presented no evidence about his specific job duties and the injuries were not distinctive conditions of his employment.

1. While an Industrial Injury Need Not Arise from the Worker's Distinctive Conditions of Employment, an Occupational Disease Does

An industrial injury is "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." RCW 51.08.100. A worker filing a claim for benefits for an injury must do so within one year after the injury occurred:

> No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055 and 51.28.025(5).

RCW 51.28.050. This one-year time frame is "deliberately absolute," and it is well-settled that the "initial filing of a claim for benefits, and the applicable statues are plainly jurisdictional." *Weyerhauser Co. v. Bradshaw*, 82 Wn. App. 277, 283, 918 P.2d 933 (1996) (citing *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 925, 185 P.2d 113 (1947)).

The Legislature created a different time limit to file an application for an occupational disease—two years from when the worker receives a doctor's notice that he or she has an occupational disease:

> [C]laims for occupational disease or inflection 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.

RCW 51.28.055(1). The Legislature defined an "occupational disease" as "such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." RCW 51.08.140.

The Supreme Court has explained that while an injury need not arise out of employment, an occupational disease does when it requires that the disease occur "naturally . . . out of employment." *Dennis v. Dep't*

of Labor & Indus., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Thus, "a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment." *Dennis*, 109 Wn.2d at 481. The worker must prove that his or her particular work conditions "more probably caused his or her disease or disease-based disability than conditions in everyday life or *all employments in general*; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment." *Id.* (emphasis added). Thus, if it is a condition present in "all employments" then it is not a distinctive condition of employment. *Id.* And the conditions "must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidently occurring in his or her workplace." *Id.* (emphasis in original).

Following *Dennis*, courts have provided further context as to when diseases arose naturally out of the workers' employments. For instance, the court recently rejected an occupational disease claim where the worker claimed that defective ventilation in her office, combined with odors emanating from new blinds after an office remodel. *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 315-17, 289 P.3d 727 (2012). The court explained that the claimant presented no evidence that her office

"exposed her to a greater risk of contracting multiple chemical sensitivity than other environments she had encountered." *Id.* at 316. This is because, as the court explained, "Remodels are everywhere, and by no means limited to law offices, or to work for that matter." *Potter*, 172 Wn. App. at 316 (internal quotations omitted).

In another case, the court held that a slaughterhouse plant worker who contracted spinal meningitis after a co-worker coughed in his face did not satisfy the naturally element. *Witherspoon v. Dep't of Labor & Indus.*, 72 Wn. App. 847, 851, 866 P.2d 78 (1994). His exposure was "merely coincidental and not a result of any distinctive condition of his employment." *Id.* The evidence there showed that meningitis occurs everywhere commonly and requires hours of exposure. *Id.* at 849-50.[2]

Those cases starkly contrast from when the courts held that the evidence supported the finding of an occupational disease. In *Dennis*, the claimant contracted osteoarthritis from repetitively using tin snips four to five hours a day, over 38 years. 109 Wn.2d at 483. The evidence supported the finding that the disease naturally arose out of the employment. *Id.* And the Supreme Court similarly upheld an occupational disease finding where an intensive care unit nurse who had hepatitis was

[2] *See also Gast v. Dep't of Labor & Indus.*, 70 Wn. App. 239, 852 P.2d 319 (1993) (stress caused rumors, innuendos, and inappropriate comments are not distinctive conditions of employment).

exposed to cuts by needles and bites by patients, and that she regularly came into contact with blood and bodily fluids. *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 600 P.2d 1015 (1979). There was no evidence showing that the claimant's other activities involved such exposure. *Id.* at 637.[3]

Here, substantial evidence shows that while Rumyantsev sustained two industrial injuries, he did not have an occupational disease. Getting hit in the head is a sudden and tangible happening of a traumatic nature. He had one year from March 19, 2010, and May 13, 2010, to file an application for benefits. He filed his application over three years after the injuries, so the Department correctly denied the application as time-barred.

Substantial evidence shows that Rumyantsev did not sustain an occupational disease, so he could not utilize the two-year time limit to file his application. As discussed below, his injuries were not distinctive conditions of his employment for at least two independent reasons: he failed to present evidence of his specific job duties and the injuries were not distinctive conditions of Rumyantsev's particular employment.

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[3]For further examples, the court held that foot problems caused by standing for prolonged periods on hard surfaces can constitute distinctive conditions of employment. *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 736-39, 981 P.2d 878 (1999). The Court similarly upheld an occupational disease claim where a secretary suffered kidney problems because she was directed not to leave her desk unattended so she had to wait for someone to cover her when she went to the bathroom. *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 777 P.2d 568 (1989).

2. Substantial Evidence Shows that Rumyantsev Presented No Evidence of His Specific Job Duties

Substantial evidence shows that Rumyantsev's injuries were not distinctive conditions of his employment because Rumyantsev presented no evidence of his specific job duties. Absent evidence of his specific job duties, the court cannot know what particular conditions of his work could cause the disease. *See Dennis*, 109 Wn.2d at 481.

As the party seeking benefits, Rumyantsev bore the burden to prove his entitlement to such benefits. *Robinson*, 181 Wn. App. at 427; RCW 51.52.050(2)(a), .115. During Rumyantsev's testimony, he only generally describes how the injuries occurred: by a clamp hitting his head and a board hitting his head. BR Alexandr at 10, 13-14. In describing the second injury, he mentions moving planks of wood and needing to duck, but there is no other mention about his role. BR Alexandr at 13.

In the signed accident report for the March 2010 injury, Rumyantsev does not describe his job with any specificity, except what appears to be "Toiler/grader/stacker." Exs 2, 5. And the application itself stated that he did labor on any job, "as needed by supervisor." Ex 1.

Substantial evidence thus supports the superior court's finding that Rumyantsev presented no testimony regarding his specific job duties. CP 45. It is unclear what Rumyantsev did for Huntwood or why his job placed

him where he was injured. It was Rumyanstev's burden to present testimony on this point, and on substantial evidence review any inference from the evidence is construed in the Department's favor. *See* RCW 51.52.050, .115; *Ruse*, 138 Wn.2d at 5; *Ramos v. Dep't of Labor & Indus.*, No. 32675-6-III, at *4-6 (Wash. Ct. App., Nov. 3, 2015).[4] As there is no evidence about Rumyantsev's specific job duties, he cannot show how those duties put particular conditions on him that led to any occupational disease. The Court can affirm on this basis alone.

3. Substantial Evidence Shows that Rumyantsev's Injuries Do Not Constitute Distinctive Conditions of Employment

A second independent reason to affirm is that substantial evidence shows that the two injuries to Rumyantsev's head do not constitute distinctive conditions of employment. Substantial evidence shows that the injuries were more probably caused by than conditions in everyday life or all employments in general. There is no evidence that the injuries were a natural incident of conditions of that worker's particular employment. These head injuries resulted from conditions coincidently occurring in the workplace.

The risk of hitting one's head is not unique to the conditions of Rumyantsev's job as a laborer. The risk of hitting one's head can occur at

[4]The Court published this case the day this brief is filed. The Department will supplement its citation as the information becomes available.

any job, just as it can occur at home or elsewhere. For that reason, Dr. Cox only testified that Rumyantsev had delayed effects of work-related injuries (i.e., that they occurred at work). BR Cox at 29. As she did not know Rumyantsev's specific job duties, she could not, and did not, testify that the distinctive conditions of Rumyantsev's job caused an occupational disease. And Rumyantsev presented no other testimony that the risk of hitting his head was a unique condition of his employment, as compared to any other employment or conditions in everyday life.

This case is analogous to *Potter* and *Witherspoon.* The risk of hitting one's head is similar to the risks of being exposed to fumes in an office building remodel or the risk of contracting meningitis from a co-worker's cough. *Potter*, 172 Wn. App. at 315-17; *Witherspoon*, 72 Wn. App. at 851. As the Court of Appeals emphasized in *Potter*, off gassing of furniture can occur in any employment. 172 Wn. App. at 316. The *Potter* Court held that the workers' diseases in *Potter* and *Witherspoon* did not arise out of the distinctive conditions of their employment, where the conditions were not unique to the workers' job and could occur just as easily in everyday life. *Potter*, 172 Wn. App. at 315-17; *Witherspoon*, 72 Wn. App. at 851. Being struck by an object in the head can occur everywhere. Similarly here, substantial evidence shows that Rumyantsev's alleged disease did not arise out of the distinctive conditions of his

employment, as the risks were not unique to the conditions of his job and could occur just as easily in everyday life. This Court should follow *Potter* and *Witherspoon*, and affirm.

The Court should reject Rumyantsev's unsupported claim that his job duties led to the blows on the head. App. Br. at 11, 15. First, this claim is rooted in a request to the Court to construe the record in Rumyanstev's favor; but on substantial evidence review the court construes the record in the Department's favor. *See Ruse*, 138 Wn.2d at 5; *Ramos*, No. 32675-6-III, at *4-6. Second, Rumyantsev points to testimony that he was working when a clamp hit is head and that he was working with gluing wood when he had to duck before being hit. App. Br. at 15. But substantial evidence shows that these descriptions are not sufficient to describe the conditions of Rumyantsev's employment. All this evidence shows is that Rumyantsev sustained injuries at work, which the Department does not dispute. His argument fails.

Rumyantsev instead cites extensive testimony from Dr. Cox about how the injuries caused his disability. But the issue is not whether hitting one's head can lead to later problems. The Department presented no evidence disputing that hitting one's head can lead to further problems. But that the causation chain might start at injuries at work does not mean that the injuries constituted distinctive conditions of his employment.

Rumyantsev's reliance on *In re Baxter* is misplaced. App. Br. at 12-14; *In re Baxter*, No. 92 82 5897, 1994 WL 76747 (Bd. Indus. Ins. App., Jan. 7, 1994). Baxter worked as a dental assistant, where she was exposed to contaminated blood and tissue likely from needle-sticks, and contracted hepatitis C. *Baxter*, 1994 WL 76747 at *1-2. She filed an application more than one year after the needle-stick exposures, but less than two years from when she first obtained treatment for the hepatitis. *Id.* The Board thus held that any injury claim would be untimely, but her claim for occupational disease. *Id.*

In *Baxter*, the needle-stick exposures were a condition of Baxter's employment as a dental assistant. Testimony showed that she would not otherwise be exposed to hepatitis C through bodily fluids by employment in general or everyday life. *Id.* Here, by contrast, there is no testimony showing that hitting one's head is unique to Rumyantsev's job. Any person can hit his or her head at a job or at home. Because the disease related to the distinctive conditions of Baxter's employment, that case does not help Rumyantsev. This Court should affirm.

B. Substantial Evidence Shows That Rumyantsev's Application Did Not Put the Department on Notice That He Was Seeking a Claim for Noise-Induced Occupational Hearing Loss

Substantial evidence shows that Rumyantsev's application did not put the Department on notice that he was seeking a claim for noise-

induced occupational hearing loss. The application referred only to the two head injuries as causes of Rumyantsev's hearing loss, so the Department had no way of knowing that he also claimed noise-induced hearing loss. The Court should affirm.

When a claimant is entitled to benefits, he or she shall file an application with the Department along with a doctor's certification. RCW 51.28.020(1)(a). To be sufficient, a claim needs to provide notice that a particular injury has been sustained:

> A claim . . . is sufficient if it fairly gives the department such information as the law requires, or as otherwise stated, if the writing which is filed with the department reasonably directs its attention to the fact that a particular injury has been sustained and that compensation is claimed.

Leschner, 27 Wn.2d at 924 (citing *Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941); *Beels v. Dep't of Labor & Indus.*, 178 Wash. 301, 34 P.2d 917 (1934)).

Here, substantial evidence shows that Rumyantsev's application for benefits did not fairly put the Department on notice that he was claiming that noise caused his hearing loss, rather than his two head injuries. Rumyantsev's application states that he suffered two injures in March 2010 and May 2010. Ex 1. He described the specific times when those injuries occurred, and he described how those injuries occurred. Ex 1. He made no mention that his job exposed him to noises. Ex 1. Dr. Cox

similarly attested only that Rumyantsev lost hearing and might need hearing aids. Ex 1. In her objective findings, she makes no mention of his hearing. Ex 1. And there is no evidence that the Department received any supplemental information from Rumyantsev or Dr. Cox that his hearing problems were noise-induced.

Based on that information, substantial evidence shows that the Department had no reason to know that Rumyantsev claimed that his occupational disease was noise-induced occupational hearing loss. The only nexus he provided for his hearing loss and his job was the two head injuries. The Department analyzed whether those injuries constituted an occupational disease and rejected the application. Based any rational reading of his application, the Department was not put on notice that noise caused the hearing loss.[5] *See Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 9, 201 P.3d 1011 (2009) ("[o]ccupational hearing loss may result from either an industrial accident or continuous exposure to hazardous levels of noise"). As the Board noted, denying the application on that basis does not preclude Rumyantsev from bringing another application for the

[5] Had it been notified, it would have investigated the work place noise levels as is its practice in such claims.

occupational disease of noise-induced hearing loss.[6] BR 34. Substantial evidence supports the superior court's finding, so this Court should affirm.

It is of no moment that when the Department receives an application, the Department must address whether the application establishes an industrial injury or an occupational disease. The Department did that here. Based on the information in the application, it addressed whether the injuries were industrial injuries or an occupational disease. The order found neither. Ex 3. While they were industrial injuries, the application was untimely. And the injuries did not lead to an occupational disease because they did not constitute distinctive conditions of Rumyantsev's employment. The Department should not have to go a further step and guess as to any other circumstances that Rumyantsev's diagnoses might have been caused by other circumstances that could constitute an occupational disease.

The Court should reject Rumyantsev's argument that Dr. Cox's testimony at hearing established the claim for noise-induced hearing loss. App. Br. at 17. Dr. Cox's testimony occurred well after Rumyantsev submitted his application that the Department denied. BR Cox 1. Dr. Cox did not testify that she told the Department that noise caused the hearing

[6]Of course, any application would need to be timely and meet all other statutory requirements. But Rumyantsev represents that he has not received written notice such that the statute of limitations has not begun to run. App. Br. at 18.

loss in the application or any other materials she submitted while the Department adjudicated the application (or reconsidered it). Substantial evidence supports the superior court's rejecting Rumyantsev's request that the Court to engage in a *post hoc* analysis to add noise-induced hearing loss to an application that nowhere mentions it.

Because the Department did not consider the issue of noise-induced hearing loss as it was not fairly apprised of the matter, the Board could not consider it. The Department has original jurisdiction to consider claims for workers' compensation benefits. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994); RCW 51.04.010. The Board may only consider an issue that the Department has first considered. *Lenk v. Dep't of Labor & Indus.,* 3 Wn. App. 977, 986-87, 478 P.2d 761 (1970); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994); *see Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (plurality) (the Board hears appeals de novo, "reviewing the specific Department action" from which the party appealed); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491-92, 288 P.3d 630 (2012). The Board correctly declined to consider the issue here. The Court should affirm.

VI. CONCLUSION

Substantial evidence shows that Rumyantsev did not sustain an occupational disease because he presented no evidence about his specific job duties and hitting his head twice is not a distinctive condition of his employment. He did sustain industrial injuries, but his application was untimely, as he filed it more than a year after the injuries. Substantial evidence also shows that Rumyantsev's application did not put the Department on notice that he was claiming an occupational disease of noise-induced occupational hearing loss, so the Department had no reason to consider whether that type of occupational disease occurred. This Court should affirm.

RESPECTFULLY SUBMITTED this 3rd day of November, 2015.

ROBERT W. FERGUSON
Attorney General

PAUL M. CRISALLI
Assistant Attorney General
WSBA No. 40681
Office ID. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98164-1012
(206) 464-7740

No. 33181-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALEKSANDR RUMYANTSEV, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department of Labor and Industries Brief of Respondent and this Declaration of Mailing in the below described manner.

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Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201-1987

Via First Class United States Mail, Postage Prepaid to:

Drew D. Dalton
Ford Law Offices, PS
320 S. Sullivan Road
Spokane Valley, WA 99025
Attorneys for Appellant

DATED this 3RD day of November, 2015.

KJRSTEN SWAN
Legal Assistant