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SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

DONALD HARRY,

Respondent.

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SUPREME COURT  
STATE OF WASHINGTON  
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WASHINGTON SELF-INSURERS ASSOCIATION'S  
AMICUS CURIAE MEMORANDUM IN SUPPORT OF  
BUSE TIMBER AND SALES' PETITION FOR REVIEW  
PURSUANT TO RAP 10.1 AND 10.6

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I. STATEMENT OF **THE** CASE

The Court in Harry v. Buse Timber, 134 Wn. App. 739, 132 P.3d 1122, review granted, 161 Wn.2d 1014 (2007), has disregarded Boeing v. Heidy and McGraw, 147 Wn.2d 78, 51 P.3d 793 (2002) (Heidy), rejected the Legislature's mandate set forth in RCW 51.32.180, and adopted Claimant Harry's legally and medically unsupported and unsupportable contention that claimants with the condition of progressive hearing loss (some of which is likely due to aging which employers are not permitted to segregate in most cases) are entitled to a rolling schedule of benefits for each increase in hearing loss. The Court should reject this contention for a number of reasons, many of which are concisely set forth in the briefing submitted by Buse Timber to the Court of Appeals and this Court. WSIA's arguments further explaining why the Court should reject this contention, reverse the decision of the Court of Appeals, and address the Court's holding in Pollard v. Weyerhaeuser, 123 Wn. App. 506, 98 P.3d 545, review denied, 154 Wn.2d 1014, 113 P.3d 1040 (2005), are set forth below.

In addition to the arguments set forth by Buse Timber, WSIA submits that although this Court has already rejected the rolling schedule argument in Heidy, clear explication by the Court that the language of

RCW 51.32.180(b) is plain and unambiguous and applies to cases involving the condition of occupational hearing loss as any other occupational disease is again required to prevent the employer community from being required to expend its and the judiciary's resources defending these types of meritless claims and to again advise all potential parties that RCW 51.32.180(b) is to be applied as it plainly provides. Employers and workers have a substantial public interest in such a clear directive - certainty and finality of claims and prevention of meritless litigation.

## II. SUMMARY OF THE ARGUMENT

The McGraw portion of the record in Boeing v. Heidy and McGraw, 147 Wn.2d 78, 51 P.3d 793 (2002), involved the same factual scenario as in this case. The record in McGraw identified multiple audiograms from which the Court could have assigned a rolling schedule of benefits as advocated by Amicus for the Washington State Labor Council in Heidy and as contended by McGraw at the Board of Industrial Insurance Appeals (Board). Yet, based on that same set of facts and the extensive medical evidence discovered and developed in the Combined Hearing Loss Cases before the Board and culminating in Heidy, the Court determined that occupational hearing loss was **a progressive condition** and directed one schedule of benefits for all of McGraw's occupational hearing loss.

It is unfortunate that the Court of Appeals in Harry v. Buse Timber, 134 Wn. App. 739, 132 P.3d 1122, review granted, 161 Wn.2d 1014 (2007), perpetuates the medical fallacy upon which the Court in Pollard v. Weyerhaeuser, 123 Wn. App. 506, 98 P.3d 545, review denied, 154 Wash.2d 1014, 113 P.3d 1040 (2005), based its decision, i.e., that hearing loss is not one singular progressive medical condition. In fact, occupational hearing loss is a singular, progressive medical condition. Each progression would not occur but for the underlying loss that preceded it. That is the nature of the condition. The cause (noise exposure), the pathology, the process and the result are the same. Claimant Harry in this case has presented no expert medical evidence to the contrary. There is simply no medical evidence in this case to support the result reached by the Court of Appeals.

WSIA respectfully requests that the Court take this opportunity to explicitly limit the applicability of Pollard and determine that there has been no expert medical evidence presented to support the contention that progressive occupational hearing loss consists of multiple medical conditions. Hearing loss is a singular, diagnosable condition forming the basis of tens of thousands of occupational disease claims, and the Court's decision is of broad import.

Second, the Industrial Insurance Act (IIA) is not an insurance scheme meant to provide full insurance coverage. Rather, the IIA represents a compromise forged between business and labor by the Legislature through the give and take of the legislative process.

Finally, WSIA cautions against the judicial creation of a hybrid industrial injury/occupational disease claim not contemplated by Title 51. The statutory and regulatory schemes of the IIA are not equipped to deal with hybrid claims, and hybrid claims were not contemplated by the Legislature. The Court of Appeal's decision in Harry v. Buse Timber, 134 Wn. App. 739, 132 P.3d 1122, review granted, 161 Wn.2d 1014 (2007) effectively reverses this Court's decision of Weyerhauser v. Tri, 117 Wn.2d 128, 814 P.2d 629 (1991), by treating hearing loss as an industrial injury after this Court previously rejected such a notion and stated that hearing loss is an occupational disease and such claims should be adjudicated pursuant to the rules governing occupational disease claims.

### III. ARGUMENT

- A. RCW 51.32.180(b) IS CLEAR AND NOT SUBJECT TO STATUTORY CONSTRUCTION, AND THE COURT HAS PASSED UPON THIS ISSUE IN HEIDY.

The Court of Appeals in Harry has been misled regarding one of the most straightforward and plainly stated mandates of the Legislature in Title 51, specifically RCW 51.32.180(b), the schedule of benefits statute,

and has erroneously adopted Claimant Harry's legally and medically unsupported and unsupportable contention that each increment of progressive hearing loss is a new condition entitling claimants to a rolling schedule of benefits. Industrial insurance claims are governed by explicit statutory directives, not by common law. Rector v. Dep't of Labor and Indus., 61 Wn. App. 385, 810 P.2d 1363, review denied, 117 Wn.2d 1004, 815 P.2d 266 (1991). Neither the Board nor the courts have the authority to modify or amend a statute through judicial construction. Peterson v. Dep't of Labor & Indus., 40 Wn.2d 635, 245 P.2d 1161 (1952). It is a well-established, fundamental principle of statutory construction that the court will not construe an unambiguous statute. King County v. Taxpayers of King County, 104 Wn.2d 1, 700 P.2d 1143 (1985).

The doctrine of liberal construction cannot be used to change the meaning of a statute that, in its ordinary sense, is unambiguous. To allow such rules to be used for such a purpose would require the Court to usurp the legislative function and thereby violate the constitutional doctrine of separation of powers. Wilson v. Dept of Labor & Indus., 6 Wn. App. 902, 496 P.2d 551 (1972). The Court's primary duty in interpreting statutes is to give effect to the Legislature's intent. Sacred Heart v. Dep't of Revenue, 88 Wn. App. 632, 946 P.2d 409 (1997). Even in instances of ambiguity, non-existent in this case, in determining legislative intent, a

court construes statutory language in the context of the statute as a whole.  
Id.

The Court in Harry v. Buse Timber, 134 Wn. App. 739, 132 P.3d 1122, review granted, 161 Wn.2d 1014 (2007), erroneously rejected the plain language of RCW 51.32.180 and this Court's explicit holding in Boeing v. Reidy, 147 Wn.2d 78, 51 P.3d 793 (2002), that RCW 51.32.180 is clear and unambiguous and not subject to judicial construction; in favor of a judicial construction that is, at best, strained. Likewise, the term "occupational disease" is neither ambiguous nor undefined. RCW 51.08.140 defines "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." Id. The Harry Court's adoption of Claimant Harry's argument must fail for the same reason that the Court in Heidy determined that employers must compensate workers for their age-related hearing loss where the employer's basis for segregation is epidemiological data. Hearing loss is one condition with one physiological cause - dead inner ear hair follicles. It is medically impossible to examine a worker's ears and determine the cause of death of any given hair follicle, the cause of hearing loss. It was Claimant Harry's burden in this case to establish by expert medical evidence that his hearing loss is not one progressive condition. This he failed to do.

A claimant should not be able to claim multiple schedules of benefits for the same single occupational medical condition. Claimant Harry's argument that anything less than a rolling schedule would be unfair, based on his suggestion, not supported by the record, that Buse did not tell him he had hearing loss is nothing more than a veiled attempt to resurrect the 'worker knowledge' requirement explicitly rejected by the Court in Boeing v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002). Once a condition is determined to be an occupational disease, the condition is still the subject of that single occupational disease claim subject to the schedule of benefits mandated by RCW 51.32.180(b) no matter how it worsens with the passage of time or becomes aggravated with continued work. Continued activity that aggravates or worsens that condition cannot, as a matter of law, eliminate the initial proximate cause determination.

Moreover, Claimant Harry's argument that claimants with occupational hearing loss claims should be treated the same as those claimants with industrial injury claims is fallacious. There are certain explicit differences under the IIA regarding compensation for occupational diseases versus industrial injuries. First, the statute of limitations for occupational disease claims is quite liberal compared to the statute of limitations for industrial injury claims. While the statute of limitations

applicable to industrial injuries is specifically limited to one year from the date of injury, a worker can file a claim for an occupational disease within two years of receiving written notice from a physician that he or she has a condition that is occupationally related. RCW 51.28.055; RCW 51.28.050. In practice, the statute of limitations for occupational diseases is non-existent. A worker can file an occupational disease claim many years after its onset and, in hearing loss cases, many decades after exposure and the condition arose.

In fact, the Legislature has established a more specific statute of limitations for hearing loss claims. RCW 51.28.055(2). The adoption of this legislation establishes two facts germane to this case. First, the Legislature has made clear that it will carve out exceptions for hearing loss claims where it sees fit. In this case it has not. In addition, the Legislature has established instances where occupational disease claims are in fact treated differently from industrial injury claims.

The second way in which the IIA already treats occupational diseases differently from industrial injuries is found in RCW 51.32.180, which requires that the schedule of benefits for compensating disability in an occupational disease claim is not based on the date of injury, exposure or claim filing, but on the date the condition first becomes disabling or the worker seeks treatment. Again, this is a much more liberal standard

allowing workers to receive compensation based on a schedule set many years after exposure. Hence, Harry's argument that a rolling schedule of benefits is required to equalize occupational diseases with industrial injuries is without merit.

Moreover, even in the case of an industrial injury, a worker does not receive a new and more favorable schedule of benefits when additional work exposure (for example, continued heavy manual labor by a worker with an industrial back claim) causes aggravation of an industrially-related condition. If a worker is injured on the job and files a claim, the schedule of benefits is set forever by the date of the initial injury and not the aggravating factors of continued work exposure. If it is the claimants' bar's desire for hearing loss to be compensated in the same manner as industrial injuries, then the most appropriate method for establishing the schedule of benefits is to set one schedule and treat any additional exposure as an aggravation of the original condition with the reopening rights established by RCW 51.32.160.

Claimant Harry's arguments are a veiled attempt to resurrect the 'worker knowledge' element previously rejected by this Court. In Boeing v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002), the culmination of the "Combined Hearing Loss Cases" tried before the Board of Industrial Insurance Appeals, the Department and the Board of Industrial Insurance

Appeals contended that in order for the schedule of benefits to take effect, in addition to the statutory requirements of treatment or disability, the worker must also have knowledge that he or she had partial disability to trigger the schedule of benefits. This Court rejected the Board's concern that the term "partially disabling" could "treat workers differently based solely on the nature of the medical condition they may have." Boeing v. Heidy, 147 Wn.2d 78, 88, 51 P.3d 793 (2002). In correctly refusing to add a judicial requirement to the plain language of the statute, this Court noted "that is exactly what the term 'partially disabling' does when applied to workers afflicted by a **progressive condition** with easy to miss symptoms. RCW 51.32.180(b) is clear [.]" *Id.*, emphasis added. An exception to RCW 51.32.180(b) for hearing loss claims may be created, but this is a matter for the Legislature. See, RCW 51.28.055 (creating an exception in the occupational disease statute of limitations for hearing loss claims and providing medical aid benefits (evaluation and hearing aids) in cases of untimely hearing loss claims).

Moreover, were the Court to take the opportunity to review the record in Heidy, the Court will find that the rolling schedule argument advanced by Claimant Harry is an issue that was also raised in Heidy in the Amicus Brief filed on behalf of the Washington State Labor Council (prepared by the same Counsel now representing Harry). By ruling that

one schedule of benefits applied, the Court declined the invitation to amend the statute. The record in Boeing v. McGraw, 147 Wn.2d 78, 51 P.3d 793 (2002), Heidy's companion case, evidenced Claimant McGraw's numerous audiograms over the course of his employment with The Boeing Company. Yet, the Court did not adopt the rolling schedule theory advanced by Amicus Curiae in that case, instead applying the plain language of RCW 51.32.180(b) and assigning one schedule of benefits for compensation under the claim. See, Amicus Curiae Brief of Washington State Labor Council, p. 12. (**Appendix A**).

Notably, unlike this case, the Court in Heidy had the benefit of a well-developed medical record created through the testimony of world renown experts in hearing loss. The Court's decision in Heidy, which appropriately treated occupational noise-induced hearing loss as a singular occupational medical condition, was based on sound medical evidence.

More importantly, this Court has previously passed on this issue in another manner when it determined that hearing loss is an occupational disease and should be adjudicated under the rules governing occupational disease claims, not industrial injuries. Weyerhauser v. Tri, 117 Wn.2d 128, 814 P.2d 629 (1991).

Even were the Court to find some ambiguity in the statute, the courts have held that the rule of statutory construction that trumps every

other rule is that the court should not construe statutory language so as to result in absurd or strained consequences. In re Custody of Smith, 137 Wn.2d 1, 8, 969 P.2d 21 (1998). Moreover, statutes are to be interpreted so that no portion is rendered meaningless or superfluous. Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Were the Court to permit the Court of Appeals decision to stand, the terms "**without regard to the date of the contraction of the disease or the date of filing of the claim**" would be a nullity.

In cases where workers continue to be exposed to injurious levels of occupational noise following the filing and closing of the claim causing increased hearing impairment, the schedule of benefits applicable to the increased permanent impairment award is that schedule in effect when "the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and **without regard to the date of the contraction of the disease or the date of filing of the claim**" not the date when the new occurrence requires medical treatment or becomes totally or partially disabling as the Court held in Pollard v. Weyerhaeuser, 123 Wn. App. 506, 98 P.3d 545, review denied, 154 Wash.2d 1014, 113 P.3d 1040 (2005). RCW 51.32.180(b).

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B. THE LEGISLATURE HAS NOT CREATED NOR DOES TITLE 51 CONTEMPLATE HYBRID INDUSTRIAL INJURY/OCCUPATIONAL DISEASE CLAIMS.

Claimant Harry is attempting to create a hybrid condition somewhere between an industrial injury and an occupational disease which simply does not exist under Washington law. Claimant Harry wants workers to have the benefit of the liberal statute of limitations and schedule of benefits rules applicable to occupational diseases, yet still be able to treat hearing loss like an injury, with new schedules applicable to each incident of exposure. The IIA simply does not contemplate such a hybrid. The Court cannot create a new area of coverage in addition to industrial injury and occupational disease claims established by the Legislature. Such action is only within the purview of the Legislature.

Moreover, the system proposed by Claimant Harry is simply unworkable and unfair to hearing loss claimants not in hearing conservation programs who have the benefit of the serial audiograms necessary to establish multiple rates of compensation. Arguably, under Claimant Harry's analysis, a worker is entitled to set the schedule of benefits based on the alleged increase in hearing loss due to each and every exposure. The logistics of calculating any worker's award using such a system would be daunting, completely unworkable, and unfair to the population of all hearing loss claimants. The IIA sets forth a bright-

line rule establishing the date for schedule of benefits for an occupational disease, which hearing loss is, according to the Court in Boeing v. Heide, 147 Wn.2d 78, 51 P.3d 793 (2002). If the Court is to be consistent, the Court should reject Claimant Harry's rolling schedule argument for the same reasons it rejected the apportionment argument in Weyerhaeuser v. Tri, 117 Wn.2d 128, 135, 814 P.2d 629 (1991) (adopting last injurious exposure rule as means to eliminate the need "to go back in time and determine the degree or extent to which each and every exposure affected the ultimate disability"). The plain language of the statute requires that one date be identified, and that the schedule of benefits applicable to occupational diseases remains constant.

Claimant Harry argues Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222, 883 P.2d 1370 (1994), supports his claim for a rolling schedule of benefits. The Kilpatrick case is clearly distinguishable from the current case and is consistent with Buse Timber's interpretation of RCW 51.32.180. In Kilpatrick, this Court held that a widow's pension benefit rate is set based on the date the spouse manifested the disease which resulted in death, without regard to the date of the original exposure (in that case asbestos) and without regard to the date the worker contracted any other disease from the same exposure. Occupational hearing loss is one condition, not multiple conditions arising from a single type of

occupational exposure. The schedule of benefits is set based on when that one condition first arises that is the basis for the hearing loss claim. The Kilpatrick case is simply inapplicable to the issue raised in this case.

C. WORKERS' COMPENSATION IS NOT INSURANCE WITH FULL COMPENSATION.

Claimant Harry, by asserting that it is unfair that his benefits be paid under the schedule in effect when his condition first became disabling, would have this Court believe that the IIA is an insurance scheme offering full compensation to workers entitled to coverage under the HA. It is well-established that workers' compensation is not insurance. See, Washington Ins. Guar. Ass'n v. Dep't of Labor & Indus. 122 Wn.2d 527, 859 P.2d 592 (1993); Washington Ins. Guar. Ass'n v. Mullins, 62 Wn. App. 878, 885, 816 P.2d 61 (1991); Favor v. Dep't of Labor & Indus., 53 Wn.2d 698, 703, 336 P.2d 382 (1959); Stertz v. Industrial Ins. Conun'n. 91 Wash. 588, 159 P. 256 (1916). Rather, the IIA is the result of the compromise forged between labor and business through the legislative process and entitles workers to only those benefits provided by the Legislature. RCW 51.04.010; RCW 51.32.010; Meyer v. Burger King Corp. 144 Wn.2d 160, 26 P.3d 925 (2001). Compensation is to be paid only "in accordance with this chapter[.]" RCW 51.32.010. The plain language of RCW 51.32.180(b) is dispositive of this case.

"Industrial insurance claims are governed by statute, not common law. Courts will neither read matters into a statute that are not there nor modify a statute by construction." Rushing v. ALCOA, 125 Wn. App 837, 105 P.3d 996 (2005), citing: Rector v. Dep't of Labor & Indus., 61 Wn. App. 385, 810 P.2d 1363 (1991). Rhoad v. McLean Trucking Co., 102 Wn.2d 422, 426, 686 P.2d 483 (1984), King County v. Seattle, 70 Wn.2d 988, 425 P.2d 887 (1967). Labor's attempts to amend the statute and secure additional compensation for its constituents should be addressed to the source, the Legislature.

#### **IV. CONCLUSION**

Based on the foregoing points and authorities WSIA respectfully requests that the Court reverse the Court of Appeal's decision and direct the Board of Industrial Insurance Appeals and the Department of Labor & Industries to apply RCW 51.32.180(b) as it is written.

RESPECTFULLY SUBMITTED on behalf of WSIA this f  
day of December, 2007.

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## APPENDIX A

NO. 71694-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

---

Boeing Co.,

Petitioner,

v.

Carl Heidy et al. and The Department of Labor and Industries,

Respondents.

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**AMICUS CURIAE BRIEF OF WASHINGTON STATE LABOR COUNCIL**

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## **I. ISSUE**

This brief addresses two issues regarding the determination of the schedule of benefits applicable to disabilities resulting from noise induced occupational hearing loss. First, for purposes of determining the rate of compensation for a worker's noise induced hearing loss pursuant to RCW 51.32.180, can hearing loss require medical treatment or become totally or partially disabling without the worker's knowledge? Second, where a worker has been exposed to injurious levels of noise after a valid audiogram indicates a partial disability, should a new rate of compensation be established for additional hearing loss disability sustained by that worker as a result of additional exposures to injurious noise?

## **II. STATEMENT OF THE CASE**

This appeal involves nine occupational hearing loss cases consolidated by The Board of Industrial Insurance Appeals. The facts of these cases have been amply laid out by various Briefs of the Parties, as well as in the Decision and Order of the Board of Industrial Insurance Appeals. In each case, the claimant was exposed to injurious levels of noise resulting in a loss of hearing. Also in each case, an audiogram was taken prior to and after the workers ceased employment that exposed them to injurious levels of noise.

## **III. ARGUMENT**

## A. Summary of Argument

The Washington Legislature has directed the courts to compensate workers disabled by occupational disease in the same manner as those disabled by injury. See RCW 51.32.180; 51.16.040. The one exception is that, where the schedule of benefits for injured workers is set as of the date of injury, the schedule of benefits for disability resulting from occupational disease is set "as of the date the disease requires medical treatment or becomes totally or partially disabling." *Id.*

This Court should rule that, for the purposes of establishing the applicable rate of compensation for disability arising from noise induced occupational hearing loss, a worker's hearing loss neither requires medical treatment nor is disabling without the worker's knowledge. This rule is necessary to give meaning to the entire statute when taken in the context of occupational hearing loss. However, even if this Court finds that the statute does not unambiguously impart a knowledge requirement, an interpretation of the statute that does require knowledge by workers that they are in fact disabled best comports with the purpose of the Industrial Insurance Act.

This court should also establish a rule that where a worker has sustained additional noise induced occupational hearing loss after a valid audiogram has indicated a compensable level of disability, a new rate of

compensation must be established to reflect the additional disability. Failure to do so would be contrary to the Legislature's directive to compensate workers whose disabilities arise from injury in the same manner as workers whose disabilities arise from occupational disease. Failure to do so would also create the anomalous result that while multiple diseases stemming from the same exposure are compensated at their differing rates of manifestation, multiple exposures to injurious levels of noise resulting in ever increasing levels of disability would be compensated at one outdated rate. Such a rule would also be consistent with the policies that underlie the Industrial Insurance Act.

**B. For Purposes Of Determining The Applicable Rate Of Compensation For Disability Resulting From Occupational Hearing Loss, A Worker's Disease Neither Requires Medical Treatment Nor Is It Disabling Where The Worker Lacks Such Knowledge.**

- 1. Inclusion of the knowledge requirement is necessary to give meaning to the entire statute when taken in the context of occupational hearing loss.**

RCW 51.32.180 requires that that compensation rate for occupational disease be established when the disease either requires medical treatment or becomes disabling, whichever comes first. The appellant Boeing contends that a plain meaning of the statute requires the exclusion of the knowledge requirement as does the cross-appellant, The Department of

Labor and-Industries. However, within the context of occupational hearing loss, exclusion of the knowledge requirement renders a portion of the statute redundant.

It is a primary rule of statutory interpretation that "[c]ourts should not construe statutes to render any language superfluous. " State v. Riles, 135 Wn.2d 326, 340 (1998). However, in the context of occupational hearing loss, the exclusion of the knowledge requirement renders the phrase "totally or partially disabling" redundant with "the date of contraction". Only when the phrase "totally or partially disabling " is recognized as including the requirement that the worker be aware of the disability are the two phrases endowed with different meanings.

The appellant Boeing does not contend that a compensation rate established by the "requires medical treatment" phrase can be valid in the absence of the worker's knowledge. This is consistent with the Board's common sense holding that "an individual's hearing loss is deemed to 'require medical treatment' as of the date a person consults with a physician or seeks other means of obtaining relief from his or her hearing loss." In re: William McGraw, BIIA No. 96 0205, p.17 (1998) (hereinafter McGraw DO). Given that there is no treatment for hearing loss in the curative sense, it is not reasonable to hold that a person's hearing loss can require treatment until the worker seeks it out. To hold otherwise would

render the "requires medical treatment" phrase redundant with the "becomes totally or partially disabling" phrase: a disease only requires treatment (when the knowledge of the worker is excluded) when it becomes disabling.

However, the appellant Boeing does contend that the plain language of the phrase "becomes totally or partially disabling" precludes the knowledge requirement. However, the specific characteristics of noise induced hearing loss as an occupational disease requires such a finding.

RCW 51.32.180 separates injuries from occupational diseases for purposes of determining compensation rates in order to account for the latency period of most occupational diseases. As this Court noted in Department of Labor and Industries v. Landon, 117 Wash.2d 122, 126-27 (1991), "[b]ecause of the nature of occupational diseases, schedules in effect on the date of last exposure are more likely outdated than schedules effective on the date a disease manifests itself." Conversely, schedules in effect when a worker files a claim may unjustly favor a worker who delays filing despite knowledge that he or she has a disability. Therefore, RCW 51.32.180 requires that the date of contraction cannot be used to set the schedule, but neither can the filing date. Instead, some date in the middle is preferred, either when the worker seeks medical treatment or when the disease becomes disabling.

Hearing loss has several characteristics that are distinct from those of other occupational diseases.. In particular, as opposed to most occupational diseases that involve long latency periods between exposure and the manifestation of disease, the physical changes to the ear that result from injurious noise exposure are essentially contemporaneous with exposure. As the Board noted, the record reflects that the sensory hair cells (which, in combination with particular sensory nerves, transmit nerve signals that the brain interprets as sound) are irrevocably destroyed by excessive noise, resulting in hearing loss. (McGraw DO at 3). Thus, there is no prolonged latency period between exposure and disability as there is with other occupational diseases. Of course, hearing loss is not compensable until the disability exceeds 25 dB. (McGraw DO at 5)

Therefore, when the knowledge of the worker is excluded, there can be no difference between when hearing loss becomes disabling (once exposure pushes that loss over the 25 dB threshold) and when the disease is contracted. There is, however, an analogous time regarding hearing loss that is parallel to the latency period found in most occupational disease, namely the period between when a worker is exposed (the date of contraction) and when the worker realizes that she or he has suffered disabling hearing loss. As the Board noted, individuals may not perceive that they have suffered a disability over the 25 dB threshold. This occurs

because "adaptation to ... changes in hearing are often intuitive rather than conscious or deliberative." (McGraw DO at 20). Indeed, unless the . period of time between exposure and knowledge is treated as the latency period involved in most occupational diseases, there is little reason to classify hearing loss as an occupational disease at all.

The appellant Boeing contends that requiring knowledge for a determination of disability due to hearing loss turns the *or* into an *and*, collapsing the "requires medical treatment" phrase into the "becomes totally or partially disabling" phrase. However, even if knowledge by the worker is required for both phrases, there is a distinction between the two phrases. Namely, the statute requires that the compensation rate be set either when the claimant seeks medical treatment for hearing loss or when the worker is informed that he or she is disabled due to hearing loss. The former occurs when the claimant seeks out medical assistance, the latter occurs when some other entity administers an audiogram the results of which communicate to the worker that he or she is suffering from disabling hearing loss (as when a claimant's insurance company requires a hearing test or when the employer performs industrial audiograms). The argument that the two are not distinct merely because they both require the knowledge of the worker is not well taken.

Therefore, in order to prevent rendering part of the statute superfluous, this Court should rule that a worker is not partially disabled due to hearing loss until the worker knows that such disability exists. As we shall see below, such a reading of the statute is most consistent with the intent of the Legislature and the policies of the Industrial Insurance Act

**2. Even if the statute does not unambiguously include a knowledge requirement, excluding such a requirement is contrary to the purpose of the Legislature and as such, it should be rejected.**

Even if this Court determines that a narrow reading of the statute does not clearly impart a knowledge requirement, this Court should rule that the statute is ambiguous as to the knowledge requirement and further that the statute should be read as including such a requirement in order to effectuate the Legislature's intent. Where a statute is ambiguous, courts ought to construe it in such a manner that best fulfills the intent of the Legislature.

In this case, the phrase "becomes totally or partially disabled" is ambiguous. A statute is ambiguous if it is subject to two or more interpretations. See State ex re. Royal v. Board of Yakima County Commissioners, 123 Wn.2d 451, 459 (1994). In this case, the ambiguity resides in deciding from whose standpoint a hearing loss disability is determined. Before the 1988 amendments to this section of Title 51, the rule regarding the establishment of a compensation rate was that the date

of manifestation controlled, and it was that rule that the amendments codified. See Landon at 127 ("The Legislature amended RCW 51.32.180 to adopt the date of manifestation for. all claims filed after July 1, 1988.") Prior to the amendments, the Board held that knowledge of the worker was required before a disease would be considered manifested. See In re: Kenneth Alseth, BIIA Dec. 87-2937 (1989). It appears that the Legislature intended to specify with particularity when an occupational disease was manifested, one of the determinations of which was when the disease becomes disabling. However, the Legislature did not specify whose perspective is determinative of whether the disease is disabling. As Judge Learned Hand noted, cited with approval by this Court in Landon at 125, "a disease is no disease until it manifests itself." Grain Handling v. Sweeney, 102 F.2d 464, 466 (1939). In the context of occupational hearing loss, that manifestation can occur either to a physician (or other medically certified individual) or it can occur to the worker. Given that the worker can decide that he or she is not disabled by a loss of hearing (by not filing a claim) it is not unreasonable to presume that the Legislature could have intended to codify the knowledge requirement in the phrase "becomes totally or partially disabled." It is certainly no less reasonable than is the appellant's restrictive reading of the statute.

Such a reading is most consistent with the Legislature's intent and with the policies that underpin the Industrial Insurance Act. First, precluding the knowledge requirement would represent the first time since the initial passage of the Act that the Legislature reduced coverage for occupational diseases. As this Court noted in Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 473-74 (1987), "[f]rom 'no coverage' to the present broad definition of occupational disease, the Legislature has repeatedly and consistently provided expanded coverage for disability resulting from occupational disease." As noted earlier, the rule prior to the 1988 amendments was that knowledge of disability was required for a determination that a disease had manifested. As this Court noted in Woodson v. State, 95 Wash.2d 257, 262 (1980), the Legislature "is presumed to know the existing state of the case law in those areas in which it is legislating." The appellant's contention that the Legislature intended to remove that restriction to the detriment of the worker without a more clear statement of intent is implausible.

This reading of the statute is supported by the fact that the Legislature did not explicitly exclude the knowledge requirement. In amending the statute, the Legislature did explicitly preclude two items from consideration when determining the applicable rate of compensation. RCW 51.32.180 precludes the use of the date of contraction and the date

of filing, two options that the Legislature knew were theoretically available but which it chose to exclude. Yet it chose not to exclude the knowledge requirement, even though it presumably knew that was the state of the law prior to the amendments.

Second, an interpretation of the statute that precludes the knowledge requirement does not comport with the guiding principle that this Court has long used in construing the Act, that it is "remedial in nature and is to be liberally construed in order to achieve the purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." Dennis at 470. Absent the knowledge requirement, workers may well suffer hearing loss, unbeknownst to them, without being compensated. Furthermore, if they do eventually become compensated at a lower rate based on an earlier date of disability, that award will not fairly compensate them for their injury because it will be based on an outdated schedule of benefits and they will have been deprived the value of their award for the intervening period. It is unlikely that the Legislature intended that employers should so benefit (because they have use of the award in the interval) to the detriment of workers.

Finally, precluding the knowledge requirement is bad public policy because it encourages unscrupulous behavior on the part of the employer.

The appellant may contend that the knowledge requirement is unnecessary because employers are required to notify employees within 21 days of the existence of a standard threshold shift as determined by audiometric testing. WAC 296-62-09027(8)(c). However, this argument cuts both ways. If all employers follow this rule, than the knowledge requirement can do them no harm. It is only where the employer neglects to so inform a worker suffering from disabling hearing loss, either by accident or by design, that the knowledge requirements makes a difference. Therefore, including the knowledge requirement is fairer to workers and is a substantial deterrent to employers who lack either scruples or diligence.

**C. Each Incremental Increase Of Disability Due To Distinct Exposure To Injurious Levels Of Noise Should Be Afforded Distinct Compensation Rates**

RCW 51.32.180 requires that "[e]very worker who suffers disability from an occupational disease . . . shall receive the same compensation . . . as would be paid and provided for a worker injured or killed." See also RCW 51.16.040 ("The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title.") The question is whether multiple exposures to injurious levels of noise constitute just one occupational disease with resulting disability or whether each exposure

causes discrete diseases with discrete disabilities, each of which establishes separate rates of compensation and separate percentages of total disability. If the answer is the former, then the date of manifestation for hearing loss claims could either be a very early date in a worker's employment history (the first time the worker's hearing loss crosses the 25 dB threshold) resulting in under-compensation of the worker's injury or it could just as reasonably be a date on or after the last injurious exposure, potentially resulting in over-compensation. However, if each injurious exposure that results in an increased hearing loss (and therefore a greater percentage of disability) establishes a new schedule of benefits, then workers are justly compensated for their physical loss while the economic cost-to the employer most accurately reflects the true cost of running a business that exposes workers to injurious levels of noise.

As the Board noted, a "physician's opinion could conceivably be based on an infinite number of chronologically separate and distinct facts." (McGraw DO at 13-14) As a practical matter, the establishment of a rule that each exposure to excessive noise is a distinct disease only means that, where there are multiple audiograms separated in time by injurious noise exposure that show an increased percentage of disability, a separate schedule of benefits attaches to the relative percentage of increased disability. For example, if a worker's first audiogram shows a

ten percent loss of hearing, a second ten years later. shows a twenty percent loss of hearing and a third ten years after that shows a thirty percent loss of hearing, then there have been three separate diseases, each resulting in a ten percent disability (loss of hearing) and each with a rate of compensation based on the date of the relevant audiogram.

Multiple exposures to injurious levels of noise that result in ever-increasing levels of disability should be treated as separate and distinct occupational diseases for three reasons: it is the most reasonable statutory interpretation, it is the interpretation most consistent with the Court's cases regarding occupational disease, and it is the interpretation that is most consistent with the policies that underlie the Act.

A rule that requires multiple rates of compensation for multiple injurious exposures to noise is the best interpretation of the Act. RCW 51.16.040 and RCW 51.32.180 require that compensation be paid to workers disabled by occupational disease in the same manner that it is provided to workers disabled by injury. At the same time, RCW 51.32.180 requires compensation for workers disabled because of an occupational disease. In the context of hearing loss, the issue is whether a worker, suffering from hearing loss, is treated the same as an injured worker, who suffers disability, when the former worker suffers successive exposures

and successive increases in disability yet is paid at the schedule, of benefits established for the first (or last) injury:

The treatment is not in fact the same. For instance, imagine a worker who is unfortunate enough to lose two or more toes while working in a factory, but not at the same time. If the accidents were separated in time sufficiently for a new schedule of benefits to be adopted, no one would question that different compensation rates for the incremental increase in disability resulting from the discrete accidents would be required by the Act. Or imagine that a worker's fall results in a head injury and partial loss of hearing. If that worker fell again ten years later and lost more hearing, there would be little doubt that a new rate of compensation would be established. To treat workers, who suffer hearing loss because their disability results from noise, differently from those whose hearing loss results from traumatic injury, is to fly against the directive of the Act to treat occupational disease disabilities similarly to disability resulting from disease.

Applying a single compensation rate also creates an absurd result, something that courts must avoid when interpreting statutes. See State v. Naher, 112 Wn.2d 347, 351 (1989); Royal at 462. In this case, the absurd result would be establishing a compensation rate that is based on a date of manifestation that is prior to successive injurious exposures to noise with

concomitant increases in disability. Recall that this Court reasoned that the Legislature adopted the date of manifestation rule with the 1988 amendments. See Landon at 127. It is possible that a worker could experience a compensable but relatively small hearing loss at the beginning of his or her career. Then, ten or twenty years later, after decades of continuous exposure to noise resulting in continuing damage to his or her ears, the worker is again awarded a relative percentage of disability but the rate of compensation is based on an outdated schedule. A similarly absurd result would occur if a worker suffered the bulk of his or her hearing loss early in a career only to have the compensation rate set decades later when the worker retires. Such a result is easily avoided if each successive exposure is treated as an independent disease with independent disabilities.

Such a rule is also consistent with this Court's past jurisprudence regarding occupational hearing loss. In Kilpatrick v. Department of labor and Industries, 125 Wn.2d 222 (1994), this Court held that different manifestation dates were required for separate and distinct diseases resulting from hazardous exposure. And in Clauson v. Department of labor and Industries, 130 Wn.2d 580 (1996), this Court held that the timing of the closure of claims should not work to the disadvantage of the injured worker. While neither of these cases are on all fours with the cases at bar,

.they both point in the direction of compensating workers as fully as possible for the injuries they sustain.

Kilpatrick involved workers who were exposed to asbestos and who later developed two separate and distinct diseases. This Court ruled that the distinct diseases required distinct dates of manifestation in order to determine the applicable schedule of benefits. Kilpatrick at 224. In doing so, the Kilpatrick Court was disturbed that the Department's interpretation of the statute, restricting the date of manifestation to the first disease merely because it occurred from the same exposure, resulted in the application of outdated schedules. *Id.* at 231. The same reasoning applies here. If a worker is confined to the original date of his or her first disability resulting from injurious exposure to noise, the benefits are determined by schedules that may be decades obsolete by the time a worker retires.

Clauson involved the determination of whether a worker, who has been awarded a permanent total disability pension under one claim, may later receive a permanent partial disability payment for a distinct and separate pre-existing claim. 130 Wn.2d at 581. This Court ruled that the claimant was due such an award because only the timing of the closing of his claims required otherwise. Similarly, a worker should not be disadvantaged merely because of the timing of an audiogram. A worker,

who is exposed to injurious noise for an entire work-life and who sustains substantial hearing loss but whose hearing loss was diagnosed in the first few years of employment, should receive the same compensation as a person with a similar history of noise exposure and similar disability but whose hearing loss is not diagnosed until retirement.

Finally, a rule requiring separate rates of compensation for separate injurious exposures to noise is most consistent with the policy that underlies the Act. The policy that compensation for industrial injuries is part of the cost of doing business and should be born by employers (and ultimately consumers) is basic to the underlying theory of workers' compensation. See Sweeney at 465. Where an employer can compensate a worker for disabilities sustained decades after the applicable schedule is set, the employer is not bearing the true cost of doing business. Such employers are in effect paying at a discounted rate because a worker has, early in his or her career, established compensable hearing loss.

## II CONCLUSION

Most occupational diseases arise from exposure to substance where it is not the exposure itself that leads to the disability, but rather the diseases that arise after a period of latency. Occupational hearing loss, on the other hand, involves repeated exposures to injurious levels of noise, where each discrete exposure causes a corresponding discrete injury to the

hair cells of the ear; the only latency at play is the period of time between exposure that causes a threshold shift above 25dB and when a worker realizes that such a disability (or an increase in disability) has occurred. Despite this difference, occupational hearing loss is classified and administered pursuant to the same statutes and regulations as are all occupational diseases. The implementation of those statutes and regulations in regard to occupational hearing loss creates two anomalous situations.

First, by a narrow (and perhaps erroneous) reading of RCW 51.32.180, a worker can suffer disabling hearing loss and a schedule of benefits can be established without his or her knowledge, even though he or she may not receive compensation until a substantial period of time has passed. During that period of time, through no fault of his or her own, that worker may continue to suffer injurious noise exposure without his or her knowledge. Furthermore, the worker is deprived the use of his or her award, and as a result of inflation as well as the lost use value of the award, when he or she does receive the award, it is at a discounted rate. This situation does not happen with injured workers or with workers who have other disabling occupational diseases because when those injuries happen, or when those diseases manifest themselves, it can hardly be without the worker's knowledge.

Second, occupational hearing loss is in fact the result of multiple and discrete exposures or injuries, and it is commonly the case that workers suffer repeated exposure after they have been diagnosed with a certain level of disabling hearing loss. However, the Department and the Board treat it as one disease, resulting in one schedule of benefits and with later increases in disability treated as aggravations. Were occupational hearing loss classified as an injury, a claimant who is exposed to injurious levels of noise on multiple instances could file multiple claims, just as a worker who hit his or her head multiple times can file multiple claims. This may work to the disadvantage of the worker (if the first diagnosis is early in a career) or to the employer (if the first diagnosis is at or near retirement). In that sense, the classification of occupational hearing loss results in differing rates of compensation for workers similarly situated. At the same time, workers who suffer disabling hearing loss are also treated differently than workers who suffer disability resulting from other occupational diseases. Workers who develop multiple diseases resulting from exposure to the same harmful substances are afforded different schedules of benefits for their different diseases. On the other hand, a worker who suffers discrete and separate disabling hearing loss resulting from discrete and separate exposures to noise nevertheless is afforded only one schedule of benefits. These anomalous results should be avoided.

Respectfully submitted this 19 day of February, 2002

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