Supreme Court No. 99443-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

DAVID WHITE,
Appellant/Petitioner,

v.

QWEST CORPORATION dba LUMEN TECHNOLOGIES (FORMERLY CENTURYLINK) &
WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,
Appellee/Respondents.

RESPONDENT LUMEN TECHNOLOGIES' ANSWER TO PETITION FOR REVIEW

SHAWNA G. FRUIN (48058)
Reinisch Wilson Weier, PC
10260 SW Greenburg Road #1250
Portland OR 97223
Phone: (503) 245-1846

Attorney for Qwest Corp. dba Lumen Technologies (formerly CenturyLink)

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IDENTITY OF PETITIONER/RESPONDENT

Petitioner is David White. Respondent is Qwest Corporation dba Lumen Technologies (formerly CenturyLink). White was previously employed by a company that is now part of Lumen Technologies. That employment ended in 1986, or before.

CITATION TO COURT OF APPEALS DECISION

White asks this Court to disturb *White v. Qwest Corp. dba CenturyLink & Dep't of Labor and Indus.*, 15 Wn. App. 2d 365, 478 P.3d 96 (2020), a unanimous decision of the Court of Appeals (Division One).

ISSUE PRESENTED FOR REVIEW

White presents a confluence of issues for review, each under the guise that RCW 51.28.055 (Time limitation for filing claim for occupational disease—Notice—Hearing loss claims—Rules) offends the procedural due process and equal protection guarantees found in the Washington and United States constitutions.

Lumen Technologies counters that the proper issue before this Court is whether any one of the considerations found in RAP 13.4(8) (considerations governing acceptance of review) has been satisfied.

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STATEMENT OF THE CASE

The Court of Appeals aptly summarized this case as follows:

> An employee who suffers from occupational-related hearing loss must file a claim for workers' compensation benefits within two years of the worker's last exposure to occupational noise or by September 10, 2004, whichever is later. RCW 51.28.055(2)(a). The failure to do so precludes monetary benefits, such as a partial disability award, and limits recovery to medical aid benefits.
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> In this case, [White]'s last exposure to occupational noise occurred, at the latest, in 1986, and he filed a claim for benefits three decades later. [He] was only entitled to medical benefits. The statutory limitations provision [i.e., RCW 51.28.055(2)(a), (b)] does not violate equal protection by distinguishing occupational-related hearing loss from other occupational disease or violate due process. We thus affirm the superior court's order granting [Lumen Technologies]'s motion for summary judgment.

White, 15 Wn. App. 2d at 369.

ARGUMENT

White Fails to Show that Review is Appropriate.

Where, as here, the Court of Appeals has issued a decision terminating appellate review, this Court will not revive the matter unless:

(1) the decision is in conflict with a decision of the Supreme Court;
(2) the decision is in conflict with a published decision of the Court of Appeals;
(3) the petition raises a significant question of constitutional law; or
(4) the petition raises an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (considerations governing acceptance of review).

White fails to show that any one of these considerations is met. First, he barely alleges, let alone proves that the Court of Appeals' decision conflicts with a decision of this Court. Second, he unambiguously does not allege that the decision conflicts with another published decision of the Court of Appeals. Third, he does not allege that the Court of Appeals applied an incorrect constitutional framework, and thus does not raise a significant issue of constitutional law. And fourth, he does nothing to show that *this case* involves an issue of substantial public interest, let alone one that deserves this Court's attention. Rule of Appellate Procedure 13.4(b) has not been satisfied.

Moreover, any examination of White's petition would be incomplete without due regard for three pernicious, yet telling cues. First, White does not meaningfully engage with the Court of Appeals' decision itself. He cites it twice (Pet. at 15, 18), and on those pages quotes conclusions apart from the comprehensive reasoning that preceded them. Second, Lumen Technologies has demonstrated—and on at least two points the Court of Appeals agreed—that White's arguments are premised on inaccurate facts. *See White*, 15 Wn. App. 2d at 374 n.2 (highlighting that "the certified board record reveal[ed] no evidence to support [White's] assertions of fact"); *see also* Appendix 1 (list of unsubstantiated facts from White's Court of Appeals brief). Third, though the Court of

Appeals reached White's constitutional challenges, he did not properly raise those issues before the Superior Court. *See Capper v. Callahan*, 39 Wn.2d 882, 887, 239 P.2d 541, 544 (1952) ("[The Supreme Court] has always followed the rules that a case will not be reviewed on a theory different from that on which it was tried in the trial court, and questions not raised in that court will not be considered on appeal.").

If the failure to satisfy RAP 13.4(b) were not reason enough to decline discretionary review in this matter, these obstacles should give this Court pause.

A. White Does Not Identify Any Conflict with a Decision of the Supreme Court.

White barely alleges, let alone proves that the Court of Appeals' decision conflicts with a decision of this Court. Indeed, it is an undertaking in and of itself to make out the basis for this particular complaint.

White applies RAP 13.4(b)(1) once in his petition (Pet. at 13). There, he does not cite text from the Court of Appeals' decision to show a conflict with a decision of this Court, but instead criticizes the Court of Appeals for accepting his opponents' argument (Pet. at 13). He contends that *argument*—rather than the decision itself—conflicts with this Court's decision in *Boeing Co. v. Heidy*, 147 Wn.2d 78, 51. P.3d 1011 (2009).

That claim is both reductive and incorrect. But, more to the point, it is irrelevant. *Arguments* presented to the Court of Appeals do not have the force of law; hence RAP 13.4(b)(1) requires that White show the *decision* is in conflict with a decision of this Court. Further complicating the matter, White quotes text in support of his argument that does not appear in *Heidy*, but rather from a footnote to this Court's decision in *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009), where this Court explicitly disapproved of *Heidy*. The text is also misquoted. This cannot justify discretionary review.

To expand on the point that White's claim is reductive and incorrect, there is nothing in the Court of Appeals' decision that remotely conflicts with either *Heidy* or *Harry*. Neither *Heidy* nor *Harry* so much as purported to examine the constitutionality of RCW 51.28.055's permanent partial disability statute of limitations, which is the issue in this case. Those decisions concerned the calculation of permanent partial disability, not whether the permanent partial disability rule was constitutional:

> The key issue in [*Heidy*], reduced to its essence, is whether an employer can reduce a worker's permanent partial disability award for work-related hearing loss because people of that worker's age generally suffer from age-related hearing loss.
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> [*Harry*] requires us to determine when occupational hearing loss becomes "partially disabling" for the purpose of determining the appropriate rate of compensation for a permanent partial disability award.

Heidy, 147 Wn.2d at 81; *Harry*, 166 Wn.2d at 6. The Court of Appeals saw no conflict between its present decision and those cases; it cited both *Heidy* and *Harry* extensively for the propositions for which those decision stand. *See White*, 15 Wn. App. 2d at 373, 374, 378.

White highlights and ostensibly characterizes as a "holding" a single sentence from a footnote to *Harry*, in which this Court cited *Heidy* and stated "absent reliable medical evidence, age-related hearing loss may not be segregated from noise-related hearing loss." (Again, the text provided in his petition is misquoted.) He apparently infers from this statement that the *capability to produce* reliable medical evidence does not exist, and so there can be no rational grounds for the timing requirements of RCW 51.28.055 (distinguishing between a claim for occupational hearing loss due to occupational noise exposure filed within or outside of two years of the date of the worker's last injurious exposure). However, this Court held no such thing, and for good reason. Medicine is more than capable of producing such evidence; it was simply absent in *Harry* and so this Court declined to venture a distinction based upon it. *Harry*, 166 Wn.2d at 18 n.6 ("This case does not involve, and therefore we do not

address, the circumstances under which a worker's prior permanent partial disability may be segregated based on reliable medical evidence."). To suggest that this sentence alone justifies discretionary review is grasping at straws.

White fails to present a coherent claim that the Court of Appeals' decision conflicts with a decision of this Court. To the extent that he seizes upon a single sentence from a footnote that did not purport to examine the issue he is fixed upon, he also fails to show bona fide conflict.

B. White Does Not Identify Any Conflict with a Published Opinion of the Court of Appeals.

In contrast with Section A, it takes no strain to show that discretionary review is not justified under RAP 13.4(b)(2): White unambiguously does not allege that the decision conflicts with another published decision of the Court of Appeals.

C. White Does Not Identify a Significant Question of Constitutional Law.

White alleges that RCW 51.28.055 offends the procedural due process and equal protection guarantees found in the Washington and United States constitutions (Pet. at 8). He does not dispute that the Court of Appeals applied correct constitutional frameworks, however; his complaint is with the outcome those analyses produced (Pet. at 9, acknowledging that his equal protection challenge called for a rational

basis standard of review; Pet. at 11, acknowledging that due process would be satisfied by notice and an opportunity to be heard). This Court does not entertain constitutional challenges with levity; it has long held that "[a] statute or ordinance should not be declared unconstitutional unless it appears [so] beyond a reasonable doubt." *State v. Maciolek*, 101 Wn.2d 259, 264, 676 P.2d 996 (1984).

As it pertains to equal protection, that framework required White to "do more than merely question the wisdom and expediency of the statute." *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 836, 601 P.2d 936 (1979). Consider then the manner in which the Court of Appeals rejected the same arguments White presents here:

> … White fails to address the unique aspects of hearing loss that provide a basis to distinguish it from other occupational diseases.
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> Occupational hearing loss occurs simultaneously with exposure to injurious noise, but ceases to progress once the exposure end. Thus, the injury is complete when the worker is removed from a noisy environment. Because the progression of hearing loss caused by workplace noise exposure may cease, while hearing loss may, for other reasons, continue, there is a reasonable basis distinguishing between occupational hearing loss and other occupational disease. And there is a logical and scientific basis to tie the limitations period to the end of exposure to workplace noise.
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White, 15 Wn. App. at 374–75 (internal citations omitted); *see also State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991) (explaining that a classification must be "purely arbitrary" to overcome the strong presumption of constitutionality); *Yakima Cy.*, 92 Wn.2d at 836 (explaining that a challenger "must show conclusively that the classification is contrary to the legislation's purposes").

As it pertains to due process, a statue is not unconstitutionally vague if it provides adequate notice and standards to prevent arbitrary enforcement. *Maciolek*, 101 Wn.2d at 264. Consider again the Court of Appeals:

> … [White's] arguments reflect a misunderstanding of the purpose of the procedural safeguards required by the due process clause.
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> Here, the state action that affected [White]'s asserted interest was the [Board of Industrial Insurance Appeal]'s determination that his claim was untimely and he was ineligible for the [permanent partial disability] benefit. It is undisputed that [White] had notice of the Board's decision and an opportunity to challenge it.
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> In addition, RCW 51.28.055 plainly states the timing requirements for occupational hearing loss claims and the consequences of untimely filing. It is well settled that a person is presumed to know the law such that ignorance of [it] is not a defense. The statutory notice was reasonably calculated as a matter of law to 'appraise interested parties'

> about the limitations period that applies to workers' compensation claims stemming from occupational hearing loss.

White, 15 Wn. App. at 377–78 (internal citations omitted).

That the Court of Appeals considered (and rejected) White's constitutional challenges is not an ipso facto basis to permit review under RAP 13.4(b)(3). If it were, that consideration would be reduced to a formality, or invocation of "magic words." *See Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 89, 419 P.3d 819, 824 (2018) (explaining, in a negligence context, that "[i]n affirming the Court of Appeals, we do not require affiants to aver talismanic magic words, but allegations must amount to more than conclusions … with a basis in admissible evidence that can support a claim.").

So what then is the significant question of constitutional law that White presents? It is not that RCW 51.28.055 affects a fundamental right or suspect class (Pet. at 9, acknowledging "the rational basis test [is] applicable"). It is not that RCW 51.28.055(2) applies unequally to all workers with occupational hearing loss with regard to eligibility for benefits. *White*, 15. Wn. App. at 373 ("White does not contend otherwise."). It cannot be that RCW 51.28.055 created two classes via its statute of limitations. *See Campos v. Dep't of Labor & Indus.*, 75 Wn. App. 379, 383, 880 P.2d 543, 549 (1994) (rejecting argument that a statute

of limitations creates a class). Nor can it be that White's *employer* somehow violated his right to due process. *White*, 15. Wn. App. at 378 ("No authority supports White's claim of a due process right to notice from his employer, a private entity, of a triggering event for purposes of a statute of limitations.").

Whatever remains is not a constitutional issue, it is displeasure with an outcome. White was entitled to one bite of the apple, and he took it. That should be the end of it.

D. White Does Not Identify an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

White alleges he has raised an issue of substantial public interest because he has raised "an important question of constitutional law" (Pet. at 19). This argument circles to RAP 13.4(b)(3), lending no distinct support under 13.4(b)(4). Aside from this, White invokes this Court's stated aim to effectuate the Industrial Insurance Act and notes that this Court has granted review in other cases involving occupational hearing loss (Pet. at 20). Both of these points, while true statements, do nothing to show that *this case* involves an issue of substantial public interest, let alone one that deserves this Court's attention.

The Legislature is quite familiar with the purpose of the Industrial Insurance Act, yet duly enacted the timeliness requirements of RCW

51.28.055, and the Court of Appeals affirmed that design. *See, e.g.*, *Grant v. Spellman*, 99 Wn.2d 815, 819, 664 P.2d 1227, 1230 (1983) ("Courts presume legislatures to act with integrity and with a purpose to keep within constitutional limits"). Indeed, there can be no cause for alarm where, as here, a court fulfills its duty to "ascertain and give effect to the intent and purpose of the Legislature, as expressed in the act." *In re Lehman*, 93 Wn.2d 25, 27, 604 P.2d 948 (1980). Moreover, the Court of Appeals' decision in no way threatens to make workers less safe, as White implies (via citation to the purpose of the Industrial Safety and Health Act, which is not at issue in this case; the relevant statute falls under the Industrial Insurance Act). The Court of Appeals did not disturb RCW 51.28.055(2)(b), which entitles White, and those like him, to employer-provided medical benefits.

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CONCLUSION

The language White invokes signals alarm, but his arguments do not. If the Court of Appeals' decision conflicted with a decision of this Court, White could say so clearly. If it conflicted with another published opinion, he could cite it. If this case presented a significant question of constitutional law, White could explain how the Court of Appeals misjudged it. And if this case raised an issue of substantial public interest, he could show it. Yet White has satisfied no consideration found in RAP 13.4(b), and so discretionary review is not warranted. This Court should leave the Court of Appeals' decision undisturbed.

Dated this 10th day of March, 2021.

Respectfully submitted,

Shawna G. Fruin, WSBA 45058
Attorney for Qwest Corp. dba Lumen Technologies (formerly CenturyLink)

RCW 51.28.055

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

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

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

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

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

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

NOTES:

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

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

DAVID WHITE Appellant, v. QWEST CORP. dba CENTURYLINK & WASHINGTON STATE DEP'T OF LABOR AND INDUSTRIES, Respondents.	CASE NO.: 80715-3 **RESPONDENT CENTURYLINK'S APPENDIX 1: UNSUBSTANTIATED FACTS FROM APPELLANT BRIEF**

The majority of facts referenced in the Appellant's Brief are uncited and unsubstantiated, contrary to the Rules of Appellate Procedure. *See* RAP 10.3(a)(5) (every factual statement in the statement of the case must refer to the record). The Court of Appeals' record consists of the Report of Proceedings, Clerk's Papers, exhibits, and certified record of the administrative adjudication proceedings. RAP 9.1. Regarding the administrative adjudication proceedings, the Court shall not receive evidence or testimony other than, or in addition to, that offered before the Board of Industrial Insurance Appeals (Board) or included in the record filed by the Board. RCW 51.52.115.

Here, the Board decision was based on the procedural history, CenturyLink's stipulated facts, and Appellant White's responses to

Reinisch Wilson Weier P.C.
10260 S.W. Greenburg Road, Suite 1250
Portland, Oregon 97223
(503) 245-1846
(503) 452-8066 Fax

Requests for Admissions. CenturyLink stipulated that White sustained an occupational disease. CP 35. White admitted that: (i) White filed this claim on or around March 23, 2017; (ii) White last worked for CenturyLink or its subsidiaries in 1986 or before; (iii) White filed this claim more than two years after he last worked for CenturyLink or its subsidiaries; (iv) that White could not recall if he was working from June 16, 1983 to November 11, 1984; (v) that White did not believe he was working from January 26, 1986 to April 26, 1990, but lacked sufficient knowledge or recollection to admit working those dates; and (vi) that White believed he began working for CenturyLink or its subsidiaries earlier than 1979. CP 83-85.

Because those are the total of facts in the underlying record, the following statements of facts from Appellant White's Brief are unsubstantiated and therefore should be disallowed for consideration under RAP 9.1:

1. "David White was a career telephone lineman for CenturyLink." Appellant Br. 1.
2. "[CenturyLink] never bothered to test [White] for occupationally related hearing loss during his employment or at the time he left employment in approximately 1988." *Id*.

Reinisch Wilson Weier P.C.
10260 S.W. Greenburg Road, Suite 1250
Portland, Oregon 97223
(503) 245-1846
(503) 452-8066 Fax

3. "29 years [after White left employment], Mr. White noticed that his hearing was not what it used to be and sought treatment." *Id.*
4. "When [White's] audiogram showed significantly impaired hearing, his doctor informed him for the first time that his former employment with CenturyLink proximately caused his 41.01% binaural hearing loss." *Id.*
5. Mr. White filed this claim "[c]ommensurate with this notification [from his doctor that work caused hearing loss]." *Id.*
6. Mr. White applied for this claim "due to his lengthy exposure to injurious noise while working at CenturyLink." *Id.* at 2.
7. "Mr. White … was not made aware of his hearing loss until more than two years after his last exposure to injurious noise." *Id.* at 8.
8. Mr. White's "manifestation of hearing loss does not coincide with his last exposure to injurious noise." *Id.* at 14.
9. "CenturyLink was required to conduct annual audiograms in compliance with a Washington Industrial Safety and Health Act of 1973 (RCW 49.17.060)." *Id.* at 15; *see also* RCW 49.17 (Washington Industrial Safety and Health Act does not mandate audiograms); WAC 296-817 (the hearing loss rules that Appellant White cites were enacted between 2003 and 2015, decades after White stopped working for CenturyLink); *see also*

Reinisch Wilson Weier P.C.
10260 S.W. Greenburg Road, Suite 1250
Portland, Oregon 97223
(503) 245-1846
(503) 452-8066 Fax

WAC 296-62-09027, the audiogram regulation in effect in 1986, attached hereto.

10. "CenturyLink never tested Mr. White's hearing." Appellant Br. 15.

11. "[CenturyLink] cannot now complain that [White's] failure to file a claim deprived it of notice of [CenturyLink's] potential obligation to pay benefits or the opportunity to make its workplace safer." *Id*. (CenturyLink has never argued those points, and there is no evidence on the record about CenturyLink's safety programs.)

12. "Because of the insidious development of hearing loss, workers typically do not recognize their hearing loss symptoms, which are permanent, until it's too late, and well after the statute of limitations runs." *Id*. at 19.

13. "When the employer shirks its responsibility for maintaining a hearing loss safety program and/or fails to conduct audiometric testing for its workers, simple written notice to all workers would be monumental." *Id*. (There is no evidence in the record about whether the employer provided White with an audiogram, or whether White's employment met the thresholds of needing to provide one).

Reinisch Wilson Weier P.C.
10260 S.W. Greenburg Road, Suite 1250
Portland, Oregon 97223
(503) 245-1846
(503) 452-8066 Fax

Dated this 28th day of May, 2020.

Respectfully submitted,

REINISCH WILSON WEIER, P.C.

_____

Shawna G. Fruin, WSBA 45058
Attorney for Qwest Corp. dba CenturyLink

Reinisch Wilson Weier P.C.
10260 S.W. Greenburg Road, Suite 1250
Portland, Oregon 97223
(503) 245-1846
(503) 452-8066 Fax

REINISCH WILSON WEIER, PC

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