

55902-8

55902-8

79613-1

No. 55902-8-I

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

DONALD HARRY,

Appellant,

v.

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

Respondents,

BRIEF OF RESPONDENT
BUSE TIMBER & SALES, INC.

Amy L. Arvidson
Keehn ■ Arvidson, PLLC
701 Fifth Avenue
Suite 3470
Seattle, WA 98104
(206) 903-0633
WSBA # 20883

2005 JUN 23 PM 4:28
FILED
COURT OF APPEALS
DIVISION I
SEATTLE, WA

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
	A. Counterstatement to Issues Pertaining to Assignments of Error.	1
II.	STATEMENT OF THE CASE	2
III.	SUMMARY OF ARGUMENT	5
IV.	ARGUMENT	6
	A. STANDARD OF REVIEW	6
	B. THE SUPERIOR COURT PROPERLY GRANTED JUDGMENT AS A MATTER OF LAW AFFIRMING THE USE OF THE 1974 SCHEDULE OF BENEFITS WHERE THE EVIDENCE IS UNDISPUTED THAT HARRY'S HEARING LOSS WAS PARTIALLY DISABLING AS OF 1974.	7
	1. RCW 51.32.080 Provides That the Schedule of Benefits in an Occupational Disease Claim Is Established by the Date the Condition Required Medical Treatment or Became Totally or Partially Disabling, Whichever Occurs First.	7
	2. Under Washington Law, Harry's Hearing Loss Was Partially Disabling in 1974.	10
	3. Based on the Undisputed Facts, Judgment Affirming the 1974 Schedule Was Appropriate As a Matter of Law.	12

C.	HARRY'S NOVEL ARGUMENT FOR MULTIPLE SCHEDULES OF BENEFITS UNDER A SINGLE CLAIM IS WITHOUT PRECEDENT OR AUTHORITY IN WORKERS' COMPENSATION LAW.....	13
1.	Harry Cites No Authority for Having More Than One Rate of Compensation for a Single Permanent Partial Disability Award.....	13
2.	RCW Title 51 Treats Injuries and Occupational Diseases Differently with Respect to Establishing Rates of Compensation.....	17
3.	The Statute Does Not Treat Workers Disparately or Inequitably.....	20
4.	Public Policy Compels Adherence to the Clear Statutory Language Passed by the Legislature Regarding Rates of Compensation.....	22
V.	CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<u>Ashenbrenner v. Department of Labor and Indus.</u> , 62 Wn.2d 22, 380 P.2d 730 (1963).	17
<u>Bennerstrom v. Department of Labor and Indus.</u> , 120 Wn. App. 853, 86 P.3d 826 (2004).	6
<u>Boeing v. Heidy</u> , 147 Wn.2d 78, 51 P.3d 794 (2002).	8, 10, 11, 16, 17, 21, 22
<u>Clauson v. Department of Labor and Indus.</u> , 130 Wn.2d 580, 925 P.2d 624 (1996).	18
<u>Department of Labor and Indus. v. Landon</u> , 117 Wn.2d 122, 814 P.2d 626 (1991).	8, 18
<u>Gallo v. Department of Labor and Indus.</u> , 119 Wn. App. 49, 81 P.3d 869 (2003).	6
<u>In re: Carl Heidy</u> , BIIA Dkt. No. 96 1511, 1998 WL 226281.	11-12, 15, 16
<u>In re: Paul J. Brooks</u> , BIIA Dkt. No. 02 17331, 2003 WL 22722450.	14
<u>Kilpatrick v. Department of Labor and Indus.</u> , 125 Wn.2d 222, 883 P.2d 1370 (1994).	25
<u>McIndoe v. Department of Labor and Indus.</u> , 144 Wn.2d 252, 26 P.3d 903 (2001)	10, 18
<u>Page v. Department of Labor and Indus.</u> , 52 Wn.2d 706, 328 P.2d 663 (1958).	10

<u>Pollard v. Weyerhaeuser,</u> 123 Wn. App. 506, 98 P.3d 545 (2004).	8, 9, 13 14, 21
<u>Pybus Steel v. Department of Labor and Indus.,</u> 12 Wn. App. 436, 530 P.2d 350 (1975)	18
<u>Weyerhaeuser Co. v. Bd. Of Indus. Insurance Appeals,</u> 107 Wn. App. 505, 27 P.3d 1194 (2001).	6

Statutes

RCW 51.16.040	18
RCW 51.32.080	7
RCW 51.32.080(1)	10
RCW 51.32.080(2)	7
RCW 51.32.080(3)(a)	10
RCW 51.32.080(7)	17
RCW 51.32.180	11, 18, 19, 20
RCW 51.32.180(b)	1, 5, 8, 9, 11, 12, 20, 22, 23, 24, 25
WAC Ch. 296-62	21
WAC Ch. 296-817	22
WAC 296-14-350(3)	8
WAC 296-20-2015	10
WAC 296-20-19000	10
WAC 296-20-19020	10

WAC 296-62-09041 21

Other Authorities

American Medical Association, Guides to the Evaluation
of Permanent Impairment, (Linda Cocchiarella &
Gunnar B.J. Andersson eds., 5th ed., 2001). 10, 11, 12, 23

I. ASSIGNMENTS OF ERROR

- A. Counterstatement of Issues Pertaining to Assignments of Error.
1. Was the Department's use of the 1974 schedule of benefits for Harry's permanent partial disability award under RCW 51.32.180(b) correct as a matter of law, where his hearing loss first became partially disabling in 1974?
 2. Did the superior court err in granting summary judgment affirming the use of the 1974 schedule of benefits where the undisputed evidence is that Harry's hearing loss was partially disabling in 1974?

II. STATEMENT OF THE CASE

Donald Harry worked for Buse Timber for 33 years until his retirement in 2001. CP, CABR 2/13/03 Hearing Transcript at 11, 16. Buse Timber had a Hearing Conservation Program for its employees, and as part of this program, Harry received annual audiograms beginning in 1974. CP, CABR, Board Ex. 2; CP, CABR 1/27/03 Lipscomb Deposition Transcript ("Tr.") at 15. Harry's first audiogram, on August 26, 1974, documented a ratable hearing disability in his left ear. CP, CABR, Lipscomb 1/27/03 Tr. at 43, 49. By 1985, Harry also had ratable hearing disability in his right ear as well. CP, CABR 1/27/03 Lipcomb Tr. at 52.

Harry's audiograms continued to document a ratable hearing disability throughout his employment with Buse Timber. Id. at 32.

In April 2001, Harry filed an occupational disease claim alleging he sustained occupational hearing loss during the course of his employment with Buse Timber. CP, CABR 18, 59. An audiogram performed on August 28, 2001 for purposes of the claim showed a hearing loss equal to 38.13% of the complete loss of hearing in both ears. CP, CABR at 18. On November 13, 2001 the Department issued an order directing Buse Timber to: accept Harry's claim for occupational 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 59¹. In its order, the Department based the rate of compensation for the 38.13% disability award on the legislatively-set schedule of disability benefits in effect on March 5, 2001. Id.²

¹The order itself is not part of the Board record. A copy is attached hereto as Exhibit A because the summary of the order by the Board at CABR at 59 is brief.

²The "Date of Injury" is identified in the upper right-hand corner of the Department Order. The reason the Department originally used a March 5, 2001 date is not discussed in the Board record, but it may be the
(continued...)

Buse Timber timely protested, arguing that since Harry demonstrated hearing disability on the August 26, 1974 audiogram, the award should be paid on the schedule in effect in 1974 rather than on the 2001 schedule. CP, CABR at 59.³ The Department agreed and on January 14, 2002 established the rate of compensation for the disability award as that in effect on August 26, 1974.⁴ CP, CABR at 21-22. The Department otherwise reinstated the terms of its November 13, 2001 order. Id.

Harry timely appealed to the Board of Industrial Insurance Appeals contending that he was not aware of his impairment in 1974. CP, CABR 23. The sole issue presented to the Board was whether the Department should have used the 2001 schedule instead of the 1974 schedule. CP, CABR at 15, 43. Harry presented testimony of himself, his wife, and

²(...continued)

date Harry first saw the doctor who assisted him in filing the claim.

³The employer's protest is also not part of the Certified Appeal Board Record. A copy is attached as Exhibit B.

⁴The date triggering the rate of compensation is identified by the "Injury Date" in the upper right-hand corner of the order, fifth line down. CP; Certified Appeal Board Record, 21. The value of the 38.13% award reflects the schedule of benefits in effect in 1974, which was the schedule adopted by the Legislature in 1971. According to the 1971 schedule, the complete loss of hearing in both ears was worth \$14,400. See Laws 1971, Ex.Sess., ch. 165 §1. 38.13% of \$14,400 is \$5,490.72.

David Lipscomb, Ph.D. He did not present a medical expert. CP, CABR.

Buse Timber filed a motion to dismiss for failure to present a prima facie case that Harry's hearing disabling was not partially disabling as of 1974, CP, CABR at 71-79, but it meanwhile perpetuated the testimony of its expert, Duncan Riddell, M.D. See CP, CABR, 3/6/03 Riddell Deposition Transcript. Harry responded that 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 argued, without any citation to authority, that if the industrial audiograms were valid, that his hearing disability loss should be calculated each year up to 2001. CP, CABR at 85-86.

On May 6, 2003 the Industrial Appeals Judge issued a Proposed Decision and Order concluding that Harry failed to present a prima facie case and affirming the Department order. CP, CABR at 14-19. Harry filed a petition for review, CP, CABR at 2-11. The Board denied Harry's petition for review and adopted the Proposed Decision and Order as the Board's final order. CP, CABR at 1.

Harry appealed to Snohomish County Superior Court. CP 84-86. Buse Timber moved for summary judgment. CP 66-83. In his response, Harry again maintained the invalidity of the 1974 audiogram. CP 52-65.

At unrecorded oral argument on the motion, Harry conceded for the first time that the 1974 audiogram was valid. Based on the change in legal theories, Buse Timber submitted supplemental authorities to the Court. CP 12-50. On February 16, 2005, the superior court granted Buse Timber's motion for summary judgment. CP 7. Harry appealed to this Court. CP 4-6.

III. SUMMARY OF ARGUMENT

Washington law is clear and unambiguous: the schedule of benefits for occupational disease cases is established 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). In this case, the undisputed evidence is that Harry's hearing loss was "partially disabling" by his first audiogram in 1974. Although at the Board, Harry attempted to challenge the validity of the 1974 audiogram, in superior court Harry abandoned this argument and focused solely on whether the use of the 1974 schedule was correct as a matter of law. Because it is undisputed that the 1974 audiogram showed hearing disability, summary judgment affirming the Department's use of the schedule of benefits in effect in 1974 was appropriate and should be affirmed.

IV. ARGUMENT

A. STANDARD OF REVIEW.

In appeals from superior court under RCW Title 51, appellate courts review issues of law *de novo*. Where a superior court grants summary judgment in an appeal from the Board of Industrial Insurance Appeals, the appellate court's inquiry is the same as the trial court's. Bennerstrom v. Department of Labor and Indus., 120 Wn. App. 853, 857, 86 P.3d 826 (2004). The court defers to the Board concerning the meaning of the Industrial Insurance Act, at least if its reading is reasonable. Weyerhaeuser Company v. Board of Indus. Insurance Appeals, 107 Wn. App. 505, 510, 27 P.3d 1194 (2001).

In this Court, Harry has not assigned error to the factual findings of the Board. The unchallenged findings of the Board are now verities on appeal. Gallo v. Department of Labor and Indus., 119 Wn. App. 49, 54, 81 P.3d 869 (2003). One of these findings is that Harry failed to present a prima facie case that the 1974 audiogram is invalid. CP, CABR at 18.

B. THE SUPERIOR COURT PROPERLY GRANTED JUDGMENT AS A MATTER OF LAW AFFIRMING THE USE OF THE 1974 SCHEDULE OF BENEFITS WHERE THE EVIDENCE IS UNDISPUTED THAT HARRY'S HEARING LOSS WAS PARTIALLY DISABLING AS OF 1974.

1. RCW 51.32.080 Provides That the Schedule of Benefits in an Occupational Disease Claim Is Established by the Date the Condition Required Medical Treatment or Became Totally or Partially Disabling, Whichever Occurs First.

Harry seeks to enlarge his permanent disability award by establishing a new rate of compensation for his disability. Two factors determine the monetary award an injured worker receives for permanent disability under the Industrial Insurance Act, RCW Title 51. One factor is the percentage of impairment suffered, expressed as a fraction of total impairment of that body part or system. RCW 51.32.080(2). In this case, Harry did not dispute the use of the August 28, 2001 audiogram, which showed a 38.13% binaural loss of hearing, to determine his overall percentage of hearing loss related to work exposure through his retirement in 2001.

The other factor affecting a disability award is the rate of compensation. The rate of compensation, which is based on a schedule established by the Legislature setting forth the value of 100% disability for the type of impairment at issue. See RCW 51.32.080. The

Legislature periodically increases the schedule of total disabilities. Harry contested the schedule used by the Department to establish the rate of compensation, contending the 2001 schedule rather than the 1974 schedule should apply.

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 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.2d 122, 124 fn.1, 814 P.2d 626 (1991).

Harry suggests that RCW 51.32.180(b) cannot be interpreted using its plain language because it is unclear when a person becomes totally or partially disabled, citing Pollard v. Weyerhaeuser, 123 Wn. App. 506, 98 P.3d 545 (2004). 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 that the rate of compensation on the second claim should be the same as that of the

first claim because the hearing loss was all one disease. The court stated the issue before it as “whether the Department of Labor and Industries (DLI) 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 that 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 never focused on the “partially disabling” language in RCW 51.32.180(b) and certainly did not find this term ambiguous.

Under the plain language of RCW 51.32.180(b), the sole issue presented by Harry’s claim is: when did Harry’s hearing loss first require medical treatment or become partially disabling? It is undisputed that Harry did not seek treatment until 2001. If his hearing loss was partially disabling prior to 2001, the date of such disability establishes the rate of compensation for the claim as a matter of law. RCW 51.32.180(b).

2. Under Washington Law, Harry's Hearing Loss Was Partially Disabling in 1974.

The meaning of the term “partially disabling” with respect to industrial hearing loss is also clear and unambiguous. Permanent partial disability is a loss of bodily function. RCW 51.08.150; McIndoe v. Department of Labor and Indus., 144 Wn.2d 252, 26 P.3d 903 (2001); Page v. Department of Labor and Indus., 52 Wn.2d 706, 328 P.2d 663 (1958). Hearing loss is a specified, scheduled partial disability. RCW 51.32.080(1). The Department has promulgated rules regarding the establishment of permanent partial disability in Washington. E.g., WAC 296-20-19000; WAC 296-20-19020; WAC 296-20-2015. Permanent hearing disability in Washington is determined by audiograms using the formula found in the nationally recognized American Medical Association's publication, *Guides to the Evaluation of Permanent Impairment* (“*AMA Guides*”). RCW 51.32.080(3)(a); WAC 296-20-2015; Heidy, supra, 147 Wn.2d at 83. Under the *AMA Guides*, 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 loss exceeds 25 dB across the frequencies specified in the *AMA Guides*. *Heidy, supra*, 147 Wn.2d at 83.⁵ Thus, there is nothing

⁵The Board had earlier reached the same decision in the *Heidy* case. After discussing what constitutes “medical treatment” in the hearing loss context, the Board stated:

The second phrase of RCW 51.32.180 relates to the words “partially disabling.” As we discussed in an earlier portion of this decision, the *AMA Guides* do not recognize the existence of any hearing disability until an individual's average hearing loss exceeds 25 dB at the four frequencies tested. For purposes of establishing a schedule of benefits date, other hearing loss thresholds could be adopted that might begin with as little as 1 dB of permanent threshold shift, assuming such a threshold was nationally recognized. To adopt a different standard, however, would mean that we would create one definition of “partially disabling” to determine the percentage of permanent partial disability and a second definition to determine the schedule of benefits for paying the award. We do not believe this is wise. Despite the potential existence of other standards, we believe logic and consistency require the use of the *AMA Guides* standard for the purpose of establishing the schedule of benefits date. So that we are clear, we conclude that hearing loss is disabling within the meaning of RCW 51.32.180 when the average loss exceeds 25 dB across the frequencies specified in the *AMA Guides*. Individuals whose threshold shift averages 25 dB or less do have some hearing loss, however, their hearing loss will not be considered “partially disabling” within the meaning of RCW 51.32.180 until it exceeds, on average, 25 dB. This will continue to be the case as long as the *AMA Guides* are the approved standard of evaluation or until
(continued...)

mysterious, vague or ambiguous about when hearing loss is first partially disabling. In Harry's case, his hearing loss was partially disabling in 1974 because the average loss over the four AMA frequencies was over 25 dB according to the valid audiogram on that date. See CP, CABR Lipscomb Tr. at 43.

3. Based on the Undisputed Facts, Judgment Affirming the 1974 Schedule Was Appropriate As a Matter of Law.

Harry argues that summary judgment was inappropriate because proof of the validity of the 1974 audiogram was not required. It was Harry who undertook the argument at the Board that the 1974 audiogram was not valid or reliable and therefore did not establish the presence of a partially disabling hearing loss as of 1974. Harry failed to produce evidence that his hearing loss was not partially or totally disabling on August 26, 1974, and therefore he failed to make a prima facie case that the Department erred in using schedule of benefits in effect in 1974 to calculate his disability award. RCW 51.32.180(b). Since he now concedes the validity of the audiogram, summary judgment was

⁵(...continued)
the Guides are modified.

In re: Carl Heidy, BIIA Dkt. No. 96 1511, 1998 WL 226281 at 11.

appropriate because there were no disputed issues of material fact.

C. HARRY'S NOVEL ARGUMENT FOR MULTIPLE SCHEDULES OF BENEFITS UNDER A SINGLE CLAIM IS WITHOUT PRECEDENT OR AUTHORITY IN WORKERS' COMPENSATION LAW.

1. Harry Cites No Authority for Having More Than One Rate of Compensation for a Single Permanent Partial Disability Award.

Harry's primary argument is that each additional increment of impairment should be assigned its own rate of compensation. Yet he cites no authority for the novel proposition that a worker with a single claim and a single disability (38.13% of the complete loss of hearing in both ears) should have multiple schedules of benefits applied to the disability award. The case he relies on, Pollard v. Weyerhaeuser, *supra*, 123 Wn. App. 506, is inapposite. Pollard worked at Weyerhaeuser from 1961 to 2000. *Id.* at 508. He filed a claim for hearing loss in 1982 and was found to have a 10% disability. *Id.* The 1979 schedule of benefits was used because this was the schedule in effect when he first sought treatment in 1982. *Id.* In 1999 Pollard filed a second hearing loss claim. *Id.* at 509. By this time his hearing disability had increased to 45.9%. *Id.* Weyerhaeuser argued the 1979 schedule should apply to the second claim also, as that was the schedule in effect when he first sought treatment for

hearing loss in 1982. Id. Holding that the second claim was the result of a different disease process resulting from a different period of exposure, the court held that a new schedule should apply to the second claim. Id. at 512. Although the Department had used the 1998 schedule to adjudicate the second claim, the court held the appropriate schedule was the 1994 schedule, which was the schedule in effect when Pollard first sought treatment for the post-1982 exposure. Id. at 513. The court clearly weighed the possibilities of different schedules, but selected only a single schedule to apply the claim before it, representing the hearing loss from 1982 to 1999. Pollard does not provide any support for Harry's multiple-schedule theory.

The facts of In re: Paul J. Brooks, BIIA Dkt. No. 02 17331, 2003 WL 22722450, are nearly identical to Pollard. Brooks filed a hearing loss claim in 1984, also against Weyerhaeuser, which was closed in 1986 with a PPD award of 5.15% based on the 1979 schedule of benefits. Id. at 2. Brooks filed a second claim in 2001 for exposure from 1988 to 2001. Id. Weyerhaeuser moved for summary judgment arguing the 1979 schedule should apply to the second claim as well, and the Board's Industrial Appeals Judge agreed. Id. at 1. The Board granted review to hold that the two disease processes were separate, and a different schedule should apply

to the second claim. Id. at 4. The Board remanded back to the hearings process to decide the appropriate schedule. Id. at 1. There is no indication that the Board expected more than one schedule to be chosen for the increase in disability that occurred between 1988 and 2001. There is no support for Harry's sliding scale scheme in Brooks.

Moreover, in an earlier case, In re Carl Heidy, the Board of Industrial Insurance Appeals addressed and rejected the very theory that Harry raises in the instant appeal. In re: Carl Heidy, BIIA Dec. 96 1511 (1988), 1998 WL 226281 at 10-14. Heidy worked at Boeing from 1951 to 1989. Id. at 14. He filed his hearing loss claim in 1995. Id. at 16. Heidy's claim was closed by the Department with a PPD award of 31.56% based on a 1993 audiogram. Id. The award was paid using the schedule of benefits in effect when he retired, which was the 1988 schedule. Id. at 18. Boeing contested the percentage awarded, arguing that some of the loss was due to aging, and the Board did reduce the percentage to 27.51% by using an audiogram closer to his retirement in 1989. Id. at 15. Boeing also argued that an earlier schedule of benefits should apply. Id. at 10. The record showed that Heidy had no fewer than 24 audiograms in the years between 1975 and 1995. Id. at 17. He first sought medical treatment in 1978. Id. Heidy argued, as Harry does here, that each

additional increment of hearing loss should be given its own schedule of benefits. Id. at 10. 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 Harry proposed to use a new schedule of benefits for each additional increment of hearing loss 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 Heidy’s claim, selecting the date of 1978, which is when Heidy first received hearing aids (treatment). Id. at 14. Boeing argued that the Board should have used the schedule in effect 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 the Board decision to superior court, and then to the court of appeals, which certified review to the Washington Supreme Court. Boeing Co. v. Heidy, supra, 147 Wn.2d at 84. Heidy did not appeal the Board decision. Id. The Washington Supreme Court’s decision in Heidy 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 that Heidy continued to sustain additional increments of loss through his retirement in 1989, the Washington Supreme Court selected the 1975 schedule as the single schedule of benefits applicable to Heidy’s claim.

2. RCW Title 51 Treats Injuries and Occupational Diseases Differently with Respect to Establishing Rates of Compensation.

Harry argues that workers who are disabled by occupational diseases should be paid in the same way as those who suffer discrete injuries. AB at 15-16. However, the fact that occupational diseases typically occur as a result of exposure over time makes the goal of equal treatment virtually impossible to implement. Thus, separate rules exist for establishing the schedule of benefits for disability payments governing injuries and occupational diseases claims.

For industrial injuries, the appropriate rate schedule is that in effect on the date of injury. RCW 51.32.080(7); Ashenbrenner v. Department of Labor and Indus., 62 Wn.2d 22, 380 P.2d 730 (1963). The schedule in effect on the date of injury is used to calculate the monetary value of the

disability even though the permanent partial disability award is not made until the condition becomes fixed and stable, often years after the injury occurred. Pybus Steel v. Department of Labor and Indus., 12 Wn. App. 436, 438, 530 P.2d 350 (1975) (condition of claimant must be "fixed" before Department can give permanent partial disability rating). See also Clauson v. Department of Labor and Indus., 130 Wn.2d 580, 583, 925 P.2d 624 (1996) (worker's claim for a 1974 injury was first closed in 1980 with a permanent partial disability award of 35 percent of the amputation value of the right leg, which was increased in 1989 to 60 percent permanent partial disability of the right leg); McIndoe., supra, 144 Wn.2d at 252.

Prior to 1988, the Legislature had not defined the method of selecting a schedule of benefits for occupational disease cases, other than to say that "every worker who suffers disability . . . from an occupational disease ... shall receive the same compensation benefits . . . as would be paid for a worker injured . . . under this title." Laws 1977, Ex. Sess., ch. 350 § 53, codified at 51.32.180 (1977). See also RCW 51.16.040. In Landon., supra, the claimant challenged the Department's use of the date of last exposure to set the schedule of benefits. 117 Wn.2d at 124. Landon had developed asbestos-related disease several years after his last

exposure to asbestos. Id. at 123. The Department used the date of last exposure to set the schedule of benefits. Id. The Court described the task as follows: “We must decide whether the date of injury is the date when a worker is exposed to the harmful materials or when a worker’s disabling disease first manifests itself.” Id. at 124. The Court concluded that the schedule of benefits is determined by the date the disease “manifests itself.” Id. at 126.⁶

In 1988, the Legislature added the current subsection (b) to RCW 51.32.180.⁷ That statute recognizes that injured workers who suffer from occupational diseases should be treated like workers who sustain injuries except with respect to how the schedule of benefits is established. RCW 51.32.180. The statute provides, in relevant part:

[e]very 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 or killed in employment under this title, except as follows: . . . (b) for claims filed

⁶Although the phrase “date of manifestation” see Landon, supra, 117 Wn.2d at 128, appears in the Board transcript and throughout Harry’s brief, the phrase is obsolete for occupational hearing loss claims filed after 1988, as discussed, *infra*.

⁷Landon, supra, 117 Wn.2d at 124 fn.1, was decided after the statute was amended, but the law specifically applied only to claims filed after 1988; Landon’s had been filed earlier.

on or after July 1, 1988, the rate of compensation 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.

RCW 51.32.180 (emphasis added). Contrary to Harry's argument, the Legislature clearly contemplated treating claimants who have occupational diseases differently than those with discrete injuries when it comes to establishing a rate of compensation, creating a specific exception within the statute.

Harry further argues that "establishing a schedule of benefits based on a date of manifestation that is before the disability fully manifests itself" is absurd, and that absurd results must be avoided when interpreting statutes. AB at 16. Since the plain language of RCW 51.32.180(b) is clear, no judicial interpretation is necessary. The Legislature has stated plainly that the schedule of benefits is determined based on the date of medical treatment or total or partial disability, whichever is first, "without regard to the date of contraction of the disease or the date of filing the claim." RCW 51.32.180(b).

3. The Statute Does Not Treat Workers Disparately or Inequitably.

Harry argues that workers should not be disadvantaged by the

timing of audiograms. AB at 17-19. He argues that a worker who files a claim in 2001 should not be paid in 1974 dollars. However, the Washington State Supreme Court in Heidy affirmed just this result. 147 Wn.2d at 78 (1999 claim paid on 1974 schedule of benefits).

Further, the court in Pollard addressed the hypothetical raised by Weyerhaeuser of two co-workers who had the same exposure over 20 years but who would receive different monetary awards depending on whether they filed one or two claims. The Pollard court was unconcerned about this problem, stating, “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 benefits levels change during intervening legislation.” Pollard, 123 Wn. App. at 513-14.

Harry’s argument that “Buse wants to penalize Mr. Harry for not filing his claim earlier, when Mr. Harry had no access to those audiograms like Buse did,” AB at 18, is simply unfounded. Buse Timber performs audiograms on a schedule that complies with WISHA’s hearing conservation regulations. WAC Ch. 296-62.⁸ WAC 296-62-09041

⁸The WISHA hearing regulations were revised in 2003 and are
(continued...)

provided employee access to, *inter alia*, all audiometric records. Buse Timber employees were informed of the results of their audiograms, as was Mr. Harry. See, e.g., CP, CABR, 2/3/03 Transcript at 21, lines 14-23 (admitting he received copies of his audiograms); CABR, Board Exhibit 4 (audiogram notification report signed by Donald Harry).⁹

4. Public Policy Compels Adherence to the Clear Statutory Language Passed by the Legislature Regarding Rates of Compensation.

Harry's argument that the Industrial Insurance Act must be liberally construed fails to acknowledge that RCW 51.32.180(b) is unambiguous with respect to the issues presented by this appeal and needs no construction. Public policy arguments cannot override a clear statutory mandate. The Washington Supreme Court in Boeing v. Heidy, supra, 147 Wn.2d at 78, has already upheld the use of a schedule of benefits set by an

⁸(...continued)
currently found in WAC Ch. 296-817. The former version was in effect at the time this claim was filed.

⁹Because Harry's knowledge of his hearing disability was not relevant to the schedule of benefits issue under Boeing v. Heidy, supra, 147 Wn.2d at 88, not much evidence was taken on the subject in the Board hearing. Harry did, however, receive other types of reports in other years, some of which were clearer about the degree of hearing loss he suffered. See Exhibit C, attached hereto as an example. Ex. C is not part of the official record in this case and is offered for illustrative purposes only. If Harry's knowledge of his loss were ever considered to be dispositive in this case, the matter should be remanded for additional evidence.

audiogram that shows partial disability under the AMA Guides years before the claim is filed. If Harry disagrees with the statute, his arguments should be addressed to the Legislature, not this Court.

Harry neglects to mention that the test in RCW 51.32.180(b) usually results in a schedule of benefits that represents a happy medium as a result of the AMA formula for hearing disability. Under the AMA formula, a worker can lose up to 25 decibels of hearing across the tested frequencies without impairment. These frequencies are the speech sensitive frequencies, but most noise-induced hearing loss occurs at higher frequencies.

Harry first became exposed to industrial noise in the Marine Corps after high school in the 1950's. CP, CABR, February 3, 2003 Tr. at 11. He was exposed to noise at prior employers and at Buse Timber beginning in 1968. Id. Certainly he was incurring hearing loss during this time, as his 1974 audiogram shows significant loss well above 25 dBs in the upper, noise-sensitive frequencies. For example, by 1974, his hearing threshold at 3,000 in the left ear was 70 dB. At 4,000 Hz (which is not included in the disability rating under the AMA Guides), it was 75 dBs, and at 6,000 Hz, his hearing threshold was at 70 dBs. Thus, he was paid for loss that probably began in 1950 at 1974 dollars. Thereafter, Harry had relatively

little absolute increases in his hearing threshold. For example, from 1950 to 1974 he lost 70 dBs at 3,000 Hz on the left. In the next 20 years from 1974 to 1994, he lost only 10 additional decibels. So, for rating purposes, small decibel increases in the hearing threshold over 25 dBs result in relatively large increases in impairment, but these small increases in the threshold would not result in impairment if there had not be prior, unrated loss. Since the schedule is not set until the disability is ratable, the Legislature's scheme in RCW 51.32.180(b) is fair.

Finally, if Harry's argument were taken to its logical endpoint, then each day of work in which claimant was exposed to injurious noise would result in increased disability. Trying to adjudicate a claim would be an administrative nightmare and defeat the purpose of providing the worker swift and certain relief. The Legislature addressed the murkiness created by the "date of manifestation" rule and has clearly and unambiguously set forth a bright-line test for setting a rate of compensation on an occupational disease claim. This result achieves "the longstanding principle of workers' compensation law which is the protection of the state workers' compensation fund. And while the purpose of workers' compensation is to provide injured workers and their families with swift and certain relief, the point is to achieve this objective

as economically as possible.” Kilpatrick v. Department of Labor and Indus., 125 Wn.2d 222, 238, 883 P.2d 1370 (1994) (Madsen, dissenting) (citations omitted). The Board’s application of the 1974 schedule as a matter of law pursuant to RCW 51.32.180(b) should be affirmed.

VI. CONCLUSION

RCW 51.32.180(b) provides that the rate of compensation for an occupational disease is established when the condition covered by the claim becomes partially disabling. Because the 1974 audiogram established a partial hearing disability, and because Harry now concedes the validity of this audiogram, the Department’s use of the 1974 audiogram to set the schedule of benefits in Harry’s claim is correct as a matter of law. This Court should affirm the superior court order on summary judgment, which affirmed the Board, which in turn affirmed the Department order on Harry’s claim.

DATED this 23rd day of June, 2005.

Respectfully submitted,

KEEHN ■ ARVIDSON, PLLC

By:



AMY L. ARVIDSON #20883

Attorneys for Respondent
Buse Timber & Sales, Inc.

FROM: STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
SELF-INSURANCE SECTION
PO BOX 44892
OLYMPIA WA 98504-4892
FAX (360) 902-6900

MAILING DATE: 11/13/01
CLAIM ID : W509427
CLAIMANT : DONALD HARRY
EMPLOYER : BUSE TIMBER & SALES
INJURY DATE : 3/05/01
SERVICE LOC : EVERETT
UBI NUMBER : 314-001-413
ACCOUNT ID : 700312-00
RISK CLASS : 1002-00

139

WORK LOCATION ADDRESS:
NO ADDRESS REPORTED

BUSE TIMBER & SALES INC
C/O JOHNSTON & CULBERSON INCOR
TWO UNION SQUARE STE 3500
601 UNION STREET
SEATTLE WA 98101

ORDER AND NOTICE (SELF INSURING EMPLOYER)

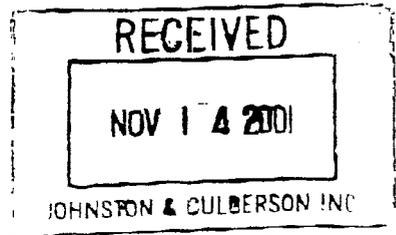
* THIS ORDER WILL BECOME FINAL 60 DAYS AFTER YOU RECEIVE IT UNLESS *
* YOU FILE A WRITTEN REQUEST FOR RECONSIDERATION OR AN APPEAL WITHIN *
* THAT TIME. YOUR REQUEST OR APPEAL SHOULD INCLUDE THE REASONS YOU *
* BELIEVE THIS DECISION IS WRONG. REQUESTS FOR RECONSIDERATION *
* MUST BE SENT TO LABOR AND INDUSTRIES, SELF-INSURANCE SECTION, *
* P O BOX 44892, OLYMPIA, WA 98504-4892. APPEALS MUST BE SENT TO *
* THE BOARD OF INDUSTRIAL INSURANCE APPEALS, 2430 CHANDLER COURT SW, *
* P O BOX 42401, OLYMPIA, WA 98504-2401. IF YOU REQUEST *
* RECONSIDERATION, WE WILL REVIEW YOUR CLAIM AND SEND YOU A NEW *
* ORDER. IF YOU STILL DISAGREE, YOU MAY THEN APPEAL TO THE BOARD. *

IT IS ORDERED THAT THE SELF-INSURED EMPLOYER ACCEPT THIS CLAIM FOR OCCUPATIONAL HEARING LOSS.

LABOR AND INDUSTRIES IS CLOSING THIS CLAIM BECAUSE THE COVERED MEDICAL CONDITION(S) IS STABLE.

THE SELF-INSURED EMPLOYER IS DIRECTED TO PAY YOU A PERMANENT PARTIAL DISABILITY AWARD OF:

01
38.13% FOR THE
COMPLETE LOSS OF HEARING IN BOTH EARS.



01 AWARD DUE \$25,673.19
TOTAL AWARD DUE \$25,673.19

THE SELF-INSURED EMPLOYER IS RESPONSIBLE FOR PURCHASE AND MAINTENANCE OF HEARING AID(S).

EXHIBIT A

MAILING DATE: 11/13/01
 CLAIM ID : W509427
 CLAIMANT : DONALD HARRY
 EMPLOYER : BUSE TIMBER & SALES
 INJURY DATE : 3/05/01
 SERVICE LOC : EVERETT
 UBI NUMBER : 314-001-413
 ACCOUNT ID : 700312-00
 RISK CLASS : 1002-00

WORK LOCATION ADDRESS:
 NO ADDRESS REPORTED

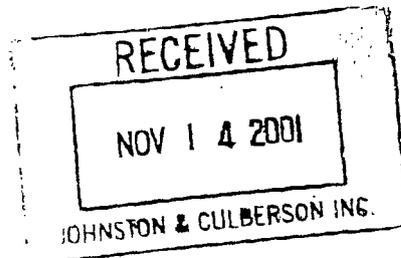
THIS DECISION WAS MADE USING THE RESULTS OF THE AUDIOGRAM DATED 08/28/01.

THIS CLAIM IS CLOSED.

SUPERVISOR OF INDUSTRIAL INSURANCE
 KAREN FIELDS
 SI CLAIMS ADJUDICATOR

ORIG: CLAIMANT: DONALD HARRY
 815 124TH ST SW #68, EVERETT WA, 98204-5670

CC: EMPLOYER: BUSE TIMBER & SALES INC
 C/O JOHNSTON & CULBERSON INCORPORA, TWO UNION SQUARE STE 3500,
 601 UNION STREET, SEATTLE WA, 98101
 ATTENDING PHYSICIAN: THE HEARING & BALANCE LAB
 # 270, 12800 BOTHELL EVERETT HWY,
 EVERETT WA, 98208-6629



XHIBIT A

JOHNSTON & CULBERSON

I N C O R P O R A T E D

Professional Workers' Compensation Services

December 11, 2001

Karen Fields, Adjudicator
Dept. of Labor and Industries
Self-Insurance Section
P. O. Box 44892
Olympia, WA 98504-4892

RE: Employee : Donald Harry
Employer : Buse Timber
D/I : 8/26/74
Claim # : W509427

Dear Ms. Fields:

Please consider this letter in protest of your Order and Notice dated 11/13/01.

Enclosed for your reference are additional records received since the claim was submitted for closure. According to the IME, the 8/26/74 audiogram showed that Mr. Harry did have high frequency hearing loss. While his right side was nonratable, his left ear had a 5.625 percent hearing loss, using the **AMA Guides to the Evaluation of Permanent Impairment**.

Accordingly, Mr. Harry's date of injury should be reflected as 8/26/74.

Sincerely,

Gail Mann
Sr. Claims Examiner

cc: Buse Timber

EXHIBIT B

© 1981-1993 Impact Health Services, Inc.

K.C., MD 64105

11/20/98

Johnston & Culberson EMPLOYEE HEARING TEST REPORT 19
 BUSE TIMBER Location: EVRT Test Date: NOVEMBER 20, 1998
 HARRY, DONALD, L. SSN: 233-56-7696 Age: 59 Dept: EVRT003

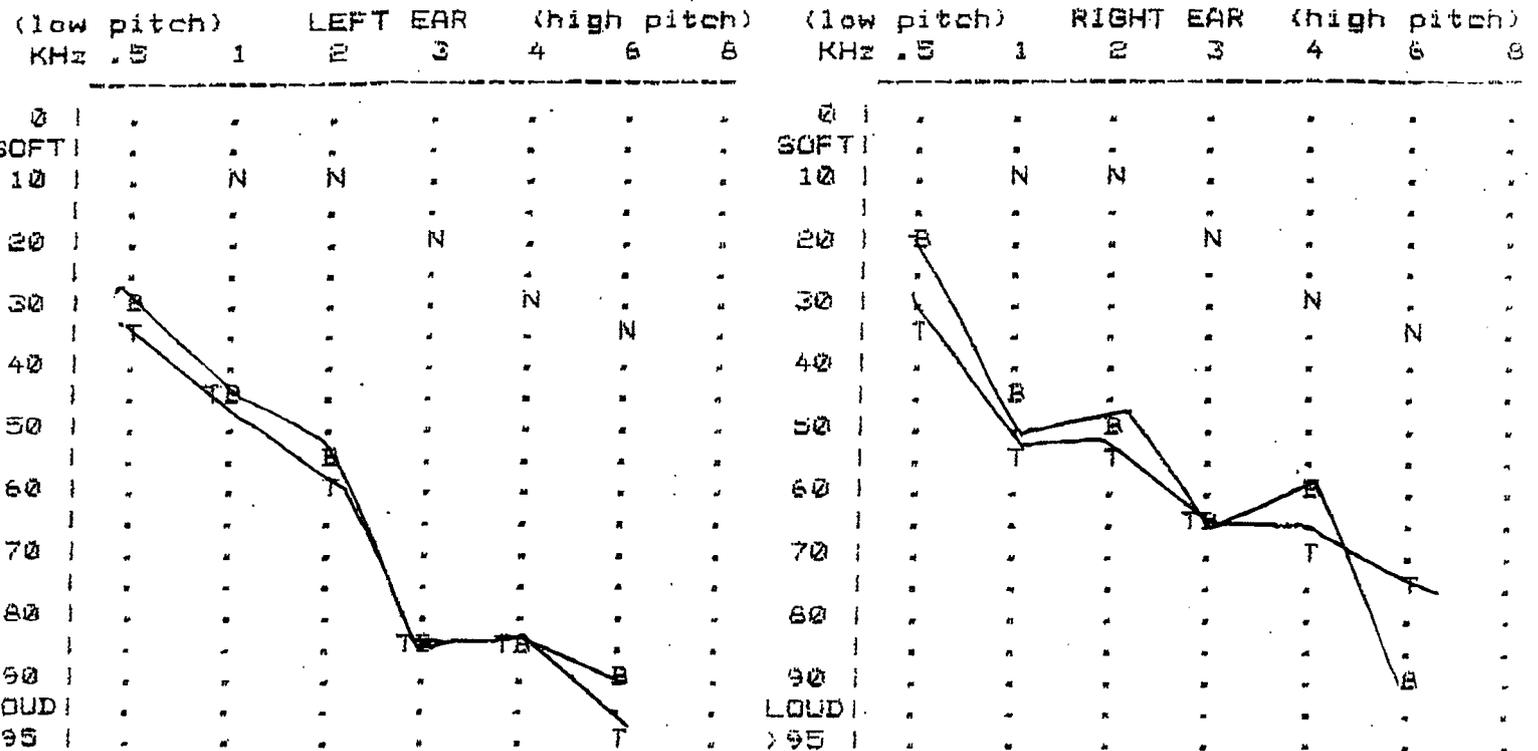
The results of looking in your ears with the otoscope (earlight) suggest your left ear shows no apparent problems and your right ear shows no apparent problems.

For high-pitched sounds such as whistles and birds singing, and some speech sounds, the hearing test results indicate that your left ear shows a serious hearing loss and your right ear shows a serious hearing loss.

For common sounds such as voices and most everyday sounds, the hearing test results indicate that your left ear shows a serious hearing loss and your right ear shows a serious hearing loss.

Remember that ears are sensitive! IT IS IMPORTANT THAT YOU ALWAYS WEAR HEARING PROTECTION WHENEVER YOU ARE EXPOSED TO LOUD NOISE, BOTH ON AND OFF THE JOB.

Graph of Hearing Test Results (Audiogram)

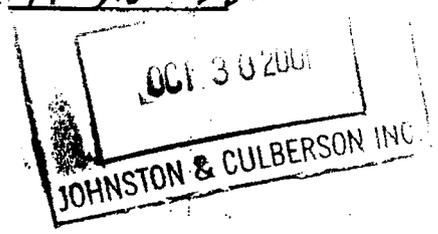


T = current test; B = baseline (first) test; N = normal (average) for your age group

Employee Signature Donald L. Harry

Date 11-20-98

EXHIBIT C



No. 55902-8-I

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

DONALD HARRY,

Appellant,

v.

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

Respondents,

CERTIFICATE OF SERVICE OF
BRIEF OF RESPONDENT

Amy L. Arvidson
Keehn ■ Arvidson, PLLC
701 Fifth Avenue
Suite 3470
Seattle, WA 98104
(206) 903-0633
WSBA # 20883

FILED
COURT OF APPEALS
DIVISION I
2005 JUN 23 PM 4:28

I certify under penalty of perjury that I mailed, postage paid (or served as noted) today June 23, 2005, the Respondent's Appellate Brief to the following:

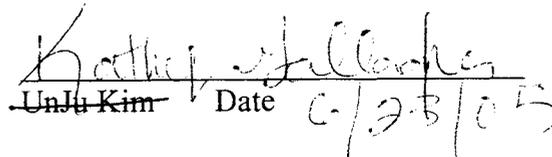
Original:

Court of Appeals - Division I *Via ABC Legal Messenger*
One Union Square
600 University Street
Seattle, WA 98101-4170

Copies:

Ms. Nicole Hanousek *Via facsimile 425.744.0464 and U.S. Mail*
William D. Hochberg Law Office
222 Third Avenue North
Edmonds, WA 98020

Ms. Anastasia Sandstrom, AAG *Via ABC Legal Messenger*
Office of the Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164


~~UnJu Kim~~ Date 6/23/05

Amy L. Arvidson
Keehn ■ Arvidson, PLLC
701 Fifth Avenue
Suite 3470
Seattle, WA 98104
(206) 903-0633
WSBA # 20883