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No. _____

Court of Appeals No. 55902-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD HARRY,

Respondent,

v.

BUSE TIMBER & SALES, INC., and DEPARTMENT OF LABOR AND
INDUSTRIES FOR THE STATE OF WASHINGTON,

Petitioner.

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**ANSWER IN OPPOSITION TO THE PETITIONS FOR
DISCRETIONARY REVIEW**

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IDENTITY OF RESPONDENT

Donald Harry, the claimant in an occupational hearing loss claim arising under the Washington State Industrial Insurance Act, respectfully requests this Court to deny review of the published opinion in Harry v. Buse Timber & Sales, Inc., and the Dep't of Labor & Indus., ___ Wn. App. ___, 132 P.3d 1122 (No. 55902-8-I 2006).

CITATION TO COURT OF APPEALS DECISION

Mr. Harry respectfully requests that this Court deny a review of the published opinion in Harry v. Buse Timber & Sales, Inc., and the Dep't of Labor & Indus., ___ Wn. App. ___, 132 P.3d 1122 (Div. I 2006), dated May 1, 2006, and the Order Granting In Part the Department's Motion for Reconsideration and Changing Opinion, dated October 5, 2006. This Court should deny review because the Court of Appeals decision is consistent with Pollard v. Weyerhaeuser, 123 Wn. App. 506, 98 P.2d 1370 (2004), review denied, 154 Wn.2d 1014 (2005), another Court of Appeals decisions on the same issue in which the Supreme Court denied discretionary review. Additionally, the Court of Appeals decision did not conflict with any Supreme Court case deciding this issue and there is no issue of substantial public interest that should be determined by this Court rather than a legislative body, as required by RAP 13.4(b).

ISSUES PRESENTED FOR REVIEW

The Department of Labor and Industries establishes the schedule of benefits for hearing loss claims as arising on the date of the first valid audiogram, regardless of whether the worker suffers further injurious noise exposure after that date. Without this additional noise exposure, the worker's added disability would not occur. Under the Industrial Insurance Act, can hearing loss manifest itself pursuant to RCW 51.32.180(b) before a worker is exposed to the injurious stimuli causing the disability?

STATEMENT OF THE CASE

Donald Harry worked as a truck driver for Buse Timber and Sales, Inc. (Buse) from 1957 until his retirement in 1990. During the course of this employment, Buse Timber exposed Mr. Harry to injurious noise. This injurious noise exposure was such that WISHA regulations required Buse Timber to monitor and protect Mr. Harry's hearing. As part of this hearing conservation program, Mr. Harry underwent yearly industrial screening audiograms. These audiograms were done at Buse Timber, in a van, and Buse was notified and given the results of the yearly audiograms.

Even though these audiograms demonstrated that Mr. Harry suffered from a compensable hearing loss as early as 1974, when it was shown Mr. Harry suffered hearing loss in only his left ear, Buse neither

encouraged him to seek medical treatment or file a claim as allowed under the Industrial Insurance Act. From 1974 to 2001, Mr. Harry's additional injurious noise exposure furthered his hearing loss. In 2001, Mr. Harry consulted a doctor, who informed him that he had 38.13% binaural hearing loss.

As a result, Mr. Harry filed a claim for benefits under the Industrial Insurance Act. At Buse's insistence, the Department finally accepted Mr. Harry's claim for 38.13% using the schedule of benefits from 1974. This entitled Mr. Harry to \$5,490.72 in permanent partial disability. This schedule of benefits compensated him at a rate established before all of Mr. Harry's hearing loss was manifested. If he was awarded benefits in 2001, when all of his hearing loss had manifested itself, he would have been entitled to \$25,673.19.

Mr. Harry appealed this determination to both the Board of Industrial Insurance Appeals and the Snohomish County Superior Court. Both upheld the Department's determination. The Court of Appeals, however, disagreed. It reasoned that by using a schedule of benefits established before an injured worker's hearing loss fully manifests itself, the Department treats workers with occupational diseases and industrial injuries differently. Instead, it held, pursuant to Pollard v. Weyerhaeuser, 123 Wn. App. 506, review denied, 154 Wn.2d 1014 (2005), that an injured

worker should be awarded benefits using a tiered approach, awarding a new schedule of benefits when ever additional disability is shown by a new, valid audiogram.

ARGUMENT WHY REVIEW SHOULD BE DENIED

According to the Rules of Appellate Procedure (RAP), this Court accepts review of Court of Appeals decisions only if (1) the decisions conflict with a decision of the Supreme Court; (2) the decisions conflict with another decision of the Court of Appeals; ... or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

None of these provisions apply to the decision in this case. First, every other decision addressing whether hearing loss can manifest itself before exposure to the injurious stimuli causing disability has the same holding as the decision in this case. Pollard v. Weyerhaeuser Co., 123 Wash.App. 506 (2004), review denied, 154 Wn.2d 1014 (2005); In re Paul J. Brooks, BIIA No. 02 17331 (2003). Second, the holding below does not conflict with established Supreme Court precedent regarding the interpretation of RCW 51.32.180(b). Third, no issue of public interest requires the Supreme Court's immediate action. Therefore, the Supreme

Court should deny the Department of Labor & Industries and Buse
Timber's Petition for Discretionary Review.

A. The Court of Appeals decision is in accordance with all other case law directly addressing the issue of whether an occupational disease can manifest itself before the worker is exposed to the injurious stimuli causing the disability.

The Court of Appeals decided Mr. Harry's case in the same manner as Division II of the Court of Appeals, in Pollard v. Weyerhaeuser Co., 123 Wash.App. 506 (2004), and the Board of Industrial Insurance Appeals, in In re Paul J. Brooks, BIIA No. 02 17331 (2003). Both of these cases determined that RCW 51.32.180(b) does not require the establishment of an injured worker's schedule of benefits before the disability medically occurred. As no reason exists, requiring review of these decisions, there is no reason to review Mr. Harry's case now.

In Pollard, the claimant worked at Weyerhaeuser from 1961 to 2000 or for a total of 39 years. During that period, the claimant was continually exposed to industrial noise. By 1982, the claimant was diagnosed with a 10% hearing loss. He filed a claim and was awarded the 10% loss using the schedule of benefits that was effective from 1979 to 1986. Id. at 508-509. By 1998, the claimant noticed his hearing loss increasing. In 1999, the claimant filed another claim and was awarded compensation for an additional 35.9% hearing loss. The Department used

the 1999 schedule of benefits for the second award rather than use the 1979 schedule of benefits used in the earlier claim. Weyerhaeuser appealed saying the Department should have used the 1979 schedule of benefits in effect when the claimant first sought treatment for noise-related hearing loss. Id.

The court disagreed, holding that RCW 51.32.180(b) did not address whether an injured worker can have multiple schedules of benefits, when their disability manifests itself at different times. Id. at 514. See also Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222, 231 (1994). It reasoned the hearing loss demonstrated in the later claim would have occurred wholly independent of the hearing loss demonstrated in the earlier claim. Pollard, 123 Wn. App. at 513. When there are multiple dates of injury, each unrelated to the other, the claimant's rights are governed by the law in force on the date of each injury. RCW 51.16.040; Pollard, 123 Wn. App. at 514. Therefore, as each audiogram displayed a separate and distinct hearing loss, a different schedule of benefits is applied. Id.

The court in Pollard relied on the Board's Significant Decision In re Paul J. Brooks to conclude distinct noise exposures constituted separate and distinct occupational diseases. In re Paul J. Brooks, BIIA No. 02 17331 (2003). In Brooks, the claimant worked for Weyerhaeuser from

1971 through July 2001, during which he was continually exposed to injurious noise. This noise exposure resulted in the claimant filing two claims for occupational hearing loss: one in 1984 and a second in 2001. Similar to Pollard, the self-insured employer argued hearing loss is one disease; therefore, the schedule of benefits for the entire hearing loss is the first date the worker demonstrates any disability, regardless of whether it increases because of later injurious noise exposure. Id.

The Board disagreed, also finding RCW 51.32.180(b) did not require use of the date of manifestation established in an earlier claim for a later claim bearing no causal relationship to the earlier claim. According to the Board, “but for the additional noise exposure, [the claimant] would not have had additional hearing loss.” Brooks. Additionally, the Board reasoned that it is inconsistent with the goals of the Industrial Insurance Act to compensate a person at a rate in effect long before either the exposure or damage occurred. Id.; see also Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122 (1991). As such, it rejected the self-insured employer's argument and allowed the claimant multiple schedules of benefits, reflecting the increased disability after the first claim.

The position advanced by the Department and Buse Timber requires this Court to ignore the established precedent in Pollard and In re Brooks holding RCW 51.32.180(b) is ambiguous. Pollard, 123 Wn. App.

at 513; In re Brooks. According to the Industrial Insurance Act, an ambiguous statute must be liberally construed in the injured worker's favor. RCW 51.12.010. In cases where an occupational disease becomes disabling on multiple dates, the Department and Buse Timber requests this Court to construe the Act against the injured worker and establish the schedule of benefits before some, or even most, of the disability occurred. This is contrary to the clear mandate of RCW 51.12.010.

As the Court of Appeals decision agrees with the only precedents addressing diseases with multiple dates of disability, Mr. Harry respectfully requests this Court deny review of this decision.

B. This Court has not addressed the issue of whether RCW 51.32.180(b) requires the Department to under compensate workers by establishing the date of manifestation before their disease could medically become disabling.

A disease cannot be disabling before it has occurred. There is clear legal evidence that noise induced hearing loss only occurs with noise exposure. See Pollard v. Weyerhaeuser Co., 123 Wash.App. at 512-513; In re Paul J. Brooks, BIIA No. 02 17331 (2003). According to the West Virginia Supreme Court, "once noise exposure stops, so does the progression of the hearing loss unless other factors are involved. Damage to hearing is permanent: Once the hair cells in the cochlea are destroyed the cells cannot be rejuvenated." Blackburn v. Workers' Comp. Div., 212

W.Va. 838, 847, 575 S.E.2d 597 (2002); see also, In re Eugene Williams, BIIA Dec. 95378 (1998). While impossible to determine exactly when a hair cell dies, hair cell loss can be illustrated by audiograms showing additional exposure.

As each audiogram depicts additional hearing loss caused by exposure to noise, each exposure creates a separate and discrete disability requiring a separate schedule of benefits. Both the Board of Industrial Insurance Appeals and Division II of the Washington State Court of Appeals have found that this is the proper method to establish benefit schedules in noise induced hearing loss claims. Pollard v. Weyerhaeuser, 123 Wn. App. 506 (2004); In re Paul J. Brooks, BIIA No. 02 17331 (2003).

This Court has never addressed which schedule of benefits is applicable in a hearing loss claim when a worker suffers new disability from additional noise exposure. In fact, all cases dealing with RCW 51.32.180(b) are consistent with the decision in Mr. Harry's case. As the Court of Appeals decision does not conflict with any Supreme Court decisions on occupational hearing loss or RCW 51.32.180(b), there is no reason under RAP 13.4(b) for this Court to review the decision.

1. The Court of Appeals decision is consistent with the Supreme Court's holding in Heidy, as it does not require worker

knowledge to establish when a disease is manifest pursuant to RCW 51.32.180(b).

The most recent Supreme Court decision to address occupational hearing loss is Boeing Co. v. Heidy, 147 Wn.2d 78 (2002). In Heidy, the Court made three holdings relevant to these cases: (a) a disabled worker's permanent partial disability award for hearing loss cannot be reduced because of age; (b) there is no legal presumption against pre-retirement industrial audiograms; and (c) RCW 51.32.180(b) does not require that a worker have knowledge he or she is partially disabled before the applicable schedule of benefits is determined. Id. at 86-89. None of these holdings determine RCW 51.32.180(b) unambiguously establishes a worker must be compensated before the disease could have medically occurred.

Instead, this Court determined another element – knowledge – could not be added into the statutory requirements enumerated in RCW 51.32.180(b). Boeing Co. v. Heidy, 147 Wn.2d at 89. That holding does not resolve the question of when an occupational disease becomes totally or partially disabling. Nevertheless, the Department erroneously argues RCW 51.32.180(b) requires manifestation when the disease first becomes disabling. Whereas the statutory language states, “when the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first.” See Petition for Discretionary Review by

Department of Labor and Industries, p. 7-8. The comma before “whichever occurs first” shows the Legislature was differentiating between requiring medical treatment and becoming disabling. The aforementioned clause does not establish manifestation on the date of first disability. Such a construction violates RCW 51.12.010’s requirement the Industrial Insurance Act be interpreted liberally in the worker’s favor.

In requesting such an interpretation, the Department and Buse Timber also ignores a clear requirement of the statute – that an occupational disease be disabling or require medical treatment. See Pollard v. Weyerhaeuser Co., 123 Wash.App. at 512-513; In re Paul J. Brooks, BIIA No. 02 17331 (2003). In occupational hearing loss cases, an employer can stop the progression of hearing loss by stopping the noise exposure. But if the noise exposure continues, the worker will develop additional disability. Id. The Department and Buse Timber’s argument is contrary to the statutory requirement that a disease is disabling before it is manifested, as it establishes the schedule of benefits before some or even most of disability occurs.

As this Court did not address whether compensating hearing loss before the entire disability could have occurred is consistent with RCW 51.32.180(b) in its published decision, arguments made in briefing before the Court should not bind parties seeking resolution of this issue now. See

Petition for Discretionary Review, p. 11. Stare decisis should only be applicable to published decisions. See generally, RAP 10.4(h). Without written precedent on whether hearing loss can manifest itself before the workers' exposure to injurious stimuli causing disability, the Court of Appeals decision is consistent with the Supreme Court's decisions on occupational hearing loss and the request for review should be denied.

2. The Court of Appeals decision is consistent with the Supreme Court's decision in Kilpatrick, as additional exposure to industrial noise results in disability that would not occur without that noise exposure.

Another Supreme Court dealing with RCW 51.32.180(b) allowed multiple schedules of benefits for multiple occupational diseases arising from exposure to injurious stimuli. Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222 (1994). The Court of Appeals decision here relies on that finding.

In Kilpatrick, the Supreme Court made a similar determination for a different kind of occupational disease. Kilpatrick, 125 Wn.2d at 231. Kilpatrick involved workers exposed to asbestos later developing two separate and distinct diseases from this exposure. The Court in Kilpatrick was concerned the Department's interpretation of RCW 51.32.180(b), restricting the date of manifestation to the first disease merely because it occurred from the same exposure, resulted in the application of outdated

schedules of benefits. Id. at 231. The Court has held "just as multiple dates of injury will give rise to multiple industrial injury claims, so also will the worker who establishes separate and distinct diseases from asbestos exposure be able to claim separate dates of manifestation." Id. at 224. The same reasoning applies here.

In noise induced hearing loss cases, there is a "unique pathology" for the evolution of the disability. That unique pathology is the additional noise exposure. Without it, the worker's hearing loss disability would not increase. Awarding benefits pursuant to the first schedule applicable, even before all the disability occurred, results in outdated benefits, exactly what this Court was trying to prevent in Kilpatrick.

As the Court of Appeals decision does not conflict with Heidy and Kilpatrick, this Court should deny the requests for discretionary review.

C. Requiring multiple dates of manifestation in occupational hearing loss cases is not an issue of substantial public interest requiring immediate resolution by this Court.

The Court of Appeals decision will minimally effect the current role of the Department of Labor and Industries in administering occupational hearing loss claims. Currently, the Department already engages in the fact-finding required by the Harry decision, as it has to determine if pre-retirement industrial audiograms are valid in order to establish when the disease first manifested itself. The Court of Appeals

decision merely requires the Department to subtract the latter percentage of disability from the percentage of disability established in the former valid audiogram and multiply by the appropriate schedule of benefits. It is hard to see how this additional math will result in the apocalyptic unraveling of the entire occupational disease compensation system, as suggested by the Department. See Petition for Discretionary Review by Department of Labor and Industries, p. 14.

Additionally, the Department has the ability to establish rules and regulations to assist it in determining which audiograms are valid. RCW 51.04.120. Simply by creating an administrative rule requiring all audiograms include indicia of reliability, such as the calibration date for the audiometer, the name and occupational of the person administering the examination and a reliability rating for the examination, the Department can reduce the additional burden to almost nil. Most audiograms already include such information so the requirement would not adversely affect the audiological community.

The Department also argues that the system will be affected by other occupational disease claimants also caused by multiple exposures to injurious stimuli. This is incorrect. According to the Industrial Insurance Act, the schedule of benefits is determined to be “when the disease requires medical treatment or becomes totally or partially disabling,

whichever occurs first.” RCW 51.32.180(b) (emphasis added). In other occupational disease cases, such as asthma or hives, the disease will not be manifested until they seek medical treatment, as there is no way to rate the disability resulting from these diseases without seeking medical treatment. That is not the case in hearing loss claims – where disability can be determined via an audiogram administered by a non-medical provider.

As there is minimal administrative burden associated with the Court of Appeals decision, is no substantial public interest requires this Court to grant review, as required by RAP 13.4(b).

CONCLUSION

The Court of Appeals decision compensates occupational diseases in the same manner as industrial injuries, pursuant to RCW 51.16.040 and RCW 51.32.180. As this decision neither conflicts with any established legal decision nor involves a substantial public interest requiring determination by the Supreme Court, Mr. Harry respectfully requests this Court deny the Department of Labor and Industries’ and Buse Timber’s petitions for discretionary review. Mr. Harry also requests his attorneys’ fees and costs pursuant to RCW 51.52.130, should he be successful in this request.

Respectfully submitted this 5th day of December, 2006.

THE LAW OFFICE OF WILLIAM D. HOCHBERG

Handy Mart #34875 for:

William D. Hochberg
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Amie Peters

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APPENDIX

RCW 51.32.180 Attachment 1
RCW 51.12.010 Attachment 2
RCW 51.16.040 Attachment 3

ATTACHMENT A

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.

ATTACHMENT B

RCW 51.12.010

Employments included -- Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

ATTACHMENT C

RCW 51.16.040
Occupational diseases.

The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title.

[1971 ex.s. c 289 § 83; 1961 c 23 § 51.16.040. Prior: 1959 c 308 § 12; 1941 c 235 § 2; Rem. Supp. 1941 7679-1.]

NOTES:

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

CERTIFICATE OF MAILING

CLAIMANT: Donald Harry
NO:

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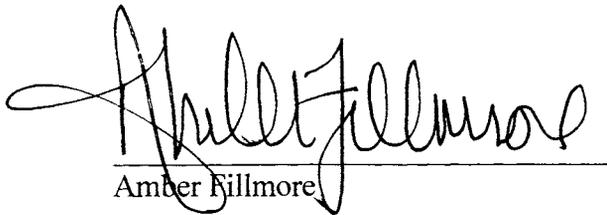
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I certify that either the original, via personal delivery, or a copy of the document attached hereto was mailed, postage prepaid, first class mail to the parties referenced above this 5th day of December, 2006.


Amber Fillmore