

FILED

SEP 24 2010

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DIVISION III
STATE OF WASHINGTON
By: _____

NO. 291251

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STATE OF WASHINGTON**

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent.

APPELLANT'S BRIEF

William D. Hochberg WSBA # 13510
Amie C. Peters, WSBA #37393
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

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INTRODUCTION

Washington's Industrial Insurance Act (IIA) entitles workers to benefits if they suffer an occupational disease contracted from employment covered the IIA. RCW 51.08.140; *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 309, 849 P.2d 1209 (1993). The IIA entitles these workers to benefits even if they are also separately or concurrently exposed to hazardous substances while working in employment not covered by the IIA. As such, the Superior Court erred in interpreting RCW 51.12.102 when the court held: "The legislature in passing section 102 intended that claimants receive benefits (if eligible under the IIA) while pursuing benefits under Federal law." CP at 63 (emphasis added). The Superior Court erroneously assumes—without citing any authority—that RCW 51.12.102 requires employees to pursue recovery under the LHWCA whenever possible.

Rather than forcing claimants into federal compensation, the statute's text and legislative history permit the claimant to elect the appropriate compensation program. Additionally, federal law and the Washington Administrative Code preclude the Department from determining the responsible insurer is a federal insurer; the Department may only determine whether there exists a responsible IIA-covered insurer. In the alternative, if the Department can select the claimant's appropriate compensation program

and determine there is a responsible federal insurer, the Department must do so under the last injurious exposure rule.

ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying Mrs. Olsen's request to reverse or modify the Department of Labor and Industries' decision and order granting Mrs. Olsen temporary death benefits under the Washington Industrial Insurance Act (IIA).
2. The Superior Court erred in holding Mrs. Olsen's argument without merit regarding her claim the Department does not have subject matter jurisdiction over issues related to Mr. Olsen's asbestos exposure at jobs covered under the Longshore and Harbor Workers' Compensation Act (LHWCA).
3. The Superior Court erred in ruling *Gorman v. Garlock*, 155 Wn.2d 198, 118 P.3d 311 (2005), does not conflict with *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993).

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Does RCW 51.12.102 permit regular IIA benefits, as opposed to temporary benefits, for workers who may be entitled to benefits under the LHWCA?
2. Is *Gorman* controlling even though it did not involve a workers' compensation claimant and did not contemplate the issues presented by this claim, and when no court has abrogated *Fankhauser*?
3. Did the Department and the Superior Court exercise subject matter jurisdiction over a LHWCA claim in determining the responsible insurer and was the exercise of jurisdiction improper?
4. If the Department may exercise jurisdiction, has Mrs. Olsen demonstrated the last injurious exposure rule requires that when the last exposure occurs in an IIA-covered employment that such final exposure entitles the worker to benefits under the IIA?

STATEMENT OF THE CASE

Robert E. Olsen worked as a pipefitter in the State of Washington from 1955 to 1990. *See* CABR 22–25. This employment repeatedly exposed Mr. Olsen to asbestos. *Id.* Mr. Olsen’s asbestos exposure occurred while working for employers covered under the Washington Industrial Insurance Act (IIA) and the Longshore & Harbor Workers’ Compensation Act (LHWCA). His exposure by employers covered under the LHWCA occurred early in his career. The remainder of his work-related injurious exposure occurred exclusively under IIA-covered employment. *See* CABR 26–27.

Before Mr. Olsen died in 2008, his physician diagnosed him with an asbestos related disease, including asbestos-induced visceral pleural fibrosis, parietal pleural fibrosis, and subpleural interstitial fibrosis. CABR 28–33. Dr. Hammar, the diagnosing physician, determined the concentration of asbestos fibers in Mr. Olsen’s lungs showed his lung diseases resulted from asbestos exposure. CABR 26–27. Mr. Olsen’s prolonged asbestos exposure from employers covered under the IIA and the LHWCA proximately caused his asbestos related diseases; however, his last injurious exposure occurred under IIA-covered employment. *Id.*

On November 6, 2008, the Department issued an order granting Mrs. Olsen temporary death benefits. The order in pertinent part stated:

It has been determined that Mr. Olsen was exposed to asbestos in the shipyards, and therefore is considered a maritime worker, under maritime coverage. A claim has been filed with the Longshore and Harbor Workers Compensation Act, Claim number, 14-148086. That claim is not yet allowed and benefits have not been paid.

It has been determined that the worker was also exposed to asbestos in employment subject to coverage under Title 51 RCW.

In accordance with RCW 51.12.102, temporary benefits will be paid to the surviving spouse from the Asbestos Fund until the Federal insurer initiates payments or benefits are otherwise properly terminated under the title. CABR 34–35.

The following week, Mrs. Olsen appealed the Department's ruling to the Board of Industrial Insurance Appeals (Board) which granted the Petition for Appeal on January 5, 2009. CABR 56. The parties moved for summary judgment and the Board granted judgment for the Department. Mrs. Olsen petitioned for review but the Board denied her petition. CABR 2. Following the Board's denial, Mrs. Olsen appealed to the Yakima County Superior Court. On May 20, 2010, the Superior Court affirmed the Department's decision limiting benefits under RCW 51.12.102 to temporary benefits until the federal insurer initiates payment, at which point IIA benefits would cease. See CP 63.

STATUTORY FOUNDATION

This case concerns jurisdictional overlap between two workers' compensation acts: the Longshore and Harbor Workers' Compensation Act

(LHWCA) and the Washington Industrial Insurance Act (IIA). Congress enacted the LHWCA, 33 U.S.C. § 901 et seq., in 1927 to cover maritime workers not covered by the Jones Act. This federal coverage includes maritime workers who suffer occupational diseases resulting from at-work exposure to hazardous substances. Usually, workers in these fields have transitory employment histories, resulting in hazardous exposure at jobs covered by many workers' compensation systems. Therefore, questions commonly arise asking which workers' compensation system is responsible for the resulting occupational disease.

In this case, Mrs. Olsen answered that question by filing a claim for Washington State workers' compensation benefits. She filed under IIA because her husband's last asbestos exposure occurred while covered by the IIA. CABR 26-27. Washington's workers' compensation system is governed by Title 51 RCW and administered by the Department of Labor and Industries. Washington's first workers' compensation act passed in 1911. The Act was drafted by representatives for employers and for employees through mutual desire to end wasteful and costly litigation. *Stertz v. Industrial Ins. Com'n of Washington*, 91 Wash. 588, 590, 158 P. 256 (1916). From this "great compromise," employers gained immunity from suit and employees obtained guaranteed "sure and certain relief" via the accident fund established and paid for by employers. *Id.*; *State v. Clausen*, 65 Wash. 156, 169–170, 175, 117 P. 1101 (1911). Employees gave up their

right to substantial damages at trial in exchange for “a small sum without having to fight for it.” Stertz, 91 Wash. at 590. Ultimately, this is a case where the Department has forgotten the purpose of the “great compromise.”

STANDARD OF REVIEW

A. Summary judgment is appropriate because there is no issue of material fact.

The parties initially tried this case before Industrial Appeals Judge Molchior on cross motions for summary judgment. CABR 44. At that time, Judge Molchior determined there were no genuine issues of material fact. CABR 45. The parties, by large, stipulated to the facts. CABR 26-27. As such, no genuine issue of material fact exists because RCW 51.52.115 binds the parties to the record created before the Board of Industrial Insurance Appeals. RCW 51.52.115 (“[T]he court shall not receive evidence or testimony other than, or in addition to, that offered before the board . . .”).

B. The Standard of Review on Appeal is *de novo*.

Appellate courts review questions of law *de novo*. Statutory interpretation is a question of law; as such, it is reviewed *de novo*. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 813, 16 P.3d 583 (2001). Additionally, no genuine issues of material fact exist and the only issue for review is a question of law; accordingly, the standard of review is *de novo*.

Tallerday v. Delong, 68 Wn. App. 351, 355, 842 P.2d 1023, 1025 (1993); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 583, 925 P.2d 624 (1996). Finally, when the record consists entirely of written material, as it does here, the appellate court stands in the same position as the trial court and reviews the record de novo. *Truly v. Heuft*, 138 Wn. App. 913, 916, 158 P.3d 1276 (2007).

Since the standard of review is de novo, this Court is not bound by the Superior Court's holdings and conclusions opposing Mrs. Olsen. Because Mrs. Olsen is claiming widow's benefits under Washington's workers' compensation statute, the statutory presumption favoring the claimant still binds this Court. RCW 51.12.010; *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009). ("Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker"). As such, this Court should review the issues in this case anew and resolve all "doubts and ambiguities" in Mrs. Olsen's favor.

ARGUMENT

A. Textual Interpretation

1. **The Department inappropriately interprets RCW 51.12.102 (1) because it rearranges the statutory structure and inserts additional conditions not contemplated by the statute.**

The Department rearranged the structure of RCW 51.12.102 (1) in a way that confuses the order of operations created by the legislature for determining workers' compensation jurisdiction. RCW 51.12.102 (1) in relevant part reads:

The department *shall* furnish the benefits provided under this title to any worker or beneficiary who may have a right or claim for benefits under the maritime laws of the United States resulting from an asbestos-related disease if . . . the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title. The department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title.

RCW 51.12.102 (1) (emphasis added). As the legislature worded it, the statute says the Department must provide Title 51 benefits if the claimant shows some asbestos exposure while under an IIA-covered employer. The Department must pay those benefits even if another workers' compensation act might also entitle the claimant to benefits. After the claimant elects state benefits, the Department seeks out any liable insurer and continues benefits until the liable insurer begins payments. Within that process, there remains

the question of how the Department determined the liable insurer. The answer is the last injurious exposure rule: “[t]he liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure . . . during employment within the coverage of Title 51 RCW. . . .” WAC 296-14-350(1). As the following sections of this brief demonstrate, the Department misconstrues the entire procedure for determining liability in occupational disease cases.

The Department’s first misstep in determining liability occurred when the Department placed the final sentence of RCW 51.12.102(1) (determining the liable insurer while continuing benefits payments) at the top of the section. As the legislature worded the section, the Department furnishes benefits and then determines the liable insurer. Instead, the Department, by moving that last sentence, determines the liable insurer before any benefits have even been paid. Then, if the Department determines the claimant might have had some LHWCA-covered exposure, no matter how trivial, the Department automatically makes the benefits temporary. The Department’s current process is wrong; it ignores *Fankhauser* and in no way coincides with the process laid out by the Legislature in RCW 51.12.102(1).

The Department’s interpretation is incorrect for two textual reasons: (1) the sentences contained within RCW 51.12.102(1) are not interchangeable, and (2) the Department cannot shoehorn extra words into

the statute. The section cannot be rearranged because each sentence is anchored into place, creating a multi-step process for determining the liable insurer. Looking to the last sentence of RCW 51.12.102(1), the phrase “shall continue to pay benefits” is locked in place by the word “continue”. This sentence says the Department continues to pay benefits while determining the liable insurer and waiting for that insurer to initiate payments. In this case, it is undisputed the last insurer is the State Fund because Mr. Olsen’s last insured employment occurred with a State Fund employer. The legislature’s use of “continue” requires the Department pay full regular benefits before any determination as to the liable insurer—contrary to the Department’s current procedure.

Instead of following the legislatively enacted process, the Department began adjudicating this claim by choosing a liable insurer *before* paying any benefits. CABR 34. By doing so, the Department rendered the word “continue” superfluous—the Department cannot continue paying benefits while determining the liable insurer when it starts by determining the liable insurer. In Washington State, “[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Stone v. Chelan County Sheriff’s Dep’t*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)). Accordingly, the Department should have begun adjudicating this claim by paying Mrs.

Olsen normal widow's benefits and then determined the liable insurer. Because the Department's interpretation renders superfluous the term "continue," this Court cannot sustain the interpretation proffered at the Superior Court.

Aside from adding the word "temporary" before "benefits," the Department also inserted the word "federal" into the statute. However, inserting this word renders later provisions of RCW 51.12.102 superfluous. Such interpretation violates our canon requiring reading acts as a whole and giving effect to all language used. *See State v. S.P.*, 110 Wn.2d 886, 890, 756 P.2d 1315 (1988). RCW 51.12.102(3) tells the Department what to do in occupational disease claims if the responsible insurer is a self-insurer or the state fund. RCW 51.12.102(3). However, if the statutes automatically makes LHWCA-covered employers the liable insurer in every case, then the legislature had no reason whatsoever to include § 102(3) in RCW 51.12.102. Therefore, to keep § 102(3) operative, the Department cannot be allowed to render liable every LHWCA-covered employer.

2. Because *Gorman* did not consider eligibility for Washington workers' compensation benefits, the Department wrongly relies on it for determining the liable insurer.

Aside from rendering provisions of RCW 51.12.102 inoperative, the Department's method for determining the liable insurer fails for other reasons. The case law cited by the Department to support its method for assigning liability in occupational disease cases is off point. Specifically, the

Department relies on *Gorman v. Garlock*, 155 Wn.2d 198, 118 P.3d 311 (2005), for interpreting RCW 51.12.102. CABR 104–6. However, *Gorman* is not controlling: that case only concerned an employee’s attempt to bring civil suit in state court against longshore-covered employers for intentional asbestos exposure. *Gorman*, 155 Wn.2d at 206–208. To contrast, this case concerns a claim for workers’ compensation benefits—not a tort lawsuit. At no point in *Gorman* did either plaintiff make a claim for state or federal workers’ compensation benefits; indeed, the plaintiffs tried to combine federally-covered employers under Washington State law. *Id.* To further contrast, Mrs. Olsen is making a claim for state workers’ compensation benefits which, if allowed, would abrogate all liability for any federal longshore employer—rather than wrongfully attempting to bring an employer covered under federal law within the jurisdiction of state tort law.

Although *Gorman* discussed RCW 51.12.102(1), the discussion is dicta because the Supreme Court did not have before it the foregoing issue of a claim for state workers’ compensation benefits. As discussed in the section above, RCW 51.12.102(1) deals exclusively with two items: (1) claims for Title 51 workers’ compensation benefits, and (2) the process for determining whether claims should be allowed when the claimant has exposure from both IIA-covered and non-covered employment. Because the case did not concern workers’ compensation, the *Gorman* court did not consider the ramifications their decision would have on future workers’ compensation

claimants. Therefore, *Gorman*'s reach should be limited and the discussion regarding RCW 51.12.102 should be considered inapplicable because the Supreme Court has yet to properly weigh and consider the issue presented here of a claimant seeking benefits under the IIA.

3. The *Fankhauser* analysis of the last injurious exposure rule conflicts with *Gorman*, but still controls because the *Gorman* court neither modified nor abrogated *Fankhauser*

Fankhauser has already decided this case. Even the Superior Court acknowledged *Fankhauser* would be definitive but for the ruling in *Gorman*. CP 63. *Fankhauser* applies because it involved two occupational disease claimants who, similar to Mr. Olsen, had asbestos exposure at employments covered by the IIA and employments not covered by the IIA. *Fankhauser*, 121 Wn.2d at 306–307. In *Fankhauser*, the Department used *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 130, 814 P.2d 629 (1991), to deny workers' compensation benefits because *Fankhauser* and Rudolph's last injurious exposure did not occur at IIA-covered employment. *Fankhauser*, 121 Wn.2d at 312. However, the Supreme Court held: "Weyerhaeuser does not address how to assign liability when one of the employers is not covered by the state workers' compensation system." *Id.* at 313. The Court then adopted the Ninth Circuit's interpretation of the last injurious exposure rule and granted Mr. *Fankhauser* and Mr. Rudolph Title 51 benefits. *Id.* (adopting *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984)). *Fankhauser*, following *Todd*, guarantees Title

51 benefits to occupational disease claimants whose work history shows both IIA-covered and non-covered employment, so long as some exposure occurred at IIA-covered employment. *Id.* at 315.

This case falls within the *Fankhauser* rule, entitling Mrs. Olsen to widow's benefits under Title 51 RCW. The Superior Court erred when it found *Fankhauser* and *Gorman* not in conflict and decided *Gorman* overrode *Fankhauser*. CP at 68. However, the court failed to provide a basis for its assertion. Examining the briefs and oral arguments from *Gorman*, it becomes clear the parties did not brief the Supreme Court on the issues present in both *Fankhauser* and the present case. The parties spent the entire oral argument in *Gorman* discussing provisions of the LHWCA and whether *Gorman* could sue federally-covered employers under state tort law. *See generally*, Oral Argument, *Gorman v. Garlock*, 155 Wn.2d 198 (No. 75606-6) available at <http://www.tvw.org/media/mediaplayer.cfm?evid=2005050032B&TYPE=V&CFID=780633&CFTOKEN=28203811&bhcp=1>. The same applies to the five briefs submitted to the Supreme Court. *See generally* Appellants' Br., *Gorman v. Garlock* (No. 75606-6); Br. of Respondent Lockheed Shipbuilding Co, *Gorman v. Garlock*; Appellants' Reply Br., *Gorman v. Garlock*; Petitioner's Supplemental Br., *Gorman v. Garlock*; Respondents' Supplemental Br., *Gorman v. Garlock*.

If the *Gorman* Court truly had been briefed on determining the responsible insurer, the parties could not have avoided discussing

Fankhauser and its treatment of the last injurious exposure rule. That is exactly what happened in *Gorman*: the parties did not mention *Fankhauser* once in the oral argument and only in passing in the briefs. Even then, those limited references fail to discuss the *Fankhauser* ruling on last responsible employer and only mentions the case as good background reading on the last injurious exposure rule. Br. of Resp. Lockheed Shipbuilding Co at 6, *Gorman*; *Gorman*, Respondents' Supp. Br. at 7, *Gorman*. As such, the Supreme Court did not foresee *Gorman* having any bearing on determining eligibility for workers' compensation benefits and its reach should be appropriately limited. Because the parties in *Gorman* were not concerned with the procedures for determining the responsible insurer and did not brief the Court on that topic, the Superior Court erred in finding *Gorman* controlling when determining the liable insurer.

Additionally, *Gorman* could not have impacted any part of *Fankhauser* due to the Supreme Court's holdings on *stare decisis*. In deciding *Gorman*, the Supreme Court recognized the Ninth Circuit's holding; making the last LHWCA-covered employer responsible for all benefits regardless of subsequent non-covered exposure in *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1292 (9th Cir. 1983). *Gorman*, 155 Wn.2d at 217. However, the *Gorman* court failed to recognize Washington State had already adopted this same rule for Washington State workers' compensation in *Fankhauser*. *Fankhauser*, 121 Wn.2d at 314. In so doing,

the *Gorman* decision ignored *stare decisis*. The doctrine of *stare decisis* “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 139, 147, 94 P.3d 930 (2004), quoting *In re: Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Where the Court expresses a clear rule of law, like in *Fankhauser*, the court should not overrule it *sub silentio*. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). The Supreme Court in *Gorman* made no such finding overruling *Fankhauser*; therefore, it would be incongruous for *Gorman* to bind injured workers who have relied on the *Fankhauser* line of cases in filing for benefits under the IIA.

4. If *Gorman* applies, it must be overturned or modified due to its resulting conflict with RCW 51.12.010 and Supreme Court precedent.

If *Gorman* applies, the holding must be abandoned or modified because it runs counter to the Court’s long-standing precedents liberally construing Title 51 in favor of the injured worker. The Act’s purpose is to reduce “to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. Furthermore, courts liberally construed the Act to achieve this purpose favoring workers. *Id.*; *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001) (“[W]here reasonable minds can differ over what Title 51 RCW provisions mean . . . , the benefit of the doubt belongs to the injured worker.”). The Court reaffirmed this purpose as recently as last year

in *Harry v. Buse Timber & Sales, Inc.* In *Harry*, the Supreme Court distinguished its precedent set by *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991), regarding the schedule of benefits for claimants with occupational hearing loss. *Harry*, 166 Wn.2d at 12. Even though the result in *Harry* would become cumbersome and expensive for the Department, the Court distinguished *Landon* because applying it to *Harry* would have resulted in an interpretation of Title 51 limiting the benefits an injured worker could receive. *Id.* Because RCW 51.12.010 requires interpreting Title 51 in favor of the claimant, Mrs. Olsen asks this court to follow the Supreme Court's lead in *Harry* and accordingly limit *Gorman's* unforeseen consequences.

The petitioners in *Gorman* argued for liberally construing RCW 51.12.102 as abrogating the exclusionary language in RCW 51.12.100; however, as the Court noted, such interpretation would violate the canon against superfluity. *Gorman*, 155 Wn.2d at 211. Instead, the *Gorman* court went with a more limited interpretation. But, that interpretation works little better than the one proffered by petitioners *Gorman* and *Helton* because the Court's holding needlessly limited injured workers' relief. Such limitation is unnecessary since a middle ground exists which provides better relief to injured workers without going so far as to violate the canon against superfluity.

That middle ground relies on the following two items, which *Gorman* correctly acknowledged when beginning statutory analysis:

- 1) the purpose of RCW 51.12.100's exclusionary language was "to prevent double recovery by [such a] worker," *Gorman*, 155 Wn.2d at 208, quoting *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 938, 15 P.3d 188; and
- 2) "[t]o resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute." *Gorman*, 155 Wn.2d at 210–211, quoting *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000).

Despite these two acknowledgments, the *Gorman* Court went on to overlook them in resolving RCW 51.12.100 with RCW 51.12.102. Since RCW 51.12.100's sole purpose is to prevent double recovery, the Court should have permitted recovery under RCW 51.12.102 up to the point of double recovery which would violate RCW 51.12.100. This ensures both statutes remain in effect, avoiding superfluity. Accordingly, this court should adopt the foregoing resolution of § 100 with § 102 for the following two reasons: (1) this interpretation better complies with RCW 51.12.010's required construction favoring claimants and (2) it better favors the more recently enacted statute, as required by *Tunstall*. This interpretation entitles Mrs. Olsen to IIA benefits up to the point that she begins receiving longshore benefits, at which time RCW 51.12.100 would cut off state benefits to prevent double recovery.

B. Legislative Intent

- 1. The legislative history of RCW 51.12.102 shows the legislature contemplated neither temporary benefits, nor forcing claimants to pursue federal compensation; therefore, the Department should not be permitted to restrict the statute beyond the legislature's intended scope.**

The Superior Court held: “[t]he legislature in passing section 102 intended that claimants receive benefits (if eligible under the IIA) *while pursuing benefits under Federal law.*” CP at 69 (emphasis added). However, the court fails to cite where in the statute’s history the legislature asserted such intent. The legislature in drafting RCW 51.12.102 nowhere included the term “temporary” and nowhere included a requirement for claimants to pursue federal benefits. As such, the Department should not imply such intent where none exists.

If the legislature had intended or even contemplated such requirements, a record would exist of such debate in the legislative history. However, when the legislature considered the bill there was no discussion whatsoever that benefits under the bill would, should, or could be anything less than regular. The only disagreement over the bill concerned whether benefits should be paid out of the medical aid fund or state fund. House Bill Report on SHB 1592 at 3 (February 8, 1988).

Like the legislature, the Department at the time of passage also had not contemplated forced federal compensation or limiting benefits in situations like Mrs. Olsen’s. In 1988, after the legislature enacted SHB

1592, the Department would have allowed Mrs. Olsen's claim because Mr. Olsen's last injurious exposure occurred under an IIA-insured employer. *See Asbestos Related Disease: Report to House Commerce and Labor Committee*, Dep't of Labor and Indus. at 2 (September 12, 1987). On page two of that report, the Department plainly states the last injurious exposure rule governs, even if evidence exists of federal longshore exposure. *Id.* ("When there are multiple employers including Self-Insured and/or Longshore and Harbor Workers coverage a determination must be made relative to the last injurious exposure.").

In 1993, the Department clarified their procedure in an updated report to the legislature regarding RCW 51.12.102. In that follow-up report, the Department laid out the procedure they had used since § 102's enactment to determine jurisdiction:

If the last injurious exposure to asbestos fibers took place under employment covered by Title 51 RCW . . . the claim is accepted under the State Fund or by a Self Insured employer. If the last exposure . . . was with an employer covered under a federal program and there was prior Title 51 exposure . . . the claim is accepted for interim benefits under the Asbestos Fund.

Asbestos-Related Disease: A Report to the Commerce and Labor Committee, Dep't of Labor and Indus. at 4 (1993). Nowhere in that procedure does the Department automatically preclude Title 51 benefits when evidence exists of federally-covered exposure. Instead, the Department only precludes Title 51 benefits if the last exposure in time

occurred at federally-covered employment. By the Department's own procedure, Mrs. Olsen's claim should have been allowed without question because Mr. Olsen's last injurious exposure occurred at IIA-covered employment. CABR 26-27. Because the legislature and the Department nowhere contemplated temporary benefits or forced federal compensation, the Department should not be allowed to now read those provisions into the statute.

Case law also bars the Department and Superior Court from reading those extra provisions into RCW 51.12.102. The Washington State Supreme Court has long held courts may not insert extra words into statutes, despite good cause to do so. *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981) ("This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission."); *State v. Taylor*, 97 Wn.2d 724, 730, 649 P.2d 633 (1982); *McKay v. Dep't of Labor and Indus.*, 180 Wn.2d 191, 194, 39 P.2d 997 (1934). Accordingly, the Superior Court erred in permitting the Department to interpret the benefits paid under RCW 51.12.102 as temporary and erred again when permitting the Department to make a default determination as to liable insurer without regard to WAC 296-14-350.

C. Federal Jurisdiction

- 1. Subject matter jurisdiction prohibits the determination required by the Department's policy; thus the Department lacks a basis for rendering Mrs. Olsen's benefits temporary.**

Mrs. Olsen disputes the Department's and the Industrial Appeals Judge's jurisdiction over part of the subject matter of this appeal. The Industrial Appeals Judge has jurisdiction over Mr. Olsen's exposure to asbestos in employment covered under the IIA. RCW 51.32.010 and RCW 51.04.010. The Judge does not have jurisdiction over Mr. Olsen's exposure to asbestos in employment covered by the federal Longshore & Harbor Workers' Compensation Act, and therefore can make no ruling based on Mr. Olsen's alleged exposure to asbestos under the LHWCA. U.S. Const. art. III, § 2; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 903–904 (1984). For the Department to determine whether Mrs. Olsen has a right under the LHWCA and decide the liable insurer is longshore-covered, the Department would have to make complex decisions under §§ 903–904 of the LHWCA—effectively usurping the statutory jurisdiction and authority of the U.S. Department of Labor.

However, the Washington State Department of Labor and Industry's jurisdictional authority is confined to the four corners of Washington's Industrial Insurance Act. In no uncertain terms, the IIA limits the Department to determining the responsible IIA-covered insurer. WAC 296-14-350. The Department enacted this WAC in 1988, shortly after RCW

51.12.102 took effect, in order to implement that statute. Indeed, this regulation clearly determines the only time a Title 51 insurer is not responsible is when a “worker has a claim . . . that is *allowed* for benefits under the maritime laws” WAC 296-14-350(1) (emphasis added). By making the Department wait to dispel IIA liability until after the U.S. Department of Labor’s Office of Workers’ Compensation Programs allows a LHWCA claim, the WAC forbids the Department from making a final determination as to the liable insurer; thus, eliminating the Department’s basis for limiting benefits under RCW 51.12.102. If the Department was not prohibited from exercising federal jurisdiction, the WAC would not limit the Department to finding the responsible Title 51 insurer—the Department would instead be able to make a determination as to the liable federal insurer. Additionally, the WAC would not make the Department wait until the OWCP allows a claim to know the liable insurer is a federal insurer.

Because the Department cannot exercise federal jurisdiction to find a LHWCA-covered insurer liable until after the OWCP allows a federal benefits claim, the Department has no basis for granting only temporary benefits. Therefore, the Department should grant Mrs. Olsen regular Title 51 benefits until the OWCP makes a final determination on her claim. If such a determination is made, the Department can assert its right to reimbursement under RCW 51.12.102 (4). Thus, this matter should be remanded to allow

Mrs. Olsen widow's benefits as specifically allowed under WAC 296-14-350.

D. Application of Last injurious exposure Rule

- 1. The last injurious exposure rule should apply to all employments, regardless of IIA-covered status due to Washington's long-standing policy of using the rule to allow benefits.**

In the alternative, if the Department can determine the liable insurer, regardless of federal jurisdiction, it must do so under the last injurious exposure rule. As discussed above, *Gorman* does not provide a proper basis for determining the liable insurer under RCW 51.12.102, but WAC 296-14-350 does require the Department to use the last injurious exposure rule in making its decision. *Supra* 13–18. The last injurious exposure rule applies to all exposure regardless of other coverage, so long as the Department uses the rule to aid the claimant. *See Fankhauser*, 121 Wn.2d at 316–317 (holding WAC 296-14-350 may not be used to deny IIA benefits). This interpretation is also supported by the Board of Industrial Insurance Appeals.

In *In re John L. Robinson*, the Board held “[t]he ‘last injurious exposure’ rule is not to be used as a basis to deny benefits when exposure has occurred under different compensation systems such as in the present case involving the State of Washington and the Federal Longshore and Harbor Workers' Compensation Act.” *In re John L. Robinson*, BIIA Dec.,

91 0741 at 2 (1992) (significant decision), accord, *Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993).

This point is further exemplified by *In re John R. Sikes* which held, because Mr. Sikes's last injurious noise exposure occurred while employed by NOAA and he already had an allowed federal claim, Washington benefits would be inappropriate. *In re John R. Sikes*, BIIA Dec., 02 13513 (2004). Because Mr. Sikes' employment of last injurious exposure already allowed his claim, the Board, using the last injurious exposure rule, rightfully dismissed his claim for IIA benefits to prevent double recovery. In *Sikes*, like *Robinson*, the claimant's last injurious noise exposure occurred while under LHWCA-covered employment. However, in *Robinson*, the claimant elected to receive compensation under the IIA, and because he otherwise qualified, WAC 296-14-350(1) entitled him to IIA benefits. *Robinson* at 2.

The Board reaffirmed the rule's purpose of including and not denying workers in *In re Cindy A. Meisner*, BIIA Dec. 95 6101 (1997). In *Meisner*, a state fund employer attempted to use the last injurious exposure rule to deny liability because there was a subsequent state fund employer where injurious exposure occurred. *Id.* at 4. Keeping with *Fankhauser*, the Board held the last injurious exposure rule cannot be used to deny IIA benefits and only applies in cases where there are multiple insurers—as opposed to multiple employers covered under one insurer. *Id.*; see also fn. 1 (“[T]he last injurious exposure rule does not operate to deny [state] coverage

as between insurance ‘systems,’ i.e., between Washington’s Industrial Insurance Act and another state or federal system of industrial insurance.”).

Additionally, where the last injurious exposure rule only serves to hinder the claimant’s rights, the Board excepts the situation from the rule. The Board created an exception to the last injurious exposure rule in *In re Amy J. Dunnell* because the Department could not administer the rule in a way benefitting the claimant where her last injurious exposure came from multiple concurrent employers. *In re Amy J. Dunnell*, BIIA Dec., 03 18764 at 4 (2005). The last injurious exposure rule as applied in *Robinson, Sikes*, and *Dunnell* ensures coverage to claimants regardless of other coverage where the rule serves to protect injured workers’ rights. Keeping with the required construction of RCW 51.12.010, mandating interpretation that favors injured workers, the Department cannot ignore these Board decisions.

As outlined by *Robinson, Sikes*, and *Dunnell*, the last injurious exposure rule applies only when it serves to allow compensation to claimants. The rule’s purpose is for claimants to be able to pick their compensation scheme. As such, the Department should grant Mrs. Olsen regular Title 51 benefits in accordance with the last injurious exposure rule.

ATTORNEY FEES AND COSTS

Mrs. Olsen requests attorney fees and costs pursuant to RAP 18.1 and RCW 51.52.130:

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

RCW 51.52.130. Further, an award for attorney fees under RCW 51.52.130 shall be calculated without regard to the worker's overall recovery on appeal, and shall not exclude fees for work done on unsuccessful claims. *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 670, 989 P.2d 1111 (1999).

Mrs. Olsen respectfully requests, should this Court reverse or modify the order of the previous court, an award of attorney fees and costs incurred both before this Court, and before the Superior Court, be specifically ordered.

CONCLUSION

Reasonable minds may differ over the interpretation of Title 51. However, in keeping with the Act's fundamental purpose, the benefit of the doubt belongs to the injured worker. *Cockle* 142 Wn.2d at 811; *Harry*, 166 Wn.2d at 8 ("Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker . . ."). Here, the benefit of any doubt or ambiguity regarding the interpretation of RCW 51.12.102 is construed in favor of Mrs. Olsen.

As such, RCW 51.12.102 does not require workers exposed to asbestos under both state-covered and longshore-covered employment to

elect benefits under the Longshore & Harbor Workers' Compensation Act. Nothing in RCW 51.12.102 or its legislative history permits the Department to limit benefits in occupational disease claims to temporary benefits. Additionally, WAC 296-14-350 supports Mrs. Olsen's interpretation of RCW 51.12.102, preventing the Department from exercising federal jurisdiction over her claim. Therefore, the Department impermissibly found a federal insurer liable and improperly limited Mrs. Olsen's benefits. In the alternative, if the Department can determine the liable insurer is a federal insurer, before the OWCP allows a claim, the Department should abide by the last injurious exposure rule and grant Mrs. Olsen's claim for Title 51 benefits.

This Court should reverse the Superior Court's decision, award Mrs. Olsen costs and attorney's fees, and remand the case with instructions to grant her benefits under the Washington Industrial Insurance Act.

RESPECTFULLY SUBMITTED this 22nd day of September, 2010.

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APPENDIX

RCW 51.12.100

Washington Statutes

Title 51. Industrial insurance

Chapter 51.12. Employments and occupations covered

Current through 2010SP1 Legislation

§ 51.12.100. Maritime occupations - Segregation of payrolls - Common enterprise - Geoduck harvesting

(1) Except as otherwise provided in this section, the provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers.

(2) If an accurate segregation of payrolls of workers for whom such a right or obligation exists under the maritime laws cannot be made by the employer, the director is hereby authorized and directed to fix from time to time a basis for the approximate segregation of the payrolls of employees to cover the part of their work for which no right or obligation exists under the maritime laws for injuries or death occurring in such work, and the employer, if not a self-insurer, shall pay premiums on that basis for the time such workers are engaged in their work.

(3) Where two or more employers are simultaneously engaged in a common enterprise at one and the same site or place in maritime occupations under circumstances in which no right or obligation exists under the maritime laws for personal injuries or death of such workers, such site or place shall be deemed for the purposes of this title to be the common plant of such employers.

(4) In the event payments are made both under this title and under the maritime laws or federal employees' compensation act, such benefits paid under this title shall be repaid by the worker or beneficiary. For any claims made under the Jones Act, the employer is deemed a third party, and the injured worker's cause of action is subject to RCW 51.24.030 through 51.24.120.

(5) Commercial divers harvesting geoduck clams under an agreement made pursuant to RCW 79.135.210 and the employers of such divers shall be subject to the provisions of this title whether or not such work is performed from a vessel.

History. 2008 c 70 § 1; 2007 c 324 § 1; 1991 c 88 § 3; 1988 c 271 § 2; 1977 ex.s. c 350 § 21; 1975 1st ex.s. c 224 § 3; 1972 ex.s. c 43 § 11; 1961 c 23 § 51.12.100. Prior: 1931 c 79 § 1; 1925 ex.s. c 111 § 1; RRS § 7693a.

RCW 51.12.102

Washington Statutes

Title 51, Industrial Insurance

Chapter 51.12, Employment and occupational covered

Chapter/Revision 2010SP1 Legislation

§ 51.12.102, Maritime workers - Asbestos-related disease

- (1) The department shall furnish the benefits provided under this title to any worker or beneficiary who may have a right or claim for benefits under the maritime laws of the United States resulting from an asbestos-related disease if 3) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and (2) the worker's employment history has 1) prima facie indicia of duration exposure to asbestos fibers while employed in the state of Washington in employment covered under this title. The department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise judicially determined under this title.
- (2) The benefits authorized under subsection (1) of this section shall be paid from the medical aid fund with the self-insurers and the state fund each paying a pro rata share, based on number of worker hours, of the costs necessary to fund the payments. For the purposes of this subsection only, the employees of self-insured employers shall pay an amount equal to one-half of the share charged to the self-insured employer.
- (3) If the Department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a self-insurer or the state fund, then the self-insurer or state fund shall reimburse the medical aid fund for all benefits paid and costs incurred by the fund.
- (4) If the department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a federal program other than the federal social security, old age survivors, and disability insurance act, 42 U.S.C. or an insurer under the exclusive laws of the United States.
- (5) The department shall pursue the federal program insurer on behalf of the worker or beneficiary to recover from the federal program insurer the benefits due the worker or beneficiary and on its own behalf to recover the benefits previously paid to the worker or beneficiary and costs incurred.
- (6) For the purpose of pursuing recovery under this

subsection, the department shall be subrogated to all of the rights of the worker or beneficiary, including compensation under subsection (1) of this section and

(c) The department shall not pursue the worker or beneficiary for the recovery of benefits paid under subsection (1) of this section unless the worker or beneficiary receives recovery from the federal program insurer, in addition to recovering benefits authorized under this section. The director may exercise his or her discretion to waive, in whole or in part, the recovery of any such benefits where the recovery would be inequitable and good conscience

(d) Actions pursued against federal program insurers determined by the department to be liable for benefits under this section may be prosecuted by special assistant attorneys general. The attorney general shall select special assistant attorneys general from a list compiled by the department and the Washington state bar association. The attorney general, in conjunction with the department and the Washington state bar association, shall adopt rules and regulations outlining the criteria and the procedure by which private attorneys may have their names placed on the list of attorneys available for appointment as special assistant attorneys general to litigate actions under this subsection. Attorneys' fees and costs shall be paid in conformity with applicable federal and state law. Any legal costs remaining as an obligation of the department shall be paid from the medical aid fund.

(5) The provisions of subsection (1) of this section shall not apply if the worker or beneficiary refuses, for whatever reason, to assist the department in making a proper determination of coverage. If a worker or beneficiary refuses to cooperate with the department, or if a worker refuses to submit to medical examination or obstructs or fails to cooperate with the examination, or if the worker or beneficiary fails to cooperate with the department in pursuing benefits from the federal program insurer, the department shall reject the application for benefits. No instruction occurred under this section is subject to release by subpoena or other legal process.

(6) The amount of any third party recovery by the worker or beneficiary shall be subject to a lien by the department to the full extent that the medical aid fund has not been otherwise reimbursed by another insurer. Reimbursement shall be made immediately to the medical aid fund upon recovery from the third party settl. If the department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a federal program insurer, the department shall not participate in the costs or attorney's fees incurred in bringing the third party suit.

RCW 51.12.010

Washington Statutes

Title 51. Industrial insurance

Chapter 51.12. Employments and occupations covered

Current through 2010SP1 Legislation

§ 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.

CERTIFICATE OF MAILING

Elizabeth A. Olsen v. Dep't of Labor & Indus.

Cause No. 09-2-04095-7

DLI Claim No. AD-66348

BIIA Docket No. 08-20855

Court of Appeals No. 291251

ORIGINAL PETITIONER'S BRIEF TO:

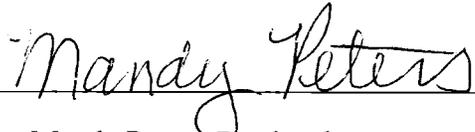
Renee S. Townsley
Clerk of the Court
Washington State Court of Appeals, Division III
500 N Cedar St.
Spokane, WA 99201-1905

COPY OF PETITIONER'S BRIEF TO:

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I certify that a copy of the document(s) attached hereto was mailed,
to the parties referenced above this 22nd day of September, 2010.

BY: 
Mandy Peters, Paralegal