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No. _____

Court of Appeals No. 55902-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

DONALD HARRY, Petitioner,

**PETITION FOR DISCRETIONARY REVIEW
BY BUSE TIMBER & SALES INC.**

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I. IDENTITY OF PETITIONER.

Buse Timber and Sales Incorporated, a self-insured employer under Washington's industrial insurance system, asks this court to accept review of the a Court of Appeals decision on an industrial insurance matter as designated in Part B.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of *Donald Harry v. Buse Timber & Sales, Inc. and the Dep't of Labor & Indus.*, ___ Wn.App. ___, 132 P.3d 1122 (2006, No. 55902-8-I) and the order granting in part the department's motion for reconsideration and changing opinion dated October 5, 2006. The Court of Appeals decision reversed the trial court's order granting summary judgment in Buse Timber's favor and reversed the decision of the Board of Industrial Insurance Appeals. The Court of Appeals decision, for the first time in the State of Washington, adopted a novel tiered award system for calculating the date of manifestation for occupationally related hearing loss. The Court of Appeals decision conflicts with the precedent of this Court and presents an issue of substantial public interest that should be determined by the Supreme Court.

III. ISSUES PRESENTED FOR REVIEW.

Did the Court of Appeals err by holding RCW 51.32.180 is ambiguous, and thus failed to apply the schedule of benefits in effect on the date Harry's hearing loss first became "partially disabling"?

Did the Court of Appeals err by adopting a novel "tiered award system" for applying the schedule of benefits in hearing loss cases when no prior court in the State of Washington has adopted such a system and there is no statutory basis to support the tiered award system?

IV. STATEMENT OF THE CASE

Donald Harry worked for Buse Timber for 33 years until his retirement in 2001 where he was exposed to industrial noise. CP, CABR 2/3/03 Hearing Transcript 11, 16. Buse Timber had a hearing conservation program for its employees, and as part of the program Harry underwent 21 audiograms from August 26, 1974 through November 2, 2000. CP, CABR 1/27/03 Lipscomb Deposition at 15. Following each audiogram Harry was given a copy of the results. CP, CABR, 2/3/03 Hearing Transcript 19, 21. Harry's first audiogram on August 26, 1974 detected ratable impairment in his left ear. CP, CABR, Lipscomb 1/27/03 at 43, 49. By 1985, Harry had ratable impairment in both ears. CP, CABR 1/27/03 Lipscomb at 52. Harry's audiograms continued to

document ratable impairment throughout the years of his employment with Buse Timber. *Id.* at 32. Harry retired from Buse Timber in March, 2001. CP, CABR 2/3/03 Hearing Transcript 16. Harry first sought medical treatment for his hearing loss on March 16, 2001 with Dr. Lynch. CP, CABR 1/27/03 Lipscomb Deposition at 16.

In April 2001, Harry filed an occupational disease claim alleging he sustained occupational hearing loss in the course of his employment. CP, CABR 18, 59. Following the filing of the claim, Harry was seen in and Independent Medical Examination with Dr. Riddell on August 28, 2001. An audiogram performed in conjunction with the IME on August 28, 2001 demonstrated a binaural loss of 38.13%. CP, CABR at 18. The department initially issued an order which directed Buse Timber to accept Harry's claim for hearing loss, pay Harry a permanent partial disability award equal to 38.13% of the complete loss of hearing in both ears (based on the 2001 audiogram), pay for the purchase and maintenance of hearing aids, and thereupon close the claim. *See* CP, CABR at 59. In that initial order, the department directed Buse Timber to apply the schedule of benefits in effect on March 5, 2001. *Id.*

Buse Timber timely protested, arguing since Harry demonstrated ratable impairment on the August 26, 1974 industrial audiogram, the award should be paid based on the schedule of benefits in effect in 1974

rather than the 2001 schedule. CP, CABR at 59. The Department reconsidered its initial order and agreed with Buse Timber and issued a new order that directed Buse Timber to pay Mr. Harry's hearing loss claim utilizing the 1974 schedule of benefits and not the 2001 schedule. CP, CABR at 21. Harry appealed the Department order to the Board of Industrial Insurance Appeals. Harry presented the testimony of himself, his wife, and David Lipscomb, Ph.D. He did not present a medical expert.

Buse Timber filed a motion to dismiss arguing Harry failed to present a prima facie case that Harry's hearing was not partially disabling as of 1974. CP, CABR at 71-79. Harry countered the 1974 audiogram should not be used to establish the rate of compensation because the audiogram was not valid and reliable. CP, CABR at 82-85. He also contended, without citation to authority, if the industrial audiograms were valid, his disability should be calculated using a different schedule of benefits for each increment of loss identified on the audiograms until 2001 when he reached his total occupational hearing loss. CP, CABR at 85-6.

On May 6, 2003, the Industrial Appeals Judge issued a Proposed Decision and Order concluding Harry failed to present a prima facie case and affirmed the Department order. CP, CABR at 14-19. Harry filed a Petition for Review, notably without taking exception to any of the findings of fact in the Proposed Decision and Order, specifically failing to

take exception to the Judge's finding he had "*an* occupational hearing loss". BR 18 (emphasis added). The Board denied Harry's petition for review and adopted the Proposed Decision and Order as the final Decision and Order of the Board. CP, CABR at 1.

Harry appealed to Snohomish County Superior Court. CP 84-86. Buse Timber moved for summary judgment. CP 66-83. During oral argument on the motion, Harry conceded the 1974 audiogram was valid. CP 52-65. On February 16, 2005, the Superior Court granted Buse Timber's motion for summary judgment. CP 7. Harry then appealed to the Court of Appeals.

On May 6, 2006, Division 1 of the Court of Appeals issued a published decision adopting Harry's tiered award theory, holding each additional compensable hearing loss shown by audiograms constituted a separate disease, and should be compensated according to the schedule of benefits in effect on the date of each such audiogram. Buse Timber and the Department of Labor and Industries filed a motion for reconsideration. On October 5, 2006 the Court of Appeals granted in part the motion for reconsideration without overturning the central tenant of the original holding. Both the Department of Labor and Industries and Buse Timber timely filed petitions for review in this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The decision of the Court of Appeals is in direct conflict with this Court's prior decisions and in conflict with other decisions of the Court of Appeals and therefore review should be accepted. RAP 13.4(b)(1). In addition, the issue before the Court is one of substantial public interest. RAP 13.4(b)(4).

A. *Harry* is in direct conflict with the clear and unambiguous language of the statute and this Court's prior decisions.

The Court of Appeals decision adopted an unprecedented and novel "tiered award system" for determining the schedule of benefits to be used in adjudicating occupational disease cases. The Court of Appeals decision extends and distorts the statutory definition of partially disabling in a way that is neither fair nor uniform and is inconsistent with accepted principles of statutory construction.

1. RCW 51.32.180(b) is unambiguous

For occupational disease cases, like *Harry's*, filed after 1988, Washington law is clear and unambiguous: the rate of compensation is established by the schedule of benefits 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 the claim.” RCW 51.32.180(b); WAC 296-14-350(3); *Boeing v. Heidy*, 147 Wn.2d 78, 88, 51 P.3d 794 (2002); *Department of Labor and Indus. v. Landon*, 117 Wn.3d 122, 124 fn.1, 814 P.2d 626 (1991).

In *Harry* the Court of Appeals relied upon *Pollard v. Weyerhaeuser*, 123 Wn.App.506, 98 P.3d 545 (2004) to find RCW 51.32.180(b) cannot be interpreted using its plain language because it is unclear when a person becomes totally or partially disabled. However, *Pollard* interpreted the statute with respect to factual circumstances not present in Harry’s case. *Pollard* concerned a claimant with two consecutive industrial insurance claims for hearing loss. Harry has only one claim. In *Pollard*, *Weyerhaeuser* argued the rate of compensation on the second claim should be the same as that of the first claim because the claimant had just one occupational disease, sensorineural hearing loss. The *Pollard* court stated the issue before it as “whether the Department of Labor and Industries may treat noise related hearing loss not causally related to earlier noise-related hearing loss as a separate and distinct occupational disease.” *Pollard, supra*, 123 Wn.App. at 512. However, once the court concluded the second claim represented a new disease process for a new period of exposure, the *Pollard* court had no trouble establishing a rate of compensation for the second claim by applying the

plain language of RCW 51.32.180(b). *Id.* at 514. The Court affirmed the Department's use of the date claimant first sought medical treatment for the loss covered by the second period of exposure. *Id.* at 515. The court clearly weighed the possibilities of different schedules, but selected only a single schedule of benefits to apply to the claim before it, representing the hearing loss from 1982 to 1999.

The *Pollard* Court was entirely cognizant of the circumstance which has arisen in Harry's case, i.e. two workers with multiple audiograms, one of whom files two claims and one who files a single claim for the same period. 123 Wn. App. at 513-14. The court had no difficulty of applying a single schedule of benefits if a worker filed only one claim:

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

Pollard, 123 Wn.App. at 513-14.

The Court of Appeals in *Harry* disagreed with the *Pollard* Court and stated it is not practical for claims to be filed each time testing reveals compensable hearing loss. However, the Court of Appeals' reasoning

ignores the plain mandate of RCW 51.08.180(b) which requires a new claim to be filed for each new occupational disease (with the exception of asbestos claims where distinct conditions of employment cause three separate and distinct diseases: asbestosis, lung cancer, and mesothelioma, each with a different latency period, and where the Courts have held the date when an individual's pathologically distinct disease manifests is the date to determine the rate of compensation. *See Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 229-31, 883 P.2d 1370, (1994)).

Secondly, Harry did not file claims for two separate occupational diseases. Rather he has one disease diagnosed as "sensory neural hearing loss." CP Tr. Riddell at 11. Occupational diseases can progress over the course of a claim, however, it does not mean additional schedule of benefits should apply each time a worker's disease worsens. *See e.g. Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 737-39, 981 P.2d 878 (1999) (prolonged standing on cement floor over the course of several years caused a foot condition); *see also, Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1997) (continued use of tin snips exacerbated pre-existing osteoarthritis and caused disease to progress over time).

Under the *AMA Guides for Evaluation of Permanent Impairment*, hearing impairment is calculated using the hearing loss in the four frequencies basic to speech intelligibility: 500, 1000, 2000, and 3000 Hz. *AMA Guides*, at 250-251. Although hearing loss may be present, there is no disability until the individual's hearing threshold exceeds an average of 25 decibels (dB) across the four frequencies measured. *Id.* Thus, hearing loss first becomes disabling for purposes of RCW 51.32.180(b) when the average exceeds 25 dB across the frequencies specified in the *AMA Guides*. *Heidy, supra*, 147 Wn.2d at 83.

Under the plain language of RCW 51.32.180(b), the sole issue presented in Harry's claim is: when did Harry's hearing loss first require medical treatment or become partially disabling. Harry did not seek medical treatment until 2001. However, the undisputed evidence shows Harry's hearing loss was "partially disabling" at the time of his first audiogram in 1974 that showed ratable impairment according to the American Medical Association Guides. Therefore based upon the clear and unambiguous statutory language, the 1974 schedule of benefits was used by the Department to adjudicate the claim.

2. *Harry is in direct conflict with this court's decision in Boeing v. Heidy.*

In an earlier case, *In re Carl Heidy*, the Board of Industrial Insurance Appeals addressed and rejected the very theory that the Court of Appeals adopted in *Harry*. *In re Carl Heidy*, BIIA Dec. 96 1511 (1988), 1998 WL 226281 at 10-14. Heidy worked at Boeing from 1951 to 1989. He filed his hearing loss claim in 1995. Heidy's claim was closed by the Department with a PPD award of 31.56% based on a 1993 audiogram. The award was used paying the schedule of benefits in effect when he retired, which was the 1988 schedule. Boeing contested the percentage awarded, arguing that some of the loss was due to aging, and the Board reduced the percentage to 27.51% by using an audiogram closer to his retirement in 1989. Boeing also argued that an earlier schedule should apply. The record showed that Heidy had undergone 24 audiograms in the years 1975 through 1995. Heidy argued, as Harry does here, that each additional increment of hearing loss should be given its own schedule of benefits. The Board stated its task as follows: "Choosing a single schedule of benefits for an occupational disease requires the selection of a date specific from, often times, numerous possibilities." *Id.* at 10. The Board discussed the idea that the Court of Appeals accepted in *Harry* as an "imaginative proposal," for which the Board was "unable to find any support . . . in either the Industrial Insurance Act or accompanying case law." *Id.* The Board went on to determine a single date of manifestation

for Heidi's claim, selecting the date of 1978, which was when Heidi first received hearing aids (treatment). *Id.* at 14. Boeing argued that the Board should have used the schedule of benefits in 1975, based on an audiogram of that date reflecting partial disability. *Id.* The Board rejected the 1975 schedule because claimant did not have knowledge of that impairment at the time and instead used the 1978 schedule. Boeing appealed to superior court, and then to the court of appeals, which certified review to the Washington Supreme Court. *Boeing v. Heidi, supra*, 147 Wn.2d at 84. Heidi did not appeal the Board decision. This Court reversed the Board's conclusion that claimant must have knowledge of his disability to establish a date of manifestation, holding "a worker's knowledge of his or her disabling condition does not affect when the rate of compensation under the Act is established. *Id.* at 89. Thus, despite the existence of 24 audiograms over a 20 year span, and despite the fact Heidi continued to sustain additional increments of loss through his retirement in 1989, this Court selected the 1975 schedule as the single schedule of benefits applicable to Heidi's claim. Therefore, the Court of Appeals decision in *Harry* is in direct conflict with this Court's prior decision.

B. The Court of Appeals Novel Interpretation of RCW 51.32.180 Presents an Issue of Substantial Public Interest.

The issue presented is one of substantial public interest and therefore review is necessary. RAP 13.4(b)(4). The Court of Appeals decision will have a significant impact on Washington workers and businesses. In the court's attempt to treat injured workers equally, the court has in actuality created an increased likelihood of litigation thereby increasing costs for employers and workers alike and placing an undue burden on two separate state agencies and an inevitable delay in receiving benefits.

There will undoubtedly be an increase in the number of claims filed for occupational hearing loss creating an increased workload for the Department of Labor and Industries. More claims ultimately result in more litigation and therefore the Board of Industrial Insurance Appeals will also feel the increased burden by additional litigation. The Court of Appeals rejected the Department's contention a tiered approach would result in an administrative burden on the Department. The Court of Appeals reasoned the "Department must simply do a little more math." *Harry* at 11. However, the Court of Appeals interpretation does not just simply involve more math, but it results in increased litigation to determine which audiograms the Department should use in adjudicating the claim.

In *Harry* the Court of Appeals remanded the case to the Department for additional fact finding to establish the proper dates of hearing loss to be paid according to a tiered schedule. *Harry* at 13. This raises a significant question of which of the 18 audiograms included in the Board record are valid and which should be used to adjudicate the claim. Inevitably this will lead to additional litigation over the validity of the audiograms and further delay the benefits to the claimant.

In addition to creating additional litigation and administrative burdens in hearing loss claims, there is a substantial question whether the Court of Appeals decision in *Harry* will be expanded to other types of occupational disease conditions. The term “partially disabling” for establishing a date of manifestation of an occupational disease does not apply only to hearing loss cases but applies to all occupational diseases. The *Pollard* court recognized this and cautioned that its resolution turned on the specific nature of noise related hearing loss and that it had not considered other occupational diseases, or even other kinds of hearing loss. *Pollard* at 98 P.3d at 549.

However, *Harry* does not have the same cautionary language as found in *Pollard*. Adopting *Harry*’s tiered schedule of benefits could allow workers to argue every time they have an increased impairment they

are entitled to use a new schedule of benefits for each increase in permanent impairment, regardless of when the condition first became disabling. The date a disease becomes partially disabling will become a moving target, making it difficult to pin down. Many occupational diseases involve on-going multiple exposures. *Simpson Timber Co. v. Wentworth*, 96 Wn.App. 731, 981 P.2d 878 (1999) (prolonged standing on cement floor caused disability, worker first sought treatment in 1989, then in 1992, and returned to work in 1994 but could no longer tolerate standing).

In its order on reconsideration, the Court of Appeals changed its decision on Page 7 ¶ 2 to read “However, we note that according to the legal definition of “partially disabling”, as it applies to other worker’s compensation claims, no worker could be unaware of his disability, because it would need to be noticed enough to interfere with his work.” This language is unnecessary and incorrect. Moreover, it could have broader implications in the context of claims outside of hearing loss. For instance, a worker with a mental deficiency could be able to do a simple assembly job without his mental abilities ever interfering with his work. There has never been a requirement previously in workers’ compensation law that a condition interfere with work before it can be considered disabling.

Moreover, there is no evidence the legislature intended for variability in the rate of compensation. The legislature set a single rate of compensation for occupational disease claims. The language of the statute is clear, the rate of compensation is set for whenever the disease becomes partially disabling or the worker seeks medical treatment, "*whichever occurs first.*" The Court of Appeals decision has far reaching implications on all occupational disease cases and will undoubtedly result in increased litigation and an increased burden on the multiple state agencies.

VI. CONCLUSION

This Court should accept review to reverse the Court of Appeals and find that Harry should be paid at the schedule of benefits in place when his hearing loss first became partially disabling in 1974 and affirm the superior court's decision.

DATED this ____ day of November, 2006.

Respectfully submitted,

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Amy L. Arvidson, WSBA # 20883

Attorney for Petitioner, Buse Timber

APPENDIX

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's 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 (BIA Dec. 2004).

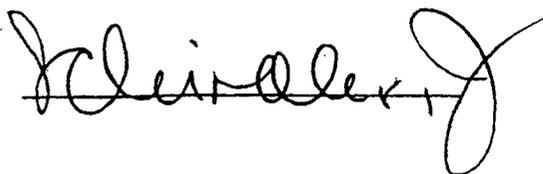
cannot possibly turn on whether one or more industrial insurance claims are filed. And the inequities of this system have been explained earlier in this opinion.

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:







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APPELLATE
COURT

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 IN PART
	)	DEPARTMENT'S MOTION FOR
THE DEPARTMENT OF LABOR &	)	RECONSIDERATION
INDUSTRIES,	)	AND CHANGING OPINION
)	
Respondents.)	

The Department of Labor and Industry's Motion for Reconsideration, and all parties' responses thereto, having been considered and finding that the motion should be granted in part and denied in part; now, therefore it is hereby:

ORDERED that the motion to remand to the trial court rather than to the Department is DENIED.

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

Page 4, ¶1, delete n4.

Page 7, ¶2, sentence 2, (beginning "This translates") will now read:

This may translate to a relatively small percentage of overall hearing loss.

Page 7, delete former n25 [now n24 due to the deletion of n4].

Page 7, ¶ 2, sentence 3, will now read,

According to the AMA guidelines, therefore, a worker can be “partially disabled” although he would not be disabled according to the common legal understanding of that term.

Page 7 ¶ 2, former n26 [now n24 due to the deletion of n4 and n24] will now read,

In the context of hearing loss claims, the definition of “partially disabling” is different from the common legal definition of that term. 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 25 decibel hearing loss would not be noticed by most workers, let alone hinder them in their jobs. The Board 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 at 89. However, we note that according to the legal definition of “partially disabling,” as it applies to other worker’s compensation claims, no worker could be unaware of his disability, because it would need to be noticed enough to interfere with his work.

Page 11, ¶ 3, sentence 2, will now read:

In Boeing Company v. Heidy,¹ the Department Board acknowledged that hearing loss is different from other types of “diseases” because the sufferer can be partially disabled and not know it.²

Page 12, ¶ 1, sentence 2, will now read:

Strict application of RCW 51.32.180(b), as the Department Board correctly pointed out in Heidy, actually does treat workers with noise-induced hearing loss differently from workers with other occupational diseases or injuries.

Page 12, ¶ 2, sentence 3, will now read:

¹ 147 Wn.2d 78, 51 P.3d 793 (2002).

² Heidy, 147 Wn.2d at 83.

Also, the Department Board 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.³

The footnotes numbering shall be modified accordingly.

The remainder of the opinion shall remain the same.

Done this 5th day of October, 2006.

Schweitzer, A.S.

Baker, J.
Coleman, J.

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STATE OF WASHINGTON
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³ In re Gerald J. Woodard, 03 22924, at 6 (BIIA Dec. 2004).

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.]

Notes:

Benefit increases -- Application to certain retrospective rating agreements -- 1988 c 161: See notes following RCW 51.32.050.

Effective dates -- Severability -- 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.