

79613-1

FILED
DEC 26 2005
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

No. _____

Court of Appeals No. 55902-8-1

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD HARRY,

Respondent,

v.

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

Petitioner.

**PETITION FOR DISCRETIONARY REVIEW
BY DEPARTMENT OF LABOR AND INDUSTRIES**

ROB MCKENNA
Attorney General

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 NOV -3 PM 3:59

ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. ISSUE PRESENTED FOR REVIEW 1

 Does RCW 51.32.180, which explicitly mandates use of
 the rate of compensation in effect on the first date a
 disease becomes disabling (here 1974), preclude the use
 of later multiple rates of compensation for subsequent
 hearing loss disability?..... 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 4

 A. Overview 4

 B. Review Is Necessary To Resolve a Conflict between the
 Court of Appeals Decision and Supreme Court Precedent 7

 1. *Harry* conflicts with *Boeing v. Heidi* 7

 2. *Harry* conflicts with *Kilpatrick* 10

 C. Review Is Necessary because the Reworking of the
 Schedule of Benefits Law Presents an Issue of Substantial
 Public Interest 12

V. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<i>Boeing Co. v. Heidy</i> , 147 Wn.2d 78, 51 P.3d 793 (2002).....	passim
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	15
<i>Dep't of Labor & Indus. v. Landon</i> , 117 Wn.2d 122, P.2d 626 (1991).....	11
<i>Holbrook v. Weyerhaeuser Co.</i> , 118 Wn.2d 306, 822 P.2d 271 (1992).....	14
<i>In re Carl Heidy</i> , Dckt. No. 961511, 1998 WL 226281 (BIIA 1998).....	3
<i>Kilpatrick v. Dep't of Labor & Indus.</i> , 125 Wn.2d 222, 883 P.2d 1370 (1994).....	passim
<i>Pollard v. Weyerhaeuser</i> , 123 Wn. App. 506, 98 P.3d 545 (2004), <i>review denied</i> , 154 Wn.2d 1014 (2005).....	2, 12
<i>Simpson Timber Co. v. Wentworth</i> , 96 Wn. App. 731, 981 P.2d 878 (1999).....	15
<i>Soundgarden v. Eikenberry</i> , 123 Wn.2d 750, 871 P.2d 1050 (1994).....	7

Statutes

RCW 51.04.010	14
RCW 51.08.100	3
RCW 51.08.140	3
RCW 51.28.050	10
RCW 51.28.055(2).....	10
RCW 51.32.080(1)(b)(ii)	13
RCW 51.32.180	1, 2, 5
RCW 51.32.180(b).....	passim

Rules

RAP 13.4(b)(1)	1, 6
RAP 13.4(b)(4)	1, 6, 12

Appendices

Appendix A- <i>Harry v. Buse Timber & Sales, Inc.</i> , __ Wn. App. __, 132 P.3d 1122 (2006, No. 55902-8-I)	
Appendix B- Order Granting Motion for Reconsideration and Changing Opinion dated October 5, 2006	
Appendix C- RCW 51.32.180	

I. IDENTITY OF PETITIONER

The Department of Labor and Industries (L&I) asks this Court to accept review of the published opinion in *Donald Harry v. Buse Timber & Sales, Inc., and Dep't of Labor & Indus.* (opinion attached) dated May 1, 2006 and the order granting in part the L&I's motion for reconsideration dated October 5, 2006 (order attached). This Court should accept review because the Court of Appeals decision conflicts with precedent of this Court (RAP 13.4(b)(1)), and because this case presents an issue of substantial public interest that this Court should decide (RAP 13.4(b)(4)).

II. ISSUE PRESENTED FOR REVIEW

RCW 51.32.180 determines the rate of compensation for industrial insurance benefits in occupational disease claims. RCW 51.32.180(b) provides that "the rate of compensation for occupational diseases shall be established as of the date *the disease* requires medical treatment or *becomes totally or partially disabling, whichever occurs first* and without regard to the date of the contraction of the disease or the date of filing *the claim.*" Donald Harry's claim for hearing loss covered the years 1968 to 2001. In 1974, an audiogram first showed hearing loss disability. Subsequent audiograms revealed additional hearing loss. L&I, the Board of Industrial Insurance Appeals (Board), and the superior court applied the rate of compensation in effect when the hearing loss was first partially

disabling in 1974. The Court of Appeals reversed, directing use of the rate of compensation applicable during each time period in which an audiogram detected an increase in hearing loss.

Does RCW 51.32.180, which explicitly mandates use of the rate of compensation in effect on the first date a disease becomes disabling (here 1974), preclude the use of later multiple rates of compensation for subsequent hearing loss disability?

III. STATEMENT OF THE CASE

Buse Timber and Sales, Inc., employed Donald Harry from 1968 until Harry's retirement in March 2001. BR Harry 11, 16.¹ Loud noises in this employment caused occupational hearing loss. BR 18. Occupational hearing loss is caused by repeated exposure to sound levels between 85 and 140 decibels that progressively weaken and finally kill the tiny hair cells in the ear. *Pollard v. Weyerhaeuser*, 123 Wn. App. 506, 509, 98 P.3d 545 (2004), *review denied*, 154 Wn.2d 1014 (2005). Damage to hearing is permanent: “[o]nce the hair cells in the cochlea are destroyed, the cells cannot be rejuvenated. Thus, once the damage is done, one’s hearing can get neither better nor worse because of noise exposure.” *Pollard*, 123 Wn. App. at 512 (quotations omitted). “[O]nce a noise exposure stops, so does the progression of hearing loss.” *Id.*

Generally, it is difficult to pinpoint a precise time the damaging

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

exposure occurred. The damage normally worsens incrementally over time. See *In re Carl Heidy*, Dckt. No. 961511, 1998 WL 226281, *2-3, *12 (BIIA 1998), *aff'd in part by Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002). Because of this, occupational hearing loss is not categorized as an industrial injury, which requires a “sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result.” RCW 51.08.100. Occupational hearing loss is considered an occupational disease because it “arises naturally and proximately out of employment.” RCW 51.08.140; *see Heidy*, 147 Wn.2d at 88.

As part of Buse Timber’s hearing conservation program, Harry received 21 audiograms beginning in 1974. BR Lipscomb 15. The 1974 audiogram showed hearing loss. *Id.* at 49. An otolaryngologist diagnosed Harry with the disease of “sensory neural hearing loss.” BR Riddell 11. Continued exposure to noise caused Harry’s sensory neural hearing loss to gradually progress over the 33 years he worked for Buse Timber. BR Lipscomb 32; BR Riddell 23. Harry received copies of all 21 audiograms. BR Harry 21.

Harry did not seek treatment until 2001. BR Harry 23. An audiogram in 2001 showed hearing loss equal to 38.13% of the complete loss of hearing in both ears. BR 18. In 2001, he filed an occupational disease claim with L&I.

L&I accepted Harry's occupational disease claim and ordered Buse Timber to pay Harry a permanent partial disability award for the 38.13% hearing loss. BR 18. L&I used the 1974 schedule of benefits to determine the award's rate of compensation. BR 18.

Harry appealed to the Board, which affirmed use of the 1974 schedule of benefits. Harry does not contest the Board's finding that "in the course of employment" Harry sustained, in the singular, "an occupational hearing loss." BR 18 (Finding of Fact No. 2); Brief of Respondent (RB) 3-4.

Harry appealed the Board's decision to superior court, which on summary judgment affirmed the Board's decision. CP 7. Harry appealed and the Court of Appeals reversed, holding that multiple schedules of benefits applied to Harry's claim. On May 1, 2006, the Court of Appeals issued its published opinion in *Harry v. Buse Timber & Sales, Inc.*, __ Wn. App. __, 132 P.3d 1122 (2006, No. 55902-8-I) (slip opinion cited as "*Harry*"). L&I moved for reconsideration. On October 5, 2006, the Court granted L&I's motion for reconsideration in part.

IV. ARGUMENT

A. Overview

The Court should accept review to consider fundamental questions raised by the far reaching revisions made by the Court of Appeals to RCW 51.32.180(b), the statute that sets the rate of compensation, or schedule of

benefits, for occupational disease claims. RCW 51.32.180 provides that:

Every worker who suffers disability from *an occupational disease in the course of employment . . .* shall receive the same compensation benefits . . . as would be paid and provided for a worker injured . . . , except as follows:

....

(b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as *of the date the disease* requires medical treatment or becomes totally or partially disabling, *whichever occurs first*, and without regard to the date of the contraction of the disease or the date of filing the claim. (Emphasis added.)

RCW 51.32.180 on its face contemplates a single rate for the claimed “occupational disease” sustained in the “course of employment”: it provides that the compensation rate for a “claim” shall be established as “of the date” “the disease” requires medical treatment or becomes disabling “whichever occurs first.” Harry did not receive treatment until 2001. His condition first became disabling in 1974, therefore the applicable schedule of benefits is the one in 1974 when his disease “first” became “partially disabling.”

The 1974 schedule of benefits applies notwithstanding the fact that Harry had additional disability after 1974. By use of the word “first” the Legislature contemplated multiple instances of treatment or disability for an occupational disease sustained “in the course of employment,” but elected to use the “first” occurrence to set the rate of compensation.

Despite the legislative mandate in RCW 51.32.180(b), the Court

of Appeals held that for occupational hearing loss, L&I must use the schedule of benefits in effect *each* time the disease is shown as partially disabling (or more disabling), instead of the *first* time. *See Harry* at 13. The Court of Appeals calls this rule a “tiered award system.” *Id.* The Court of Appeals new system for determining the compensation rate for occupational diseases conflicts with Supreme Court precedent and accepted principles of statutory construction by impermissibly reading out RCW 51.32.180(b)’s requirement to use the rate in effect when an occupational disease “first” becomes disabling.

RAP 13.4(b)(1) provides for review when a decision of the Court of Appeals conflicts with a decision of the Supreme Court. Here *Harry* conflicts with *Boeing Co. v. Heidy*, 147 Wn.2d at 88-89, which held that only the express terms of RCW 51.32.180(b) apply to determine the rate of hearing loss, and *Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 230-31, 883 P.2d 1370 (1994), which allows different rates of compensation in a single occupational disease claim only for “separate and distinct diseases” that have different pathologies, symptoms, and treatments. The Court of Appeals followed neither *Heidy* nor *Kilpatrick*.

Also, RAP 13.4(b)(4) provides for review by this Court if “the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” Here, the Court of Appeals created a

completely new “tiered award system” for compensating hearing loss claims. Not only is this new system not authorized by the Legislature, but also it will significantly increase claim costs and litigation in hearing loss cases, and it will result in uncertainty in determinations of the rate of compensation for all types of occupational diseases.

The Court of Appeals usurped the province of Legislature by judicially legislating a separate system for hearing loss claims. *Cf. Soundgarden v. Eikenberry*, 123 Wn.2d 750, 766, 871 P.2d 1050 (1994) (declining “to engage in judicial legislation”). If the Legislature wanted to have multiple rates of compensation apply to one disease in a claim, it would have drafted a statute that does so. But instead, the Legislature looks to the date the disease becomes partially disabling or requires treatment, “whichever occurs first.” This Court should grant review to resolve the conflicts with *Heidy* and *Kilpatrick* and to address the issues of substantial public interest raised by this petition.

B. Review Is Necessary To Resolve a Conflict between the Court of Appeals Decision and Supreme Court Precedent

1. *Harry* conflicts with *Boeing v. Heidy*

The Court of Appeals decision, which developed its own system for administering hearing loss claims, conflicts with this Court’s decision in *Heidy v. Boeing*, which declined to treat the disease of hearing loss

differently under RCW 51.32.180(b) than other occupational diseases. 147 Wn.2d at 88-89.

In *Heidy*, the Board had attempted to impose a knowledge element to establish when hearing loss became partially disabling. 147 Wn.2d at 88. The Board had added this element to the statutory test because a worker may not realize that hearing loss has become disabling given its gradual progression. *Id.* This Court rejected importation of an additional element, after expressly considering the sometimes hidden nature of hearing loss, deciding that RCW 51.32.180(b) contemplated such a result: “[n]onetheless, that is exactly what the term ‘partially disabling’ does when applied to workers afflicted by a progressive condition with easy to miss symptoms.” 147 Wn.2d at 88. This Court explicitly applied RCW 51.32.180(b)’s plain terms to decide that “the rate of compensation is established when ‘the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first.’” *Id.* at 88 (quoting RCW 51.32.180(b)).

The Court of Appeals did not follow *Heidy* for two reasons. First, the Court of Appeals believed this Court was wrong in characterizing hearing loss as a progressive condition, “*Heidy* erroneously describes noise-induced hearing loss as a progressive disease” *See Harry* at 12 (citing *Heidy*, 147 Wn.2d at 89). Hearing loss in fact gets worse with

industrial exposure over time, thus it is progressive. But more importantly, an occupational disease does not need to be progressive to be subject to the express terms of RCW 51.32.180(b). Progressiveness is not an element of the statute. Under *Heidy*, only elements of the statute set the rate of compensation. 147 Wn.2d at 88.

Second, the Court of Appeals did not feel that the *Heidy* Court properly dealt with the situation where hearing loss may have occurred years before the worker notices the condition. *Harry* at 12, 11. Because of this, the Court of Appeals states that RCW 51.32.180(b) treats workers differently from workers with other occupational diseases or injuries. *Id.* at 12. As a factual matter, the Court of Appeals is incorrect; there are other occupational diseases that exist for a period of time without worker awareness. But more significantly, this Court in *Heidy* held that worker awareness and the length of time before the worker becomes aware are not relevant under RCW 51.32.180(b). 147 Wn.2d at 88-89.

The Court of Appeals characterizes the application of RCW 51.32.180(b) to hearing loss as “highly inequitable,” asserting that the employer gets a “windfall” when 1974 dollars are used. *See Harry* at 11, 10. But the Legislature has the responsibility to set the compensation rate,

not the Court of Appeals.²

The *Heidy* Court gave effect to the Legislature's intent by holding that the only relevant date is when the disease first becomes disabling or requires treatment. 147 Wn.2d at 88. By not applying RCW 51.32.180(b) and treating hearing loss claims differently than other occupational disease claims, *Harry* conflicts with *Heidy*. Review is necessary to ensure proper application of *Heidy* and its interpretation of RCW 51.32.180(b).

2. *Harry* conflicts with *Kilpatrick*

Harry also conflicts with this Court's opinion in *Kilpatrick*, which provides the standard for the limited circumstances where multiple rates of compensation may apply to a claim. 125 Wn.2d at 231. *Kilpatrick* considered the rate of compensation used in claims involving asbestos exposure, which can cause three separate and distinct diseases: asbestosis, lung cancer, and mesothelioma. *Id.* at 229. Each disease has a different latency period, often with a period of years between exposure and the onset of disability for each disease. *Id.* at 229, 231. These asbestos-related diseases each involve a "unique pathology" (125 Wn.2d at 230)

² The statute of limitations for occupational diseases takes into account the potential for unawareness of the disease. Compare RCW 51.28.055(2) (two years to file claim for permanent partial disability from last injurious exposure to occupational noise in covered employment) with RCW 51.28.050 (one year to file industrial injury claim). The Court of Appeals notes that occupational hearing loss shares attributes with an industrial injury since noise exposure contemporaneously causes hearing loss. *Harry* at 5-6. This may be true, but the Legislature treats hearing loss as an occupational disease, with a statute of limitations that allows a claim covering several years, if not decades, of the disease--compensating for all disability incurred in the extended time period.

with their “own set of symptoms and treatment.” *Id.* at 231. The *Kilpatrick* Court held that the date when the worker’s pathologically distinct disease first manifested was the date to determine the rate of compensation. 125 Wn.2d at 232.³ Under *Kilpatrick*, different rates of compensation can be used only when the worker has pathologically “separate and distinct diseases.” *Id.* at 231.

The *Kilpatrick* Court specifically ruled that the pathologically “separate and distinct disease” standard was not a “symptom-by-symptom” standard. 125 Wn.2d at 231. Rather, the standard addressed the narrow factual circumstance where “years after the original asbestos-related condition, each worker suffered the onset of an entirely different disease with its own set of symptoms and treatment.” *Id.* at 231.

In direct conflict with *Kilpatrick*, the Court of Appeals has adopted the rejected “symptom-by-symptom” approach with its scheme of a different schedule of benefits for each incremental increase in hearing

³ The *Kilpatrick* Court relied upon a case predating RCW 51.32.180(b), *Dep’t of Labor & Indus. v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991). *Landon* held that the date of manifestation establishes the rate of compensation, not the date of exposure to the harmful condition. 117 Wn.2d at 123-24. The *Landon* Court expressly limited its decision to claims filed before 1988. *Id.* at 124 n.1. Effective July 1988, the Legislature amended RCW 51.32.180(b) to set the rate of compensation as of the date the disease first requires treatment or becomes disabling. The *Kilpatrick* decision considered two claims filed before July 1988 and one claim filed after. 125 Wn.2d at 224-26. It did not explicitly consider RCW 51.32.180(b) in the issue of “date of manifestation” (*Id.* at 229-31), though the statute was cited elsewhere. *Id.* at 226 n.2.

loss.⁴ But hearing loss, as it develops and increases over time, is not at any point an “entirely different disease,” as compared to earlier hearing loss, as required under *Kilpatrick*. 125 Wn.2d at 230-31. Each increase in hearing loss does not have a “unique pathology,” nor does not it involve different symptoms or different treatment. As contrasted with *Kilpatrick*, in which three different diseases were diagnosed (asbestosis, lung cancer, and mesothelioma), here Harry had only one disease, namely “sensory neural hearing loss.” BR Riddell 11. The uncontested Board finding is that Harry had, in the singular, “an occupational hearing loss.” BR 18.

It is one thing to apply three rates to three different asbestos related diseases, it is quite another to believe that the Legislature intended that every time a hair cell is damaged at work a new disease exists. Given the manifest conflict with the legislative intent recognized by Supreme Court precedent, this Court should review the *Harry* decision.

C. Review Is Necessary because the Reworking of the Schedule of Benefits Law Presents an Issue of Substantial Public Interest

The issue here is one of “substantial public interest” (*see* RAP 13.4(b)(4)), because the Court of Appeals decision (1) will result in a

⁴ By directing use of more than one schedule of benefits for a hearing loss claim, the Court of Appeals decision is also inconsistent with another Court of Appeals decision. In *Pollard*, Division Two applied one schedule of benefits to a claim for hearing loss incurred from 1982 to 1999. 123 Wn. App. at 509, 513-14. An earlier schedule applied to the worker’s previous hearing loss claim. Division One felt that other aspects of *Pollard* supported its decision (*Harry* at 9), but as, L&I explained in its briefing to the Court of Appeals, *Pollard* is readily distinguished because it involved two separate claims for occupational diseases. RB 9, 18-22, 29.

significant increase in administrative burden for L&I, and (2) will greatly increase litigation costs for workers and employers across the state, as well as increasing the related workload of the Board and courts. Additionally, the uncertainty in law caused by the potential breadth of the Court of Appeals decision necessitates review to ensure the law that sets the rate of compensation remains clear to the thousands of workers and employers affected by workers' compensation claims.

The Court of Appeals decision dismisses the significance of its wholesale reworking of the industrial insurance laws by saying that the "Department must simply do a little more math." *Harry* at 11. Implementation of a tiered schedule of benefits, which changes with each audiogram, will create an administrative and legal morass. The 12 choices for schedules of benefits during the time frame (1974 through 2001) of Harry's claim are 1971, 1979, 1986, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001. *See* RB 24-25, 36. In other cases, there could be many more options for schedules of benefits because, effective 1993, RCW 51.32.080(1)(b)(ii) sets a new rate of compensation each year. Moreover, it is not simply a "little more math" to determine a permanent partial disability award, but rather a complex factual inquiry to determine what portion of hearing loss occurred under each schedule of benefits.

Under current law, selecting a schedule of benefits for hearing loss

is already a complex inquiry, as the Board observed in *Heidy*, “[c]hosing a single schedule of benefits for an occupational disease requires the selection of a date specific from, often times, numerous possibilities.” 1998 WL 226281, at *10. The complexity arises because of the difficulty of judging the reliability of audiograms taken several years, or decades, ago. *See* BR Lipscomb 13-15; 1998 WL 226281, at *4, *12. Audiograms must be subjected to close scrutiny by experts and fact-finders to decide whether the audiogram has reliable readings. The Court of Appeals tiered system requires changing the schedule of benefits with each small change in subsequent audiograms. This will require a protracted scrutiny of each audiogram and will result in increased litigation over the validity of each audiogram. This will delay relief for workers and increase costs for L&I, employers, and workers contrary to the goals of RCW 51. *See generally* RCW 51.04.010 (goal of Industrial Insurance Act is to provide swift, sure and certain relief); *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 310-13, 822 P.2d 271 (1992) (same).

The Court of Appeals new “tiered award approach” may unravel the entire rate of compensation system for occupational diseases. The Court of Appeals decision essentially holds that multiple schedules of benefits can be used for the same occupational disease in the context of ongoing and multiple exposures where, unrelated to a previous exposure,

there are measurable effects (*i.e.*, need for treatment and/or increased disability) from an exposure. *See Harry* at 13, 5-6. This fact pattern is not unique to hearing loss as the Court of Appeals assumed, but arises in many other contexts. Many occupational diseases involve on-going multiple exposures. *Cf. Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 576, 141 P.3d 1 (2006) (assignment of liability in occupational disease claims “is particularly difficult because the worker often received multiple exposures over a long period of time.” (quotations omitted)); *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 734, 737-39, 981 P.2d 878 (1999) (prolonged standing on cement floor caused foot disability, worker first sought treatment in 1989, then in 1992, and after respite from work in 1994 returned to work but could no longer tolerate standing).

The commonality of hearing loss with other multiple exposure cases creates the potential for uncertainty and additional litigation. Consider cases where workers require multiple instances of treatment for the disease of asthma or the disease of urticaria (hives), diseases which can be caused by multiple exposures to dust or chemicals over a prolonged period of time. The need for treatment after a period of exposure may not be related to the previous exposure. If the Court of Appeals system were implemented, for a single claim filed involving multiple exposures, L&I would be forced to adjust the rate of compensation each time a new need

for treatment occurred or an increase in disability was measured. This would affect more than the permanent partial disability scheme at issue here. If the worker was eligible for time loss compensation, the rate would increase when the statutory schedule increased.

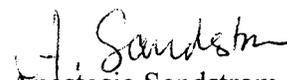
The Legislature did not intend such variability in the rate of compensation. RCW 51.32.180(b) does not increase the rate of compensation each time there is a new need for treatment or an increase in disability. Instead the Legislature set a single rate of compensation in a claim as plainly evidenced by the language “whichever occurs first.” The Court of Appeals has significantly altered the landscape of schedule of benefits necessitating review by this Court to determine whether such far reaching changes are sustainable under RCW 51.32.180(b).

V. CONCLUSION

L&I respectfully requests review. Upon review, L&I requests the Court reverse the Court of Appeals May 1, 2006 decision and affirm the February 16, 2005 decision of the superior court.

Respectfully submitted this 3rd day of November, 2006.

ROB MCKENNA
Attorney General


Anastasia Sandstrom
Assistant Attorney General
WSBA No. 2416

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DONALD HARRY,)	
)	DIVISION ONE
Appellant,)	
)	No. 55902-8-1
vs.)	
)	
BUSE TIMBER & SALES, INC., and)	PUBLISHED OPINION
THE DEPARTMENT OF LABOR &)	
INDUSTRIES,)	
)	
Respondents.)	FILED: May 1, 2006
_____)	

BAKER, J. — Noise-related hearing loss is not a progressive disease, yet it has been referred to as “progressive” in workers’ compensation case law.¹ And it is considered to be “partially disabling” long before the worker is perceptibly impaired. These two facts have led to the strange outcome below in this case: a worker is paid for his lost hearing based on a 1974 schedule of benefits for damage to his hearing that occurred long after 1974. His self-insured employer knew of, but did not disclose his hearing loss for almost 30 years, and as a result has succeeded in paying for the disability at the comparatively low rate in effect in 1974.

Donald Harry was exposed to loud noise as part of his job at Buse Timber & Sales. Beginning in the mid-1960s, Buse regularly tested him for hearing loss

¹ See, e.g., Boeing Co. v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002).

with industrial audiograms. Harry was told each time that his hearing "looked about the same," and as often happens with slow, incremental hearing loss, he did not notice it until late in the 1990s. In 2001, after his retirement, Harry finally saw a doctor, who told him he had substantial hearing loss in both ears. Most of the loss was noise-induced, the result of prolonged exposure to noise at Buse. Harry applied for permanent partial disability benefits for his hearing loss.

The Department of Labor and Industries ordered a payment based on the 2001 schedule of benefits. Buse protested, arguing that its industrial audiograms for Harry showed that he had been partially disabled since 1974, and that the 1974 schedule of benefits should apply. The Department agreed, issued a revised award using the 1974 schedule, and closed Harry's case. Harry appealed, arguing that the industrial audiograms were not valid to establish his disability, or in the alternative, that he should receive a tiered award based on the schedule in effect at the time of each documented hearing loss. The Board of Industrial Insurance Appeals and the superior court affirmed the Department's decision on the grounds that the audiograms were sufficient to establish the existence of compensable, partial hearing loss. Based on existing case law, both the Board and the superior court determined that the 1974 schedule of benefits applied to Harry's claim. Harry appeals solely on the issue of whether he is entitled to a tiered award.

We reverse because a tiered schedule of benefits is the only way to treat workers with noise-related hearing loss the same as workers with other occupational diseases and injuries as required by the Industrial Insurance Act.

Harry worked for Buse for 33 years, from 1968 until 2001. During that time, he was routinely exposed to loud noise. In the mid-1960s, Buse began administering yearly industrial audiograms to its employees. Harry's first audiogram, taken in 1974, showed a compensable hearing loss in the left ear. Subsequent audiograms revealed additional damage, and by 1986, his right ear showed significant hearing loss also. Although Harry received copies of the audiogram results, they were technical and never were explained to him. He was told after each test that his hearing looked "about the same;" he was not told to consult a doctor, and he was not provided with hearing protection until 1985. In the late 1990s, a Buse supervisor advised Harry to see a doctor about his hearing. Harry began to notice hearing problems about then, and finally consulted a doctor in 2001 after his retirement. The doctor told him that he had a 41.25 percent hearing loss in the left ear and 38.1 percent loss in the right, equal to 38.13 percent hearing loss for both ears.

Harry filed a claim with the Department of Labor and Industries for permanent partial disability in 2001. His claim was accepted by the Department and Buse, a self-insured employer, was ordered to pay Harry according to the 2001 schedule of benefits for hearing loss compensation. That schedule set the award for complete hearing loss in both ears² at \$67,333.64. Because Harry's loss was 38.13 percent, his total award was \$25,673.19. Buse protested,

² This "average" percentage of hearing loss in both ears is referred to as "binaural" hearing loss.

arguing that 1974 was the date Harry's disease first became "partially disabling"³ and that the 1974 schedule should apply. Indeed, an industrial audiogram from 1974 showed that Harry had a 5.6 percent hearing loss in his left ear – enough to be "partially disabling" according to the American Medical Association,⁴ but small compared to the almost 40 percent binaural hearing loss Harry ultimately suffered. Nevertheless, the Department revised its award for Harry's entire claim based on the 1974 schedule of benefits. In 1974, the award for complete hearing loss in both ears was \$14,400. Harry's revised award was \$5,490.72.

Harry appealed to the Board of Industrial Insurance Appeals, arguing that either (1) the Buse audiograms were not a valid basis to establish hearing loss disability, or (2) if valid, each additional compensable hearing loss shown by the audiograms constituted a separate disease, and should be compensated according to the schedule in effect on the date of each such audiogram. Harry was unsuccessful at the Department, Board, and superior court levels. He now appeals, conceding the validity of the audiograms, but arguing adoption of his tiered award theory.

Washington enacted the Industrial Insurance Act⁵ (IIA), also known as "workers' compensation," to provide predictable relief to employees harmed on the job. The IIA should be construed liberally, and doubts resolved in favor of the

³ Under RCW 51.32.180(b), the applicable schedule is the one in effect when the disease first becomes partially disabling or when the worker seeks medical treatment, whichever comes first.

⁴ The American Medical Association defines "partially disabling" hearing loss as any loss over 1.7 percent. In re Robert E. MacPhail, 89 3689, at 2 (BIIA Dec. 1989).

⁵ Title 51 RCW.

injured worker.⁶ A permanent partial disability is an injury or occupational disease that causes the loss, or loss of use, of a particular body part.⁷ Permanent partial disability results from an injury or an occupational disease. "Injury" is defined as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result,"⁸ for example, amputation of a finger.⁹ An occupational disease is "such disease or infection as arises naturally and proximately out of employment,"¹⁰ for example, asbestosis.¹¹

Noise-related hearing loss is categorized as an occupational disease.¹² The damage normally worsens incrementally over time. Like other occupational diseases, it is difficult to pinpoint a precise date of injury for noise-related hearing loss.¹³ Nevertheless, the disease has many characteristics of an injury.¹⁴ It

⁶ McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 256-57, 26 P.3d 903 (2001).

⁷ RCW 51.08.150.

⁸ RCW 51.08.100.

⁹ RCW 51.32.080(1)(a).

¹⁰ RCW 51.08.140.

¹¹ See, Kilpatrick v. Dep't. of Labor & Indus., 125 Wn.2d 222, 227, 883 P.2d 1370, 915 P.2d 519 (1994).

¹² Boeing Co. v. Heidy, 147 Wn.2d 78, 88, 51 P.3d 793 (2002); Pollard v. Weyerhaeuser, 123 Wn. App 506, 508, 98 P.3d 545 (2004), rev. denied, 154 Wn.2d 1014 (2005).

¹³ The damage occurs gradually, as opposed to hearing loss resulting from sudden head injury. See Rector v. Dep't. of Labor & Indus., 61 Wn. App. 385, 810 P.2d 1363 (1991); In re Eugene W. Williams, 95 3780 (BIIA Dec. 1998).

¹⁴ RCW 51.32.080(1)(a) includes hearing loss among other scheduled injuries such as amputation. The U.S. Supreme Court has also affirmed that noise-related hearing loss is a "scheduled injury" and not a disease in the context of the Longshore and Harbor Workers' Compensation Act, 33 USCA §§ 901-951. Bath Iron Works Corp. v. Director, Office of Workers' Comp. Prog., 506 U.S. 153, 166-67, 113 S. Ct. 692, 121 L. Ed. 2d 619 (1993).

occurs simultaneous to noise exposure,¹⁵ and does not progress after the noise ends. It differs from other industrial diseases such as asbestosis, which can manifest itself years after the worker is no longer exposed to asbestos fibers, and progress to severe disability or death.¹⁶ Also, each instance of hearing loss is separate and distinct from prior losses; each would occur regardless of any previous hearing damage.¹⁷ Noise-induced hearing loss thus has indicia both of industrial diseases and injuries, and in this way it is unique.¹⁸

Classification of an industrial condition as an injury or a disease is more than academic; it can affect how much money the worker receives. Compensation for permanent partial disability is in a fixed dollar amount based on a schedule that assigns value to the particular body part or function lost.¹⁹ Because the schedule of benefits has increased over time,²⁰ the Department must fix a date to determine which schedule applies. The rule of law for choosing this date is different depending upon whether the condition is a disease or an injury. For an injury, the applicable schedule is the one that was in effect on the date when the injury occurred.²¹ For an occupational disease, the correct schedule is the one in effect on "the date the disease requires medical treatment

¹⁵ Bath Iron, 506 U.S. at 165. By analogy, imagine a worker who bumps his head at work every day for 10 years, and gradually loses his hearing as a result. Although the daily head bump may cause an impairment over time rather than all at once, one would hardly call the worker's condition a "disease."

¹⁶ Bath Iron, 506 U.S. at 164-65.

¹⁷ Pollard, 123 Wn. App. at 512.

¹⁸ Heidy, 147 Wn.2d at 89.

¹⁹ RCW 51.32.080. For example, a worker who loses his foot currently receives \$66,596.60.

²⁰ RCW 51.32.080(b)(ii).

²¹ Kilpatrick, 125 Wn.2d at 231.

or becomes totally or partially disabling, whichever occurs first."²² This is also called the "date of manifestation."²³ Because hearing loss is categorized as a disease, and because the date of medical treatment is easy to ascertain, hearing loss cases focus on the term "partially disabling."

Medically, hearing loss becomes "partially disabling" "when the average loss exceeds 25 decibels across the frequencies specified in the American Medical Association Guides."²⁴ This translates to a 1.7 percent loss of overall hearing.²⁵ According to the AMA guides, therefore, a worker with less than 2 percent hearing loss may be "partially disabled," although the worker would not be disabled according to the common legal understanding of that term.²⁶ In contrast, an industrial disease such as asbestosis becomes "partially disabling" when the worker actually experiences symptoms and falls ill, even though he may have had asbestos fibers in his lungs or even internal scarring long before that.²⁷

²² RCW 51.32.180(b). "Partially disabled" is not defined in ch. 51.08 RCW.

²³ WAC 296-14-350(3).

²⁴ Heidy, 147 Wn.2d at 83.

²⁵ In re Robert E. MacPhail, 89 3689 (BIIA Dec. 1989).

²⁶ The medical and legal definitions of "partially disabling" hearing loss are vastly different. Black's Law Dictionary defines "partial disability" as "[a] worker's inability to perform all the duties that he or she could do before an accident or illness, even though the worker can still engage in some gainful activity on the job." Black's Law Dictionary, 494 (8th ed. 1999). But a 1.7 percent hearing loss would not hinder most workers. The Department tried to remedy this problem by requiring that the worker be aware of his hearing loss. Heidy, 147 Wn.2d at 88. The Supreme Court properly rejected this attempt to amend the statute by administrative rule. Heidy, 147 Wn.2d 89. However, we note that according to the legal definition of "partially disabling," no worker would be unaware of his disability, because it would need to be noticed enough to interfere with his work.

²⁷ Bath Iron, 506 U.S. at 165.

There is another problem with classifying noise-induced hearing loss as a disease: RCW 51.31.180(b) assumes that only one disease exists for each claim filed. Each increase in noise-induced hearing loss, however, is separate and independent of prior losses.²⁸ There are thus many possible dates when such hearing loss "becomes partially disabling," and therefore many different diseases that might be covered by a single claim. For example, if a worker's audiogram revealed a 2.5 percent loss in 1990, he met the American Medical Association criteria for "partial disability" at that time. If testing revealed in 1995 that his hearing had declined another 5 percent due to continued occupational noise from 1990 to 1995, he suffered two noise-induced hearing losses, one which became partially disabling in 1990, and one in 1995. There is no question that he could have filed two separate claims for each loss.²⁹ But he is also allowed to file a single claim for the entire 7.5 percent hearing loss.³⁰ Our cases have not yet crafted a satisfactory answer to the issue of which schedule (or schedules) of benefits should apply in this situation.

Buse and the Department argue that (1) RCW 51.32.180(b) is unambiguous, (2) hearing loss is one progressive condition, and (3) the earliest documented hearing loss establishes the applicable schedule, because that is the date when the condition became "partially disabling."

²⁸ Pollard, 123 Wn. App. at 512.

²⁹ See, Pollard, 123 Wn. App. at 512.

³⁰ No Washington court has held that such a claim is time barred, even if it is filed long after the damage took place. Also, in 2004 the Legislature set the time limit for filing occupational hearing loss claims at two years from the date of the last injurious exposure. RCW 51.28.055(2)(a).

Their position is not supportable in light of Pollard v. Department of Labor and Industries.³¹ In Pollard, a worker experienced noise-related hearing loss beginning in the 1970s. His claim was filed, paid and closed in 1982 when he was first diagnosed with a 10 percent hearing loss.³² Between 1982 and 1999, Pollard experienced additional hearing loss documented in several audiograms conducted by Weyerhaeuser, his employer. In the 1990s, he noticed more hearing loss; he filed a new claim in 1999 when his loss had reached 45.9 percent.³³ The court rejected Weyerhaeuser's argument, the same argument Buse makes here, that the 1982 schedule should apply to the 1999 claim. It held that (1) RCW 51.32.180(b) is ambiguous with respect to noise-related hearing loss,³⁴ (2) different episodes of hearing loss are properly viewed as multiple diseases instead of a single progressive condition, and (3) the applicable schedule should be the schedule in effect in 1994, when Pollard "sought treatment" for his post-1982 hearing loss.³⁵ According to Pollard, then, Harry should be compensated using the 2001 schedule, because that is when he sought treatment for his single hearing loss "disease".

But Pollard did not address the "partially disabling" language in RCW 51.32.180(b). If there is a significant time lapse between the date a worker becomes disabled and the date he seeks medical treatment, the statute requires the Department to fix benefits according to the earlier date. Yet the Pollard court

³¹ 123 Wn. App. 506, 98 P.3d 545 (2004), rev. denied, 154 Wn.2d 1014 (2005).

³² Pollard, 123 Wn. App. at 508.

³³ Pollard, 123 Wn. App. at 509.

³⁴ Pollard, 123 Wn. App. at 513.

³⁵ Pollard, 123 Wn. App. at 514.

applied the schedule of benefits in effect when Pollard first sought medical treatment for the post-1982 hearing loss, even though intervening audiograms established that some of Pollard's post-1982 hearing loss occurred earlier than 1994 and some occurred after 1994.³⁶

We decline to strictly apply Pollard. To do so would conflict with RCW 51.32.180(b), because Harry did experience some partially disabling hearing loss in 1974, long before he first sought medical treatment for that condition. Use of the 2001 schedule would provide a windfall for Harry, because some of his hearing damage occurred long ago when benefits were lower. On the other hand, to apply the 1974 schedule ignores the fact that Harry suffered most of his hearing loss after that year, resulting in a windfall for his employer.

Harry proposes a solution to the problem: a tiered award by which each compensable hearing loss is treated as partially disabling on the date it is documented by audiogram as verified by medical testimony. Workers would then be paid for that percentage of hearing loss according to the schedule in effect on the date of each such audiogram.

Buse and the Department argue that Harry's "novel" tiered award theory has been "expressly rejected" by the Board of Industrial Insurance Appeals. This is inaccurate: the proposal is neither novel nor dead. The concept of a tiered award in such cases was raised as early as 1998, and in that case the Board seemed intrigued by the concept, but felt that it was beyond its power to adopt:

The Department of Labor and Industries and the claimant argue that noise-induced hearing loss is not a single disease but is

³⁶ Pollard, 123 Wn. App. at 512.

multiple diseases. Accordingly, a separate schedule of benefits should be used for each incremental increase in hearing loss to reflect the compensation in effect at the time the loss is experienced. While this concept has a certain logic, we are unable to find any support for it in either the Industrial Insurance Act or accompanying case law. It is an imaginative proposal that appears to be outside the province of the Board of Industrial Insurance Appeals.³⁷

The existing system is highly inequitable, frequently to the worker and sometimes to the employer. It is not practical to require claims to be filed each time testing reveals a compensable hearing loss, particularly where, as here, the worker is unaware of that choice. With a tiered award system, the Department must simply do a little more math.

The Department next argues that a tiered award system would treat hearing loss differently from other types of occupational diseases, contrary to Supreme Court precedent. In Boeing Company v. Heidy,³⁸ the Department acknowledged that hearing loss is different from other types of "diseases" because the sufferer can be partially disabled and not know it.³⁹ The Department attempted to solve this problem by creating a requirement that, in the case of hearing loss, the worker must know he is disabled before the applicable schedule of benefits can be established.⁴⁰ Our Supreme Court rejected this rule because RCW 51.32.180(b) does not require knowledge, and "[a]part from the unique circumstances posed by hearing loss, as a general proposition the date a worker

³⁷ In re Eugene W. Williams, 95 3780, at 8 (BIIA Dec. 1988).

³⁸ 147 Wn.2d 78, 51 P.3d 793 (2002).

³⁹ Heidy, 147 Wn.2d at 83.

⁴⁰ Heidy, 147 Wn.2d at 88.

is partially disabled is usually the same date a worker knows of his or her disabling disease."⁴¹

But Heidy erroneously describes noise-induced hearing loss as a progressive disease, and does not address the underlying problem in this area of the law: unlike any other occupational disease, hearing loss can be partially disabling long before the disease actually has any noticeable deleterious effect on the worker, or has been diagnosed by a doctor. Strict application of RCW 51.32.180(b), as the Department correctly pointed out in Heidy, actually does treat workers with noise-induced hearing loss differently from workers with other occupational diseases or injuries.

A tiered award system is the most efficient way to treat similar claims similarly, but the Department contends that it is legally flawed because under Pollard, noise-related hearing loss can only constitute separate diseases if the worker files separate industrial insurance claims. It is true that in Pollard, the court treated the 1982-1999 hearing loss as one disease even though there were intervening audiograms showing a continuous decline in Pollard's hearing.⁴² Also, the Department has since ruled that because a claim is "necessarily filed for a single disease process," then by definition a single hearing loss claim can only encompass one disease.⁴³

We reject the "single claim, single disease" approach as illogical and inequitable. Medically speaking, whether a person has one or more diseases

⁴¹ Heidy, 147 Wn.2d at 89.

⁴² Pollard, 123 Wn. App. at 512.

⁴³ In re Gerald J. Woodard, 03 22924, at 6 (BIIA Dec. 2004).

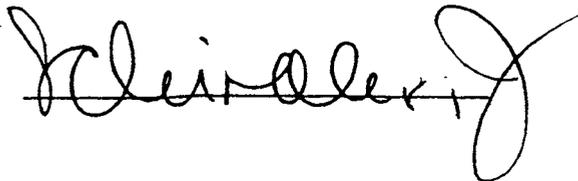
cannot possibly turn on whether one or more industrial insurance claims are filed. And the inequities of this system have been explained earlier in this opinion.

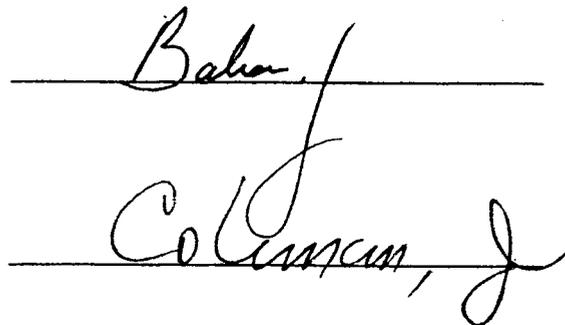
In contrast, a tiered award system solves the problems presented by this case. It prevents either the employer or the worker from receiving a windfall. It encourages employers to administer regular audiograms, disclose the results, provide hearing protection, and tell the worker to see a doctor before the condition worsens. At the same time, it does not require the worker to file a claim for each tiny, incremental loss in hearing, which would flood the Department with claims for negligible amounts of money.

Application of the 1974 schedule of benefits to Harry's entire hearing loss was improper. This case is remanded to the Department for additional fact finding to establish the proper dates of hearing loss to be paid according to a tiered schedule. The date of each audiogram which established a compensable amount of hearing loss, as verified by medical testimony, establishes the rate of benefits for the percentage of hearing loss that the audiogram documented.

REVERSED and REMANDED.

WE CONCUR:





APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DONALD HARRY,)	
)	DIVISION ONE
Appellant,)	
)	No. 55902-8-1
vs.)	
)	
BUSE TIMBER & SALES, INC., and)	ORDER GRANTING MOTION
THE DEPARTMENT OF LABOR &)	FOR RECONSIDERATION
INDUSTRIES,)	AND CHANGING OPINION
)	
Respondents.)	
_____)	

Donald Harry, having filed a motion for reconsideration regarding attorney fees, and the hearing panel having reconsidered its prior determination and finding that attorney fees are properly awarded; now, therefore it is hereby:

ORDERED that Mr. Harry's attorney fees on appeal be awarded under RCW 51.52.130.

IT IS FURTHER ORDERED that the opinion of this court in the above-entitled case filed May 1, 2006, be changed as follows:

Add a new section to the end of the opinion as follows:

Attorney Fees

Harry requests attorney fees under RCW 51.52.130. The Industrial Insurance Appeals Act grants attorney fees on appeal to a worker who obtains reversal or

modification of a board order.²³ Because the Board's order was reversed and remanded, the request is granted.

Done this 5th day of October, 2006.

Baker, J
Schneider, ACT Columb, J

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT -5 PM 3:49

²³ RCW 51.52.130.

APPENDIX C

RCW 51.32.180 Occupational diseases -- Limitation.

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title, except as follows: (a) This section and RCW 51.16.040 shall not apply where the last exposure to the hazards of the disease or infection occurred prior to January 1, 1937; and (b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.

[1988 c 161 § 5; 1977 ex.s. c 350 § 53; 1971 ex.s. c 289 § 49; 1961 c 23 § 51.32.180. Prior: 1959 c 308 § 19; prior: 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]