

FILED
NOV 15 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 29125-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT M. MCKENNA
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

FILED
NOV 15 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 29125-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT M. MCKENNA
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER STATEMENT OF THE ISSUE1

III. STATEMENT OF THE CASE2

IV. SUMMARY OF THE ARGUMENT.....5

V. STANDARD OF REVIEW AND GUIDES TO STATUTORY CONSTRUCTION9

VI. ARGUMENT10

 A. The Department Properly Granted Olsen Temporary Benefits And Determined That The Liable Insurer Was Subject To The LHWCA10

 B. *Gorman* Held That RCW 51.12.102 Authorizes The Payment Of Only Temporary, Provisional Benefits Under The WIIA15

 C. Even Assuming That *Gorman*'s Discussion Of RCW 51.12.102 And RCW 51.12.100 Was Dicta, Its Interpretation Of The Interplay Of Those Statutes Is Persuasive And Should Be Followed By This Court.....25

 D. *Gorman* Held That A Worker Who Had Harmful Exposure To Asbestos In The Course Of Both Maritime And Non-Maritime Employment Is Not Covered By The WIIA Even If The Worker's Last Exposure to Asbestos Occurred During Non-Maritime Employment In The State Of Washington.....31

 E. The Department Has Jurisdiction To Decide Whether A Claimant's "Liable Insurer" Is Subject To The LHWCA For The Limited Purpose Of Deciding Whether The Claimant Is Entitled to WIIA Benefits.....41

VII. CONCLUSION50

TABLE OF AUTHORITIES

Cases

<i>Abraham v. Dep't of Labor & Indus.</i> , 178 Wash. 160, 34 P.2d 457 (1934)	42
<i>Aviation West Corp. v. Dep't of Labor & Indus.</i> , 138 Wn.2d 413, 980 P.2d 701 (1999).....	24
<i>Bird-Johnson v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	10
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	9, 40
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	10
<i>Ghaly v. INS</i> , 48 F.3d 1426, 1438 (7 th Cir. 1995)	13
<i>Gorman v. Garlock</i> , 155 Wn.2d 198, 118 P.3d 311 (2005).....	passim
<i>In re David Buren</i> , No. 65,127 (Wash. Bd. of Indus. Ins. Appeals May 31, 1984) WL 547151 (1984).....	44
<i>In re John L. Robinson</i> , No. 91 0741 (Wash. Bd. of Indus. Ins. Appeals Sept. 29, 1992) WL 333852 (1992).....	41
<i>In Re Rights to Waters of Stranger Creek</i> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	35, 36
<i>In re Rosier</i> , 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).....	50
<i>Johnson v. Morris</i> , 87 Wn.2d 922, 927, 557 P.2d 1299 (1976).....	16

<i>Lindquist v. Dep't of Labor & Indus.</i> , 36 Wn. App. 646, 677 P.2d 1134 (1984).....	42, 43, 45
<i>Littlejohn Constr. Co. v. Dep't of Labor & Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	10
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	42, 47, 49
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 139, 94 P.3d 930 (2004).....	35, 36
<i>Senate Republican Comm. v. Pub. Disclosure Comm'n</i> , 133 Wn.2d 229, 943 P.2d 1358 (1997).....	10, 24
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	16, 20, 41
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	50
<i>State v. McDonald</i> , 40 Wn. App. 743, n. 2, 700 P.2d 327 (1985).....	13
<i>State v. Potter</i> , 58 Wn. App. 134, 842 P.2d 481 (1992).....	34, 35
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	35, 36
<i>Sun Ship v. Pennsylvania</i> , 447 U.S. 715, 100 S. Ct. 2432, 65 L.Ed.2d 458 (1980).....	44
<i>Todd Shipyards v. Black</i> , 717 F.2d 1280 (9 th Cir. 1983)	31, 32
<i>Yakavonis v. Tilton</i> , 93 Wn. App. 304, 968 P.2d 908 (1998).....	36

Statutes

RCW 51.12.010	10
RCW 51.12.020(5).....	37
RCW 51.12.100	passim
RCW 51.12.102	passim
RCW 51.12.102(1).....	passim
RCW 51.12.102(2).....	27
RCW 51.12.102(3).....	14, 28
RCW 51.12.102(4).....	15, 29, 46, 47
RCW 51.12.102(5).....	29, 30
RCW 51.12.102(6).....	30, 31
RCW 51.24.020	passim
RCW 51.24.060	31
RCW 51.32.050	27

Other Authorities

<i>Asbestos Related Disease: Report of House Commerce and Labor Committee, Dep't of Labor and Indus., p. 2 (1987).....</i>	40
<i>Asbestos-Related Disease: A Report to the Commerce and Labor Committee, Dep't of Labor and Indus., p. 4 (1993).....</i>	40
<i>Floor Notes, EHB 1353, p.1 (1993).....</i>	21
<i>Floor Synopsis, Substitute House Bill 1592, p. 1 (1988).....</i>	21

Regulations

WAC 296-14-350..... 47, 48, 49

I. INTRODUCTION

This is a workers' compensation case under Title 51, RCW, of Washington's Industrial Insurance Act (WIIA). As the Supreme Court held in *Gorman v. Garlock*, 155 Wn.2d 198, 118 P.3d 311 (2005), the Department of Labor and Industries (Department) is directed by RCW 51.12.100 to deny all claims that are subject to benefits under a federal statute, but RCW 51.12.102 directs it to provide benefits on a temporary basis to claimants who may have federal claims for asbestos exposure.¹

Here, the Department issued an order that determined that a claimant was entitled to *temporary* benefits for his asbestos related disease because he had exposure to asbestos while working for an employer who is covered by the Longshore Harbor Workers Compensation Act (LHWCA), a federal statute.

II. COUNTER STATEMENT OF THE ISSUE

Under *Gorman v. Garlock*, did L&I properly determine that Elizabeth Olsen was only entitled to temporary and provisional benefits under RCW 51.12.102 for her husband's illness that was caused by his exposure to asbestos in the course of both maritime and non-maritime employment, even though his last injurious exposure occurred in the course of non-maritime employment in Washington?

¹ RCW 51.12.100 and 51.12.102 are set forth in full in Appendix A to this brief.

III. STATEMENT OF THE CASE

Robert Olsen died on April 2, 2007 of congestive heart failure that was caused in part by his asbestos-related disease. CABR, Exhibit (Ex.) 1.² His widow Elizabeth Olsen (Olsen) filed an application for benefits with the Department. CABR 38. The Department issued an order on November 6, 2008 that determined that he was exposed to asbestos while working in the shipyards, and that he was, therefore, considered a maritime worker under maritime coverage. CABR 49-50. The Department's order indicated that a claim for benefits under the LHWCA had been filed and that "temporary benefits" will be paid to Olsen under RCW 51.12.102 "until the federal insurer initiates payment or the benefits are otherwise properly terminated under this title." CABR 34.

Olsen timely appealed that order to the Board of Industrial Insurance Appeals (Board). CABR 51.

When the case was at the Board, the Department and Olsen stipulated to the following facts:

1. The claimant, Robert E. Olsen, has been diagnosed with an asbestos related disease, including asbestos-induced visceral pleural fibrosis, parietal pleural fibrosis, and subpleural fibrosis. Dr. Samuel Hammar would testify on a more probable than not basis that the concentration of asbestos fibers in Mr. Olsen's lungs

² "CABR" references the Certified Appeal Board Record. The Clerk's Papers did not renumber the CABR. References to Board pleadings and orders are to the page number stamped by the Board in the lower right corner of the page.

demonstrates that the above lung conditions [sic] related to asbestos exposure.

2. Mr. Olsen suffered injurious exposure to asbestos while employed by state fund employers. This exposure is a proximate cause of his asbestos-related medical conditions.

3. Mr. Olsen suffered injurious exposure to asbestos while working for employers covered under the Longshore Harbor Workers Compensation Act. This exposure is also a proximate cause of his development of asbestos-related medical conditions.

4. Mr. Olsen last suffered injurious exposure to asbestos while employed by state fund employers.

See CABR, Ex. 2.

Following the entry of this stipulation of fact, Olsen filed a Motion for Summary Judgment, supported by Mr. Olsen's Declaration Under Penalty of Perjury and a copy of a medical report from Samuel P. Hammar, M.D. CABR 143-47. In her motion, Olsen contended that the Department's order was incorrect and that she was entitled to *full* workers' compensation benefits under the WIIA, rather than temporary and provisional benefits. *See id.*

Mr. Olsen's declaration provided additional information regarding the details of his work history, but it did not make any statements that were contrary to the parties' factual stipulation: it alleged exposure to asbestos while working for the U.S. Navy and for Todd Pacific Shipyards followed by additional exposure to asbestos while working as a pipefitter

for various non-maritime employers in Washington state. CABR, Ex. 1. Among other things, his declaration noted that while working for Todd Pacific Shipyards as a pipefitter, he was exposed to asbestos while working on both commercial and navy ships, in that his job duties included “knocking asbestos insulation off of lengths of pipes ... with hammers and piling it on the floor for the labors [sic] to remove from the ships.” *See id.* He notes that at the end of the shift he would “blow [his] nose, and all that would come out was white asbestos.” *See id.*

Dr. Hammar’s report provided additional information regarding the precise nature of Mr. Olsen’s asbestos-related illness, but it did not make any statement contrary to the parties’ stipulation. *See CABR, Ex. 3.*

The Department filed a Cross Motion for Summary Judgment, contending that the undisputed facts required affirmation of the Department’s November 6, 2008 order under *Gorman*, since the Supreme Court plainly held in that case: (1) that a claimant who develops asbestos-related disease as a result of exposure while working for employers who are covered by the LHWCA shall only receive temporary, interim benefits from the Department under RCW 51.12.102(1) while the federal claim is pending; and (2) that the claimant is not entitled to full WIIA benefits *even if* the claimant’s *last* exposure to asbestos occurred while working for a non-maritime employer in the state of Washington. CABR 120-131.

The industrial appeals judge assigned to the case issued a Proposed Decision and Order that affirmed the Department's order. CABR 44-48. Olsen filed a Petition for Review from the Proposed Decision and Order. CABR 4-19. The three-member Board denied Olsen's Petition for Review, thereby adopting the Proposed Decision and Order as its own Decision and Order. CABR 2.

Olsen filed a timely appeal to the Yakima County Superior Court. CP 1-8. Olsen filed a Motion for Summary Judgment seeking reversal of the Board's decision based on the information in the Certified Appeal Board Record. CP 9-25. The Department filed a response brief contending that the Board's decision was correct as a matter of law. CP 26-46. The trial court granted summary judgment to the Department. CP 59-63.³ Judgment was entered consistent with that ruling. CP 71-73.

Olsen appealed, leading to the current dispute. CP 64-70.

IV. SUMMARY OF THE ARGUMENT

Under RCW 51.12.100, WIIA does not apply to a "master or member of any vessel", nor does it apply to "employers and workers for whom a right or obligation exists under the maritime laws or federal

³ Olsen makes the unsupported statement at AB 19 that the Superior Court concluded that *Gorman* "overrode" *Department of Labor & Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993). The trial court did not make such a conclusion. *See* CP 59-63. It found no conflict between the two Supreme Court opinions, and concluded that *Gorman* controlled the outcome of the case. *See id.*

employees compensation act for personal injuries or death of such workers.”

However, RCW 51.12.102(1) provides that the Department shall furnish benefits to a worker who “may” have a claim under the maritime laws for an “asbestos-related disease” if there is evidence that there was at least some harmful exposure while working for non-maritime employers in Washington, that the Department “*shall render a decision regarding the liable insurer,*” and that the Department shall “continue to pay benefits *until* the liable insurer initiates payments *or* benefits are otherwise properly terminated under the title.” (Emphasis added).

In *Gorman*, two plaintiffs developed asbestos-related diseases as a proximate result of exposure to asbestos in the course of their employment, some of which occurred while working for employers subject to the LHWCA, and some of which occurred while working for non-maritime employers in the state of Washington. They argued that they were entitled to file tort suits against their employers pursuant to RCW 51.24.020, a provision of the WIIA which allows claimants to file tort claims against employers who intentionally injured them. The plaintiffs argued that they were entitled to WIIA benefits under RCW 51.12.102(1), and that, therefore, they were also entitled to file a tort action against their employers, since that is one of the benefits that

Washington affords to injured workers under the WIIA. The plaintiffs further alleged that their *last* injurious exposure occurred while working for a non-maritime Washington-based employer, and that, under the last injurious exposure rule, this made them entitled to benefits under the WIIA even though they also had harmful exposure to asbestos while working for maritime employers.

The *Gorman* Court held that the plaintiffs' lawsuits were properly dismissed by the trial court. The *Gorman* Court determined, first, that the plaintiffs were not covered by the WIIA, since RCW 51.12.102(1) only authorizes workers to receive "temporary, provisional" benefits while their claims for benefits under the LHWCA are pending. The court determined that the ability to file a tort under RCW 51.24.020 was not a "benefit" available to workers who are only eligible for "temporary, provisional" WIIA benefits under RCW 51.12.102(1).

Second, the *Gorman* Court determined that even if a worker's *last* exposure to asbestos occurred while working for a non-maritime employer in Washington, that the worker would be entitled only to temporary, provisional benefits under RCW 51.12.102 if he or she had harmful exposure to asbestos while performing work covered by the LHWCA.

The *Gorman* Court reasoned that the last injurious exposure rule is used to assign responsibility for an occupational disease between the state

fund and self-insured employers, and that it may not be used to determine *whether* a claim is subject to the WIIA. Furthermore, the *Gorman* Court noted that RCW 51.12.100 bars a worker from being entitled to WIIA benefits if the worker or his or her employer has a “right or obligation” under a maritime statute (except for the temporary, provisional benefits allowed by RCW 51.12.102), and it noted that the federal courts have determined that a worker *is* covered by the LHWCA if the worker had any harmful exposure to asbestos while working for maritime employers *even if* the claimant’s last harmful exposure to asbestos occurred in the course of employment with non-maritime employers.

Since workers who had harmful exposure to asbestos while working for maritime employers have “a right or obligation” under the LHWCA *even if* they have subsequent non-maritime exposure, and since workers are not entitled to benefits under the WIIA whenever they have a “right or obligation” under the LHWCA, it follows that a worker who was exposed to asbestos while working for a maritime employer is not entitled to benefits under the WIIA even if the worker’s *last* exposure to asbestos occurred while working for a non-maritime employer who would otherwise be liable under the WIIA.

Olsen contends that the Department’s order providing her with temporary benefits is incorrect as a matter of law, notwithstanding the

Gorman decision's ruling that RCW 51.12.102 authorizes the payment of only temporary, provisional benefits, and notwithstanding her stipulation that Mr. Olsen had some harmful exposure to asbestos in the course of maritime employment. Olsen argues that the *Gorman* decision is not controlling and that she is entitled to ordinary WIIA benefits.

None of Olsen's arguments have merit. Olsen fails to offer any persuasive reason to support her conclusion that *Gorman* is not controlling, and the undisputed facts in this case show that the Department's decision was correct as a matter of law.

V. STANDARD OF REVIEW AND GUIDES TO STATUTORY CONSTRUCTION

Because this case was disposed of at both the Board and Superior Court levels on motions for summary judgment, this Court reviews the trial court's decision to grant summary judgment to the Department *de novo*. When deciding whether the Department was entitled to summary judgment, the court must view all facts in the light most favorable to Olsen. Questions of law raised by this appeal are reviewed *de novo*.

The issues in this case turn in significant part on the proper construction of RCW 51.12.100 and RCW 51.12.102. Statutory construction is a question of law, reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). However,

Department and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts “must accord substantial weight to the agenc[ies’] interpretation of the law.” *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

The provisions of Washington’s Industrial Insurance Act are “liberally construed.” RCW 51.12.010; *see also Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). This rule of construction, however, does not authorize an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Comm’n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). The rule of liberal construction does not trump other rules of statutory construction. *Senate Republican Comm.*, 133 Wn.2d at 243.

VI. ARGUMENT

A. **The Department Properly Granted Olsen Temporary Benefits And Determined That The Liable Insurer Was Subject To The LHWCA**

RCW 51.12.102(1) applies to workers who *may* have a right or obligation under the maritime laws for an asbestos-related disease, who have “objective clinical findings” substantiating the asbestos-related disease, and whose work history shows a “prima facie indicia” of exposure

to asbestos fibers while employed in the state of Washington in employment covered under this title. RCW 51.12.102(1) applies to Olsen because the stipulated facts reveal that 1) she has a right under the LHWCA; 2) there is “objective clinical evidence” that her husband had an asbestos-related disease; and 3) her husband’s work history establishes a “prima facie indicia” of *some* exposure to asbestos while working for *employers* who are subject to the WIIA.

RCW 51.12.102 directs the Department to “furnish” claimants who meet its requirements with “benefits”, to “render a decision as to the liable insurer”, and to “continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title.” The Department order that is the subject of this appeal did all three of the things that RCW 51.12.102(1) requires: it furnished her with benefits, it rendered a decision regarding the liable insurer, and it provided that it would continue paying benefits until the liable insurer initiates payments *or* her benefits are otherwise properly terminated.

Olsen nonetheless argues that the Department’s order on appeal is inconsistent with the technical language of RCW 51.12.102. AB 13-16. She contends that the statute’s use of the phrase “continue to pay benefits” indicates that the Department must begin by issuing an order that takes no action *other than* furnishing her with “benefits”, and that only after issuing

such an order may it issue a further order that “renders a decision” regarding the liable insurer.⁴ *Id.* Since the Department’s order in this case both furnished her with benefits *and* determined her liable insurer, Olsen contends that the order was incorrect as a matter of law. *See id.*

Olsen’s strained interpretation of RCW 51.12.102 is not supported by the plain language of the statute. RCW 51.12.102 plainly directs the Department to pay benefits, determine the liable insurer, and continue paying benefits until the insurer initiates them or the benefits are otherwise properly terminated. RCW 51.12.102 does *not* mandate that the Department take those actions through two or more separate orders instead of issuing one order that does all three things. While the Department *could* adjudicate a claim that is governed by RCW 51.12.102 in that fashion, the statute does not mandate that it proceed in that way.

There is no reason to assume that the legislature intended for the word “continue” to impose the technical requirement on the Department that Olsen posits it creates. Rather, the legislature simply directed the Department to “continue to pay benefits until the liable insurer initiates payments or the benefits are otherwise properly terminated under this title.” The Department’s order at issue here indicated that the Department would “continue” to pay benefits until one of those two things happened.

⁴ Elsewhere in her brief, Olsen argues that the Department may not *ever* determine that the “liable insurer” is subject to a federal statute. *See* AB 27-29.

Furthermore, Olsen’s interpretation of the statute fails because no legitimate purpose would be served by requiring the Department to artificially divide its decisions regarding a given claimant into two or more orders instead of one. Under Olsen’s interpretation of the statute, the Department could have issued an order on November 6, 2008 that did nothing other than initiate benefits under RCW 51.12.102(1), and then issued another order later the same day that determined that the liable insurer was subject to the LHWCA, and that the Department would only continue paying benefits under the WIIA until the liable insurer “initiated benefits” or benefits were “otherwise properly terminated.”⁵

Olsen attempts to buttress her strained interpretation of RCW 51.12.102 by arguing that subsection three of that statute, which gives the Department directions as to what to do if it determines that the liable insurer is subject to the WIIA, would be meaningless if the

⁵ In any event, even assuming that Olsen’s technical interpretation of the statute is correct (it is not) this would only support a finding that the Department committed a harmless, technical error when it issued its order and that the Board and the Superior Court committed harmless error when they upheld the Department’s decision. When a party has merely shown that a harmless, technical error was committed, an appellate court should deny a request for a remand and should uphold the trial court’s decision. *See State v. McDonald*, 40 Wn. App. 743, 748, n. 2, 700 P.2d 327 (1985) (no remand ordered for hearing on reliability of eyewitness identification because remand would be pointless in light of indisputable facts in case demonstrating unreliability); *Ghaly v. INS*, 48 F.3d 1426, 1438 (7th Cir. 1995) (under harmless error analysis, federal court explains: “There is no point in remanding an administrative decision for a better statement of reasons if the decision on remand is a foregone conclusion, or for further evidentiary proceedings if the outcome of those proceedings is equally foreordained.”).

employer who is subject to the LHWCA is “always” the “liable insurer”.

AB 16. This argument fails for at least two reasons.

First, it is not true, and it is not the Department’s position, that *all* claimants who are subject to RCW 51.12.102(1) are entitled to benefits under the LHWCA or another federal statute and that such claimants will *never* be found eligible for benefits under the WIIA. Second, and on a related note, it is not the Department’s position that whenever a claim is subject to RCW 51.12.102 that the Department should *always* issue one order that both initiates payments to the claimant under that section *and* that makes a determination regarding the liable insurer. Rather, it is the Department’s position that it *may* issue one order that does both of those things when the information before it supports issuing such an order.

However, in cases where it appears that a claimant “may” have a right to benefits under the LHWCA, but where it is not clear whether the liable insurer is subject to the LHWCA or the WIIA, it would be proper for the Department to initiate benefits under RCW 51.12.102(1) without determining the liable insurer, and to decide that issue at a later time through a later order. If the Department ultimately determined that the liable insurer *was* subject to the WIIA, it would issue an order that made that determination, and it would take further action pursuant to RCW 51.12.102(3). Alternatively, if the Department determined that the

liable insurer was subject to the LHWCA, the Department would render a decision to that effect, and it would then take further action pursuant to RCW 51.12.102(4). Thus, the Department's interpretation of the statute does not render RCW 51.12.102(3) meaningless.

In this case, however, the undisputed evidence, and, indeed, the parties' stipulation, indicates that the claimant had some harmful asbestos exposure while working for maritime employers and some harmful exposure to asbestos while working for non-maritime employers in the state of Washington. CABR, Ex. 2. Therefore, there is no reason why the Department could not properly issue *one* order that both furnished Olsen with provisional benefits under RCW 51.12.102, and determined that the liable insurer was subject to the LHWCA.

B. *Gorman* Held That RCW 51.12.102 Authorizes The Payment Of Only Temporary, Provisional Benefits Under The WIA

Gorman held that claimants who have asbestos-related illnesses as a result of both maritime and non-maritime employment in the state of Washington are subject to the provisions of the LHWCA and that they are *not* entitled to benefits under the WIA, with the exception of the "temporary, provisional" benefits available to them under RCW 51.12.102(1). *Gorman*, 155 Wn.2d at 212-13.⁶

⁶ Without citation to supporting authority (there is none), Olsen baldly asserts throughout her Brief of Appellant that workers may "elect" to pursue either Washington

In this case, it is undisputed that Mr. Olsen developed asbestos-related illness as a result of *both* maritime and non-maritime employment. *See* CABR, Ex. 2. Therefore, under *Gorman*, Olsen is only entitled to temporary, provisional benefits under RCW 51.12.102. *See id.* Furthermore, since this Court is bound by the opinions of the Supreme Court, it cannot, as a matter of law, accept Olsen’s argument that the Department erred when it granted her “temporary” benefits under RCW 51.12.102. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). *See also Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (holding “[o]nce a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.”)

Olsen contends that the *Gorman* Court did not actually *hold* that the benefits available to claimants under RCW 51.12.102 are “temporary, provisional benefits”. AB 17. Olsen argues that the *Gorman* Court merely had to decide whether the plaintiffs in that case were entitled to file tort suits against their employers under RCW 51.24.020, and that it decided—or, at least, it *should have* decided—that issue *without* deciding

or federal benefits. AB 1, 13, 30-31. That is not so. As *Gorman* expressly recognizes, there is no right to election: if there is LHWCA coverage, then there is no WIIA coverage. *Id.* at 208-13.

whether the benefits payable under RCW 51.12.102(1) are “ordinary” WIIA benefits or “temporary, provisional benefits”. *See id.*

Olsen’s contention does not survive careful scrutiny. While it is true that the plaintiffs in that case filed tort claims, they filed their tort suits under RCW 51.24.020, a provision that would only apply to them if they were covered by the WIIA. *Gorman*, 155 Wn.2d at 204-05. Furthermore, they contended that they were covered under the WIIA per RCW 51.12.102. *See id.* at 210. The *Gorman* Court concluded that the case “required” it to decide whether the plaintiffs “were covered by the WIIA and, if they were, whether the WIIA shields their claims from the preemptive effect of the exclusive liability provision of the LHWCA.” *Id.* at 204-05. In order for the *Gorman* Court to determine whether the plaintiffs were “covered” by the WIIA, it was necessary for it to determine whether RCW 51.12.102 resulted in such coverage. *See id.* at 210.

With regard to that issue, the court ruled that

Section 102, by its plain language, directs DLI to provide WIIA benefits to certain workers who develop illness as a result of asbestos exposure who may be covered by the LHWCA. RCW 51.12.102(1). However, if the worker is covered by the LHWCA, these benefits are temporary only. If DLI determines that such a worker is covered by the LHWCA, DLI assists the worker in obtaining LHWCA benefits; once such benefits are obtained, the WIIA benefits cease.

Id. at 211-12. The *Gorman* Court then concluded that “Because LHWCA-covered workers are not covered by the general provisions of the WIIA, they may not maintain a suit under RCW 51.24.020.” *Id.* at 213.

Thus, the *Gorman* Court specifically relied on its conclusion that RCW 51.12.102 authorizes the payment of *only* temporary and provisional benefits to reach its ultimate decision that the plaintiffs’ suits were not covered by the WIIA and they could not file suits under RCW 51.24.020. *See id.* at 204-13. That this discussion is part of *Gorman*’s holding is further shown by the court’s statement that “[b]ecause we *hold* that *Gorman* and *Helton*, as LHWCA-covered workers, are not covered by the general provisions of the WIIA and, therefore, may not maintain a suit under RCW 51.24.020, we need not decide whether the WIIA shields their claims from the preemptive effect of the exclusive liability provisions of the LHWCA.” *Id.* at 218. (Emphasis added.)

Olsen suggests, but does not clearly argue, that the court should have simply decided that the plaintiffs in *Gorman* were not entitled to file tort claims under RCW 51.24.020 because they did not file claims for benefits under either the WIIA or the LHWCA. AB 17. She also appears to contend that the scope of the *Gorman* Court’s holding should be confined to the fact pattern where an individual with asbestos-related illness has not filed a claim for benefits with either the Department or the

appropriate federal agency. *See id.* To the extent that this is Olsen's argument, it fails for at least two reasons.

First, Olsen's assertion that the plaintiffs in *Gorman* failed to file claims for either WIIA or LHWCA benefits is unsupported. The *Gorman* opinion itself does not mention such a fact, and none of the briefs submitted by the parties explicitly make such an assertion, either.⁷ Second, even assuming the plaintiffs in *Gorman* did not file claims for benefits under the WIIA or the LHWCA, the *Gorman* Court's failure to mention this fact shows that it did not rely upon it in reaching its decision.

Olsen offers no legal authority to support the novel proposition that the parameters of the holding of a Supreme Court opinion are defined by "facts" that are not actually mentioned *anywhere* in the opinion, and the Department is aware of no such authority. Moreover, such a rule of jurisprudence would invite chaos and endless litigation, since it would invite litigants who are unhappy with a Supreme Court decision to try to

⁷ The *Gorman* opinion did reject the plaintiffs' argument that they may not be entitled to benefits under the LHWCA based on the fact that they "may have" entered into a third party settlement without the approval of their employers. However, this does not provide support for Olsen's assertion that the plaintiffs did not file claims for benefits under the WIIA or the LHWCA. It is possible that the plaintiffs *had* filed claims for LHWCA benefits but that they were convinced that those claims would inevitably be denied as a result of having agreed to unauthorized settlements. Moreover, the *Gorman* Court did not rely on this hypothetical fact to support its conclusion that the plaintiffs were not entitled to benefits under the WIIA: rather, it found that they were not covered by the WIIA *regardless* of whether they forfeited their rights to receive benefits under the LHWCA by entering into such settlements. *Gorman*, 155 Wn.2d at 215-16.

circumvent its holding by digging up a “fact” that was present in that case but that was not mentioned anywhere in the opinion itself.

Olsen also appears to contend that the *Gorman* Court’s determination that RCW 51.12.102 authorizes the payment of only provisional and temporary benefits should not be viewed as binding by this Court because that ruling is contrary to the legislative history of RCW 51.12.102. AB 24-26. This argument fails for at least two reasons.

First, Olsen has not identified any legal authority that would support the idea that the Supreme Court’s interpretation of a statute may be disregarded by this Court if this Court concludes that the Supreme Court did not adequately evaluate the legislative history behind that statute. Indeed, as *Gore* held, the Supreme Court’s interpretation of a statute is binding on all lower courts until and unless the Supreme Court overturns its own decision. *Gore*, 101 Wn.2d at 487.

Second, the *Gorman* decision *is* consistent with the legislative history behind RCW 51.12.102. As *Gorman* explained, the history of the bill relating to that statute shows that the legislature considered, but rejected, repealing RCW 51.12.100 at the same time that it enacted RCW 51.12.102. *See id.* at 211-13. As *Gorman* noted, if the legislature had intended for claimants covered by RCW 51.12.102 to be entitled to full WIIA benefits, it could be reasonably expected to have repealed

RCW 51.12.100, since RCW 51.12.100 states that a worker with a “right or obligation” under a federal program such as the LHWCA is not entitled to benefits under the WIIA. *See id.*

Additionally, Olsen’s blanket statement at AB 24 that support for the *Gorman* Court’s conclusion that that statute only authorizes temporary and provisional benefits can be found “nowhere” in the legislative history of RCW 51.12.102 is incorrect. Indeed, the House’s “Floor Synopsis” for the 1988 bill specifically states the following in the first sentence of the portion of the report called, “What the Bill Does” that “The Department of Labor and Industries is directed to pay *provisional* benefits to claimants in asbestos-related occupational disease cases when there is a dispute as to liability for the claim.” Floor Synopsis, Substitute House Bill 1592, p. 1 (1988) (emphasis added). *See* Appendix B. This demonstrates that the House understood that the benefits that its bill created *were* provisional benefits. *See id.*

Similarly, when the legislature amended the statute in 1993, the “Floor Notes” for the 1993 amendment states in the section of the report entitled, “What this bill does” that the bill “provides *interim* industrial insurance benefits until [the federal insurer’s] liability is established.” Floor Notes, EHB 1353, p.1 (1993) (emphasis added). *See* Appendix B. In this context, “interim” has the same meaning as “temporary” or

“provisional”: it indicates that the benefits available under RCW 51.12.102 are provided during the interim which occurs *after* the Department has determined that a claimant is eligible for benefits under RCW 51.12.102 but *before* any LHWCA benefits have been provided.

It also must be noted that even though the statute itself does not use the word “temporary” or “provisional” when describing the benefits available under RCW 51.12.102, it *does* say that the benefits are provided “until the responsible insurer initiates payments or the benefits are otherwise properly terminated under this title.” *See* RCW 51.12.102. Since the benefits that are authorized by RCW 51.12.102 must be terminated once “the responsible insurer initiates payments,” and since “ordinary” WIIA benefits would not be terminated based on the mere fact that the claimant received payments of some kind from some source other than the Department, it follows that the benefits available under that statute are not “ordinary” or “permanent” WIIA benefits. Since the statute makes the benefits available on only a temporary and provisional basis, they are temporary and provisional benefits even though the statute does not use that exact label to describe them.

Olsen also contends that the *Gorman* Court’s ruling regarding RCW 51.12.102 should not be followed by this Court because it failed to

properly apply the rules of statutory construction. AB 22-23.⁸ This argument is similarly meritless for at least two reasons.

First, it fails because she failed to cite to any legal authority suggesting that *this Court* may decline to follow a Supreme Court opinion based on such a notion.

Second, the *Gorman* Court did not ignore the rules of statutory construction. As the *Gorman* Court explained, there were two rules of statutory construction that were applicable in that case. *Gorman*, 155 Wn.2d at 211-12. First, preference should be given to the more recently enacted statute over the older statute. *See id.* Second, when there are inconsistent statutory provisions, the statutes should be interpreted in a way that gives some effect to both statutes rather than interpreting one of them in a way that renders the other meaningless. *See id.*

The *Gorman* Court then explained that its interpretation of the two statutes gives some effect to both RCW 51.12.100 and RCW 51.12.102, while giving *preference* to RCW 51.12.102. *See id.* It gives *some* effect to RCW 51.12.100, since it results in claimants with a right or obligation

⁸ Although Olsen contends that *Gorman* concluded that the “sole purpose” of RCW 51.12.100 was to prevent a double recovery, this is erroneous. AB 23. *Gorman* held that the purpose of RCW 51.12.100 is both to avoid a double recovery and to “*thereby protect the state’s industrial insurance fund when a worker is adequately compensated by the LHWCA.*” *See id.* at 211. Thus, as *Gorman* recognized, the purpose of RCW 51.12.100 was not only to avoid giving a worker a double recovery, but also to make the federal program, rather than Washington’s workers’ compensation system, bear the cost of any disability caused by employment which is subject to a federal statute. *See id.*

under the LHWCA not being entitled to *full*, or non-provisional, WIIA benefits. *See id.* However, it gives *preference* to RCW 51.12.102, since it allows such claimants to receive all of the benefits that RCW 51.12.102 authorizes even though a literal reading of RCW 51.12.100 would suggest that such claimants are ineligible for *any* WIIA benefits. *See id.*

Finally, Olsen contends that the *Gorman* Court's interpretation of RCW 51.12.102 should be disregarded because it is inconsistent with the provision that the WIIA is subject to liberal construction. AB 21-23. Like her other arguments that attack the *Gorman* opinion, this argument is meritless for two reasons.

First, it fails because there is no legal authority supporting the notion that this Court can overturn or ignore a decision of the Supreme Court based on such an argument. Second, the argument fails because the doctrine of "liberal construction" does not give a court carte blanche to ignore the language of the statute when rendering a decision. *See Senate Republican Comm.*, 133 Wn.2d at 243. Furthermore, a court may not, under the guise of statutory construction, distort a statute's meaning in order to make it conform to the court's own views of sound social policy. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999). Here, it is readily apparent from the language of RCW 51.12.102 that the benefits that the legislatures created in subsection

one of that statute are temporary and provisional in that they expire once a claimant either begins receiving benefits under the LHWCA or the benefits are otherwise properly terminated. Even a “liberal” interpretation of the statute does not support the conclusion that the benefits created by it are “ordinary” WIIA benefits.

C. Even Assuming That *Gorman*’s Discussion Of RCW 51.12.102 And RCW 51.12.100 Was Dicta, Its Interpretation Of The Interplay Of Those Statutes Is Persuasive And Should Be Followed By This Court

Furthermore, even assuming for the sake of argument that the *Gorman* Court’s discussion of the nature of the benefits provided under RCW 51.12.102 is somehow dicta (it is not), Olsen offers no persuasive reason to disregard the *Gorman* Court’s careful analysis of the interplay between RCW 51.12.102 and RCW 51.12.100. Indeed, Olsen essentially ignores RCW 51.12.100 when discussing RCW 51.12.102. However, as *Gorman* explains, RCW 51.12.102 can only be properly understood when considered in conjunction with RCW 51.12.100. *See Gorman*, 155 Wn.2d at 210-12. Furthermore, since the two statutes involve common legal issues, they must be interpreted in a way that gives some meaning to each statute. *See id.* Olsen’s interpretation of RCW 51.12.102 would render RCW 51.12.100 essentially meaningless, at least with regard to asbestos-

related illness claims, and she offers no persuasive reason why RCW 51.12.100 should be given no legal effect in such cases.

Olsen's argument that she is entitled to ordinary WIIA benefits under RCW 51.12.102 also fails because, as the *Gorman* Court noted, the plain language of RCW 51.12.102(1) states that the benefits paid under that subsection shall be terminated if the claimant receives benefits under that Act or the benefits are otherwise properly terminated. *See id.* at 212-13. This language, in and of itself, shows that the benefits are temporary in the sense that they shall *come to an end* if the worker receives LHWCA benefits even if the worker's disability related to his or her asbestos-related disease has not been resolved. *See id.* Indeed, while Olsen vehemently objects to the term "temporary" to describe the benefits that are available under RCW 51.12.102, she appears to concede in at least one portion of her brief that the benefits provided to her under that section should be terminated in the event that she actually receives a recovery from the LHWCA. AB 23.

Olsen does not attempt to reconcile this concession with her other claims in her brief that the benefits provided under RCW 51.12.102 are "ordinary" WIIA benefits. This is baffling, since *if* Olsen was entitled to "ordinary" WIIA benefits for her husband's asbestos-related disease under RCW 51.12.102, then, as the widow of a worker who died of a work-

related illness, she would be entitled to total and permanent disability benefits for life or until she remarried. *See* RCW 51.32.050. By conceding that the benefits should be terminated in the event that she receives payments under the LHWCA, she effectively concedes that the benefits available under RCW 51.12.102(1) are not “ordinary” WIIA benefits and, instead, are, as the *Gorman* Court held, temporary and provisional benefits. *See Gorman*, 155 Wn.2d at 212-13.

Furthermore, when RCW 51.12.102(1) is read in conjunction with the remaining subsections of that statute, it becomes even more apparent that the benefits available under subsection (1) are not “ordinary” WIIA benefits in any sense of the word. In this regard, it should be noted, first, that RCW 51.12.102(2) provides that the benefits payable under subsection one shall be provided out of the “medical aid” fund, and it authorizes the Department to assess special premiums on self-insured and state fund employers to fund those benefits. The medical aid fund is normally only used to furnish injured workers with medical treatment, and it is not normally used to provide them with disability benefits. The fact that the benefits under RCW 51.12.102(1) are paid out of a different fund than other disability benefits under the WIIA are paid indicates that those benefits are not “ordinary”. Furthermore, the fact that the legislature authorized a special assessment to fund the benefits paid under

RCW 51.12.102(1) further belies the claim that the benefits paid under that section are “ordinary” WIIA benefits.

On a related note, RCW 51.12.102(3) provides that if “the department determines” that the liable insurer for the asbestos related illness is a state fund or self-insured employer covered under the WIIA, that the self-insurer or state fund shall reimburse the medical aid fund for all benefits paid out of the medical aid fund under RCW 51.12.102(1). In essence, this means that if the Department determines that a claimant who received benefits under RCW 51.12.102(1) is covered by the WIIA, that the entity that would have been responsible for paying those benefits *had it been adjudicated like an ordinary WIIA claim* must repay the medical aid fund for the full amount of any benefits that were paid out of that fund pursuant to RCW 51.12.102(1). In other words, if a claimant received benefits under RCW 51.12.102(1) and the Department later determines that the responsible insurer was, in fact, subject to the WIIA, it is at that point, *and only at that point*, that the worker becomes entitled to “ordinary” WIIA benefits.

RCW 51.12.102(3) creates a mechanism to replenish the medical aid fund in the event that a claimant received temporary benefits under RCW 51.12.102(1) but it is ultimately determined that the claimant is entitled to ordinary WIIA benefits. If the benefits paid under

RCW 51.12.102(1) were “ordinary” WIIA benefits, it would not have been necessary to provide for the replenishment of the medical aid fund in the event that the claim was later determined to be subject to the WIIA: rather, the worker would simply continue receiving “ordinary” WIIA benefits.

RCW 51.12.102(4) provides that if “the department determines” that the benefits paid under RCW 51.12.102(1) are owed to the worker under the maritime laws (or by any federal program *other than* social security, old age survivors, and disability insurance) that (1) the Department shall file a claim with the appropriate federal agency on the worker’s behalf; (2) the Department’s right to recovery shall be subrogated to the rights of the worker; (3) the Department shall *not* pursue the worker for recovery of benefits paid under RCW 51.12.102(1) unless a federal recovery is actually made; and (4) the Department *may* appoint a special assistant attorney general to pursue the federal recovery. The Department does not take any of the actions referenced by RCW 51.12.102(4) when it has paid “ordinary” WIIA benefits to a claimant on an “ordinary” WIIA claim.

RCW 51.12.102(5) provides that if the worker fails or refuses “to assist the department in making a proper determination of coverage” that the provisions of RCW 51.12.102(1) shall not apply and the Department

may reject the injured worker's application for benefits. The statute also authorizes the Department to deny the worker benefits if he or she fails to cooperate with pursuing a claim for federal benefits.⁹ Through this subsection, the legislature gave the Department the specific authority to deny a worker *any* benefits under RCW 51.12.102(1) if the worker undermines the Department's attempts to determine the liable insurer. The legislature's creation of this special remedy to deny the benefits that would otherwise be authorized by RCW 51.12.102(1) further demonstrates that the benefits authorized by that subsection are not "ordinary."

Finally, RCW 51.12.102(6) provides that 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" and any recovery shall be used to reimburse the medical aid fund. It also provides that if "the department determines" that a federal program insurer is responsible for benefits that the Department shall *not* pay any portion of the injured worker's attorney's fees. While the Department has the right under chapter 51.24 RCW to share in "third party" recoveries when a worker has received "ordinary" WIIA benefits, the rules governing the Department's right of

⁹ In addition to showing that the benefits paid under RCW 51.12.102(1) are not "ordinary" WIIA benefits, RCW 51.12.102(5) also flatly contradicts Olsen's assertion at AB 24 that there is no support for the idea that the legislature intended for a worker to be "forced" to pursue federal benefits.

recovery are quite different from those set forth in RCW 51.12.102(6). In particular, under RCW 51.24.060 the Department's right of recovery of "ordinary" WIIA benefits when there is a tort recovery *is* reduced based on its proportionate share of the plaintiff's attorney's fees and costs. The fact that there are special rules governing the Department's ability to recover the benefits paid under RCW 51.12.102(1) is further evidence that those benefits are not "ordinary" WIIA benefits.

D. *Gorman* Held That A Worker Who Had Harmful Exposure To Asbestos In The Course Of Both Maritime And Non-Maritime Employment Is Not Covered By The WIIA Even If The Worker's Last Exposure To Asbestos Occurred During Non-Maritime Employment In The State Of Washington

The *Gorman* Court held that the last injurious exposure rule does *not* make a worker covered by the WIIA even if the worker's "last" exposure to asbestos occurred while working for a non-maritime employer in Washington, if the worker also had some harmful exposure to asbestos in the course of maritime employment. *See Gorman*, 155 Wn.2d at 216-19. The *Gorman* Court explained that under RCW 51.12.100 a claimant has no right to benefits under the WIIA for an injury or disease if the claimant has a "right or obligation" for that condition under a federal compensation statute, such as the LHWCA. *See id.* The *Gorman* Court then noted that under *Todd Shipyards v. Black*, 717 F.2d 1280 (9th Cir. 1983) a worker who develops an asbestos-related disease as a result of

maritime exposure has a “right or obligation” under the LHWCA for that disease *even if* the worker’s *last* exposure to asbestos occurred while working for a non-maritime employer. *See id.*

When RCW 51.12.100 is considered in conjunction with the holding of *Black*, the inescapable conclusion is that a worker who develops an asbestos-related illness as a result of the combined effects of maritime and non-maritime employment is *not* covered by the WIIA, and is *only* eligible for temporary and provisional benefits under RCW 51.12.102(1), even if the worker’s *last* exposure to asbestos occurs in the course of non-maritime employment. *See Black*, 717 F.2d at 1285. *See also* RCW 51.12.100. *See also Gorman*, 155 Wn.2d at 216-19. This is because RCW 51.12.100 prevents a claimant from being covered under the WIIA if the claimant has an entitlement to benefits under a federal act such as the LHWCA for that injury or occupational disease, and because a claimant who develops an occupational disease as a result of both maritime and non-maritime employment *is* entitled to benefits under the LHWCA even if the worker’s *last* injurious exposure was non-maritime. *Compare Black*, 717 F.2d at 1285 *with* RCW 51.12.100. *See also Gorman*, 155 Wn.2d at 216-19.

Gorman explained that the last injurious exposure rule is used to allocate responsibility for a claim that is covered by the WIIA, but that the

rule does *not* determine *whether* a claim is subject to the WIIA. *See id.* at 217. *Department of Labor & Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993) did not hold otherwise. Indeed, in essence, *Fankhauser* concluded that the nature of the workers' "last" injurious exposure *did not determine* whether or not their claims were covered by the WIIA. *See Fankhauser* 121 Wn.2d at 311. If the last injurious exposure rule does not determine *whether* a claimant is covered by the WIIA, then, as a matter of fundamental logic, this legal reasoning cuts both ways: if the rule cannot be used to support the denial of the claim that is otherwise covered by the terms of the WIIA, the rule also cannot be used to support the allowance of a claim whose coverage is excluded by the plain language of the WIIA.

Put another way, under RCW 51.12.100 a worker cannot be eligible for benefits under both the LHWCA and the WIIA for the same occupational disease. *See id.* Since the fact that a worker's "last" injurious exposure to asbestos occurred during non-maritime, WIIA-covered employment does not stop the claimant from having a right or obligation under the LHWCA, the fact that the claimant's last injurious exposure occurred during such employment does not make the claimant eligible for WIIA benefits. *See id.*

Olsen fails in her apparent contention at AB 20-21 that *Gorman* did not actually *hold* that the last injurious exposure rule did not make the plaintiffs covered by the WIIA. A statement in a case is dicta if it was unnecessary to decide the issue before the court. *See, e.g., State v. Potter*, 58 Wn. App. 134, 150, 842 P.2d 481 (1992). As noted above, the *Gorman* Court stated that the case “required” it to determine whether the plaintiffs in that case were covered by the WIIA, since they would not be permitted to file a tort claim under RCW 51.24.020 unless they were covered by the WIIA. *See id.* at 204-05. Since the plaintiffs in that case argued that they were covered by the WIIA pursuant to the last injurious exposure rule, the *Gorman* Court could not decide whether the plaintiffs were covered by the WIIA without deciding whether the last injurious exposure rule made them so covered. *See id.* at 216-19.

Olsen fails to clearly articulate *why* the *Gorman* Court’s discussion of the last injurious exposure rule should be viewed as mere dicta. AB 19-20. She claims that the *Gorman* Court was not adequately briefed on either the last injurious exposure rule in general or on the *Fankhauser* case in particular, and appears to contend that this somehow makes the *Gorman* Court’s resolution of the last injurious exposure rule mere dicta. *See id.* However, no legal authority supports Olsen’s apparent contention that the thoroughness of the briefing provided to the Supreme Court on a given

issue determines whether the court's resolution of that issue was part of its holding or was merely dicta. Rather, an issue which the Supreme Court had to determine—and did determine—in the course of disposing of a case is part of its holding. *See, e.g., Potter*, 68 Wn. App. at 150.

Olsen also appears to argue that even if the *Gorman* Court *held* that the last injurious exposure rule cannot be used to make a claimant subject to the WIIA when there is both maritime and non-maritime exposure to asbestos, that *this Court* may ignore the *Gorman* decision. AB 20-21. Her idea seems to be that in *Gorman* the Supreme Court departed from its prior ruling regarding the last injurious exposure rule in *Fankhauser*, and that it failed to adequately explain why it did so. AB 20-21, *citing 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)); *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). To the extent that Olsen is contending this, her argument is meritless for at least two reasons.

First, the cases cited by Olsen do not stand for the proposition that the *Court of Appeals* may rule that a Supreme Court opinion is invalid based on the *Court of Appeals'* belief that that the Supreme Court violated the doctrine of stare decisis when it issued that opinion. *See Riehl*, 152 Wn.2d at 147; *Studd*, 137 Wn.2d at 548; *In Re Stranger Creek*, 77 Wn.2d

at 653. In all of the cases cited to by Olsen, a litigant asked the Supreme Court to overrule one of its own prior decisions, and the Supreme Court declined to do so, explaining that it will not overrule one of its own prior decisions unless *it* is convinced that there are compelling reasons to do so. *See Riehl*, 152 Wn.2d at 147; *Studd*, 137 Wn.2d at 548; *In Re Stranger Creek*, 77 Wn.2d at 653. The Supreme Court did not suggest in any of those opinions that a *lower court* may conclude that it is not bound by a recent Supreme Court opinion based on the idea that the Supreme Court failed to adequately explain in that opinion why it did not follow the rationale of one of its prior decisions. *See Riehl*, 152 Wn.2d at 147; *Studd*, 137 Wn.2d at 548; *In Re Stranger Creek*, 77 Wn.2d at 653.

Moreover, such a view would be contrary to the rule that where there is a seeming conflict between two Supreme Court decisions, the more recently decided case governs. *See Yakovonis v. Tilton*, 93 Wn. App. 304, 311, 968 P.2d 908 (1998). Therefore, if it is assumed that there is a conflict between *Gorman* and *Fankhauser*, it is *Gorman*, rather than *Fankhauser*, that controls.

Furthermore, Olsen has also failed to demonstrate that there is any conflict between *Gorman* and *Fankhauser*. The issue the Supreme Court decided in *Fankhauser* was whether a WIIA claim may be denied based on the fact that a claimant's last injurious exposure occurred during self-

employment, *not* whether the fact that a worker has a right or obligation under the LHWCA precludes the worker from being covered by the WIIA.

In both of the consolidated cases that were at issue in *Fankhauser*, the claimants had harmful exposure to asbestos in the course of employment that was covered by the WIIA, and they then had a much longer, subsequent, period of self-employment, which also resulted in additional exposure to asbestos. *Fankhauser*, 121 Wn.2d at 306-08.

Under RCW 51.12.020(5), self-employed persons may *elect* to be covered by the WIIA, but their coverage is not mandatory, and they are only covered by the WIIA if they pay premiums to the Department. *See id.* at 309-10. The claimants in *Fankhauser* did *not* elect WIIA coverage during their self-employment. *See id.*

The Department contended that the claimants' occupational disease claims were not subject to the WIIA because they did not elect coverage during their employment as sole proprietors, because they filed their WIIA claims *after* they had elected to cease being covered, and because it was undisputed that their *last* harmful exposure to asbestos occurred during their work as non-covered owners. *See id.* at 309. The *Fankhauser* Court concluded that the claims were covered by the WIIA even though their *last* injurious exposure occurred while working on a

self-employed basis, and even though they did not elect WIIA coverage during that period of exposure. *See id.* at 311-15.

Thus, the issue that *Fankhauser* decided is that an asbestos claim cannot be rejected based on the last injurious exposure rule even if a claimant's "last" injurious exposure to asbestos occurred while the claimant was self-employed and had not elected WIIA coverage pursuant to RCW 51.12.020. *Fankhauser* did not address whether RCW 51.12.100 would prevent an asbestos-related disease from being covered by the WIIA if the claimant had a "right or obligation" for that disease under the LHWCA, nor did it suggest that the last injurious exposure rule can be used to make a claim subject to the WIIA when the plain language of RCW 51.12.100 precludes such a determination. Indeed, the *Fankhauser* opinion does not contain any discussion of RCW 51.12.100 nor did it discuss RCW 51.12.102. Therefore, when the *Gorman* Court held that RCW 51.12.100 prevents a claimant who has a "right or obligation" under LHWCA from being covered by the WIIA—regardless of where the claimant's "last" injurious exposure occurred—it did not contradict its prior holding in *Fankhauser*.

Furthermore, there is a fundamental difference between the statute the Supreme Court considered in *Fankhauser* (RCW 51.12.020) and the statutes that it considered in *Gorman* (RCW 51.12.100 and

RCW 51.12.102), which further helps explain why there is no conflict between the two opinions. RCW 51.12.020 simply provides that a claimant is not covered by the WIIA for injuries that occur during self-employment unless the claimant elects coverage. Conversely, RCW 51.12.100 provides that a claimant is not covered by the WIIA if he or she has *any* “right or obligation” for an injury or disease under certain federal statutes, including the LHWCA. Thus, the mere *existence* of a right or obligation under the LHWCA prevents a worker from being covered by the WIIA under RCW 51.12.102 for that injury or disease. In contrast, RCW 51.12.020 does not, on its face, provide that a claimant who performed *any* work on a self-employed basis will not be covered by the WIIA for a disease that was caused in part by such work and in part by employment covered by the WIIA.

In short, the facts, legal arguments, applicable statutes, and holdings of *Gorman* are entirely distinguishable from the facts, legal arguments, applicable statutes, and holdings of *Fankhauser*. There is no conflict between the two opinions.

To bolster her argument that the last injurious exposure rule makes her husband’s claim subject to the WIIA—and that *Gorman*’s holding to the contrary should be disregarded—Olsen also attempts to rely on the Department’s statements regarding its understanding of the last injurious

exposure rule in the reports it submitted to the legislature in 1987 and 1993. AB 23-26. This argument fails because there is no legal authority that supports the idea that *this Court* can ignore a holding of the Supreme Court based on the fact that the Department, in previous reports to the legislature, offered a legal opinion that is inconsistent with what the Supreme Court decreed in an opinion.

Furthermore, while it is true that the Department indicated in its 1987 and 1993 reports that it uses the last injurious exposure rule to determine whether a claimant who has had both maritime and non-maritime exposure is entitled to benefits under the LHWCA, the Department was simply reporting its interpretation of the law at those times. *See Asbestos-Related Disease: A Report to the Commerce and Labor Committee*, Dep't of Labor and Indus., p. 4 (1993).¹⁰ *Asbestos Related Disease: Report of House Commerce and Labor Committee*, Dep't of Labor and Indus., p. 2 (1987).¹¹ The *Gorman* Court was not required to adopt the view of the law that the Department expressed in those legislative reports, and it did not, in fact, do so. *See Cockle*, 142 Wn.2d at 812 (noting that the court will *not* defer to Department's interpretation of statute if it disagrees with the Department's interpretation of it).

¹⁰ This is attached for the court's convenience as Appendix C.

¹¹ This is attached for the Court's convenience as Appendix D.

Finally, Olsen attempts to rely on *In re John L. Robinson*, No. 91 0741 (Wash. Bd. of Indus. Ins. Appeals Sept. 29, 1992) WL 333852 (1992), and several other decisions of the Board, to support her argument that she is entitled to WIIA benefits under the last injurious exposure rule. AB at 29-31. The Supreme Court's opinions trump those of all lower courts, and its decisions unquestionably trump the decisions of the Board. *See, e.g., Gore*, 101 Wn.2d at 487. Furthermore, the Board's denial of Olsen's Petition for Review is a tacit recognition by the Board that *Gorman* is controlling and requires affirmation of the Department's decision in this case.

E. The Department Has Jurisdiction To Decide Whether A Claimant's "Liable Insurer" Is Subject To The LHWCA For The Limited Purpose Of Deciding Whether The Claimant Is Entitled to WIIA Benefits

Finally, Olsen's contention that the Department lacks subject matter jurisdiction to make any decision regarding whether or not an injured worker's liable insurer is subject to the LHWCA is meritless. AB 27-29. Olsen argues that the Department should adjudicate claims that are governed by RCW 51.12.102 by simply paying benefits to workers who fall within its terms and without making *any* decision regarding whether or not the worker is entitled to benefits under the WIIA or the LHWCA, and to take no action other than making payments pursuant to

that statute until and unless the worker receives benefits pursuant to the LHWCA. *See id.*

Olsen's argument fails because it is well-settled that the Department has original and exclusive subject matter jurisdiction to decide whether or not a worker is entitled to benefits *under the WIIA* for an alleged injury or occupational disease. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994); *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934). *See also Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 650-59, 677 P.2d 1134 (1984) (upholding Department's decision to reject worker's WIIA claim under RCW 51.12.100 because the worker had a "right or obligation" under the LHWCA).

Since the Department's subject matter jurisdiction stems from the Act that created it, the scope of its subject matter jurisdiction is defined by the types of decisions that the legislature has directed it to make. *See Marley*, 125 Wn.2d at 539-40. Here, RCW 51.12.102 explicitly and unmistakably directs the *Department* to "render a decision" regarding the "liable insurer" for an asbestos-related illness. RCW 51.12.102 then directs the Department to take a variety of different types of further actions depending on whether the Department determines that the liable insurer is subject to the WIIA or a federal statute. Since the statute directs

the Department to decide, among other things, whether a claim is subject to a federal statute, and since it directs the Department to take various actions in the event that it finds that the claimant is subject to such a statute, the legislature necessarily empowered the Department with jurisdiction to decide that issue and to take those actions.

Olsen's argument that the Department would invade the exclusive jurisdiction of the federal government if it attempted to decide whether she was entitled to benefits under the LHWCA misconstrues the nature of the decision that the Department makes in those situations. The Department does *not* assert that it has the authority to actually award a claimant federal benefits. However, it *does* have jurisdiction to decide whether a claimant is entitled to benefits *under the WIIA*, and it must decide whether a claimant has a right or obligation under federal law in order to determine whether the claimant is entitled to benefits under the WIIA. *See Lindquist*, 36 Wn. App. at 659. *See also* RCW 51.12.100; RCW 51.12.102.

Notably, Olsen fails to identify any state or federal case law that suggests that a state lacks subject matter jurisdiction to decide *whether* a claimant is subject to coverage under the LHWCA *for the limited purpose of deciding whether the claimant is entitled to benefits under state law*. The Department is aware of no such authority. Furthermore, the case law

shows that the Department *does* have jurisdiction to make this type of decision when deciding whether the claimant is covered by the WIIA.¹²

In *Sun Ship v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432, 65 L.Ed.2d 458 (1980), the Supreme Court of the United States clarified that even though the LHWCA purports to provide the “exclusive remedy” to workers with maritime-related injuries and occupational diseases, the states have concurrent jurisdiction with the federal government, and that, at least in some circumstances, a state *may* extend benefits to workers who are injured in the course maritime employment *if the states so choose*.

However, while the states *may* extend benefits to workers under state law even though they are covered by the LHWCA, there is no requirement that they do so. Indeed, Washington’s legislature determined that workers who have a “right or obligation” under federal workers’ compensation statutes such as the LHWCA are *not* subject to the WIIA, and are *not* entitled to benefits under that Act, except for the limited benefits that are authorized by RCW 51.12.102.¹³ Thus, in order to decide

¹² The Board concluded in the significant decision *In re David Buren*, No. 65,127 (Wash. Bd. of Indus. Ins. Appeals May 31, 1984) WL 547151 (1984) that the Department has jurisdiction to make its own determination regarding *whether* a claimant has a right or obligation under federal law, and that it should *not* wait for a federal agency to make this decision before deciding whether the claim may be allowed under the WIIA.

¹³ See footnote 5 above in Part VI.B, explaining that while Olsen asserts throughout her Brief of Appellant that workers may “elect” to pursue either Washington or federal benefits (AB 1, 13, 30-31), *Gorman* expressly concluded that there is no right to election; if there is LHWCA coverage, then there is no WIIA coverage. *Id.* at 208-13.

whether a worker is entitled to WIIA benefits, the Department must decide whether the worker has a right or obligation under the LHWCA.

In *Lindquist*, the Court of Appeals determined that the Department properly concluded that the claimant was not entitled to benefits under the WIIA because it agreed with the Department that the claimant *did* have a “right or obligation” under the LHWCA. *See Lindquist*, 36 Wn. App. at 650-59. In *Lindquist*, a worker filed a claim for both WIIA benefits and LHWCA benefits. *See id.* at 649-50. The LHWCA claim was placed in abeyance pending a final decision regarding the claimant’s eligibility for benefits under the WIIA. *See id.* The *Lindquist* Court upheld the Department’s decision to reject the WIIA claim even though no final decision had been made regarding the LHWCA claim. *See id.* at 650-59. By upholding the Department’s decision to deny the claim based on its determination that the claimant had a “right or obligation” under the LHWCA, the court implicitly concluded that the Department had jurisdiction to make that type of decision. *See id.*

Although *Lindquist* was decided before the enactment of RCW 51.12.102, it is nonetheless persuasive authority that the Department has jurisdiction to decide whether a claimant has a right or obligation under federal law for the limited purpose of deciding whether the claimant is subject to the WIIA. *Id.* Indeed, RCW 51.12.102 *explicitly* directs *the*

Department to “render a decision” regarding whether a claimant’s liable insurer is subject to the LHWCA or the WIIA, while RCW 51.12.100 merely gives the Department the implicit authority to make such a decision by directing the Department to deny a WIIA claim if the claimant has a “right or obligation” under federal law. Therefore, the adoption of RCW 51.12.102 makes it even more apparent than it was at the time of the *Lindquist* decision that the Department has jurisdiction to decide whether a claimant has a “right or obligation” under a federal statute such as the LHWCA for the purpose of determining whether the claimant is entitled to benefits under the WIIA.

Olsen appears to suggest that when the legislature directed the Department to render a decision regarding the liable insurer in RCW 51.12.102(1), it merely empowered the Department to decide the liable insurer in the event that the liable insurer was either a state fund or self-insured employer, and that the Department cannot decide whether the liable insurer was subject to a federal statute such as the LHWCA. *See* AB 15. To the extent that Olsen is contending this, she is mistaken, as this argument is contrary to the plain language of the statute.

In particular, this argument fails because RCW 51.12.102(4) directs the Department to take a variety of different actions *in the event that it determines that the liable insurer is subject to a federal statute such*

as the LHWCA. Among other things, RCW 51.12.102(4) directs the Department to pursue the federal program for benefits and to appoint a special assistant attorney general, if necessary, to pursue those benefits. If the Department cannot decide *whether* a worker is subject to a federal statute until after the worker has actually received federal benefits, then it could not take any action under RCW 51.12.102(4) until after the worker had actually received such benefits. However, once a worker has begun receiving federal benefits, it would be pointless for the legislature to direct the Department to pursue such benefits on the worker's behalf, and even more pointless for the Department to appoint a special assistant attorney general to help pursue those benefits. Olsen's interpretation of RCW 51.12.102 would lead to absurd results that could not possibly have been intended by the legislature.

Olsen also attempts to bolster her argument that the Department lacks jurisdiction to decide whether a claim is subject to the LHWCA with her strained interpretation of WAC 296-14-350. AB 27-29. This argument fails for at least three reasons.

First, the Department's subject matter jurisdiction is determined by the language of the WIIA, not by the WACs. *See, e.g., Marley*, 125 Wn.2d at 539-40 (stating that the legislature has granted the Department broad jurisdiction to decide whether a WIIA claim should be allowed).

RCW 51.12.102 plainly and unmistakably directs *the Department* to “render a decision” regarding whether a claim is subject to a statute such as the LHWCA. The Department could not shirk this responsibility even if it wanted to by enacting a regulation that purports to deprive it of jurisdiction to make a decision regarding this issue.

Second, nothing in WAC 296-14-350 purports to place a limit on the Department’s *subject matter jurisdiction*. WAC 296-14-350 states that a Title 51 insurer “shall not be liable” if the worker has an allowed claim under the maritime laws or the Federal Employees’ Compensation Act. It does *not* state that an insurer *is* liable under the WIIA until and unless a claim is actually allowed by a federal agency or court. Moreover, it does not state that the Department lacks jurisdiction to *decide* whether an insurer is subject to the WIIA until LHWCA benefits have been paid.

At most, WAC 296-14-350 shows that it would be *legally incorrect* for the Department to *terminate a worker’s temporary and provisional WIIA benefits* prior to the claimant having actually received LHWCA benefits. Here, the Department has not attempted to terminate Olsen’s temporary and provisional WIIA benefits prior to her receiving LHWCA benefits. Furthermore, the mere fact that it *might* be legally incorrect to make such a decision would not establish that the Department lacks subject matter jurisdiction to make that type of decision.

See Marley, 125 Wn.2d at 542, (explaining that the Department order is not void simply because it is based on an erroneous interpretation of the law).

Third, *Gorman* considered and rejected a related argument that was advanced by the plaintiffs. *See Gorman* 155 Wn.2d at 216-19. The plaintiffs contended that they were covered by the WIIA under WAC 296-14-350 since no LHWCA benefits had actually been paid as of the time that they filed their torts. *See id.* The *Gorman* Court rejected this argument, and concluded that WAC 296-14-350 actually supported its holding that a claimant is not subject to the WIIA if the claimant has a right or obligation under the LHWCA. *See id.*

Olsen makes the conclusory statement that the United States Constitution and the LHWCA show that the Department lacks jurisdiction to make the decision that it made in this case. AB 27. Olsen's argument fails because neither the United States Constitution nor the LHWCA show that the Department lacks jurisdiction to decide whether a claimant is eligible for benefits under a federal statute for the limited purpose of deciding whether the claimant is entitled to benefits under the LHWCA.

Furthermore, it is well-settled that a party who wishes to challenge the constitutionality of a duly-enacted statute must fully support their claim that the challenged statute is unconstitutional, and that "naked

castings into the constitutional sea” will be summarily rejected. *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (citing *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)) (internal quotation marks omitted). Olsen has not argued that RCW 51.12.102 or RCW 51.12.100 are unconstitutional. To the extent that she is suggesting that RCW 51.12.100 and RCW 51.12.102 are unconstitutional, her brief, *at most*, makes naked castings into the constitutional sea that do not merit consideration by this Court.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court affirm the Superior Court’s decision to grant summary judgment to the Department.

RESPECTFULLY SUBMITTED this 12 day of November, 2010.

ROBERT M. MCKENNA
Attorney General



STEVE VINYARD, WSBA #29737
Assistant Attorney General
P.O. Box 40121
Olympia, Washington 98504-0121
(360) 586-7715

APPENDIX A

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.



West's Revised Code of Washington Annotated Currentness

Title 51. Industrial Insurance (Refs & Annos)

▣ Chapter 51.12. Employments and Occupations Covered (Refs & Annos)

→ **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.

CREDIT(S)

[2008 c 70 § 1, eff. Jan. 1, 2009; 2007 c 324 § 1, eff. July 22, 2007; 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.]

HISTORICAL AND STATUTORY NOTES

Effective date--2008 c 70: "This act takes effect January 1, 2009." [2008 c 70 § 2.]

Effective date--Applicability--1988 c 271 §§ 1-4: See note following RCW 51.12.102.

Effective date--1975 1st ex.s. c 224: See note following RCW 51.04.110.

Laws 1972, Ex.Sess., ch. 43, § 11, throughout subsec. (2), deleted references to "class or classes" of workers; and, near the end of the subsection, following "and the employer" substituted ", if not a self-insurer, shall pay premiums on that basis" for "shall pay to the accident fund on that basis" [for complete text of subsec. (2) following amendment, see 1975 amendment note, post].

Laws 1975, 1st Ex.Sess., ch. 224, § 3, added subsec. (4); and rewrote subsecs. (1) and (2), which prior thereto read:

"(1) The provisions of this title shall apply to all employers and workmen, except a master or member of a crew of any vessel, engaged in maritime occupations for whom no right or obligation exists under the maritime laws for personal injuries or death of such workmen.

"(2) If an accurate segregation of payrolls of workmen engaged in maritime occupations and working part time on shore and part time off shore cannot be made by the employer, the director is hereby authorized and directed to fix from time to time a basis for the appropriate [approximate] segregation of the payrolls of employees to cover the shore part of their work, and the employer, if not a self-insurer, shall pay premiums on that basis for the time such workmen are engaged in their work."

Laws 1977, Ex.Sess., ch. 350, § 21, throughout the section, substituted "workers" for "workmen".

Laws 1988, ch. 271, § 2, in subsec. (4), following "repaid" inserted "by the worker or beneficiary".

Laws 1991, ch. 88, § 3, in subsecs. (1) and (4), inserted references to the federal employees' compensation act.

Laws 2007, ch. 324, § 1 added subsec. (5); and rewrote subsecs. (1) and (4), which formerly read:

"(1) 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."

"(4) In the event payments are made under this title prior to the final determination under the maritime laws or

federal employees' compensation act, such benefits shall be repaid by the worker or beneficiary if recovery is subsequently made under the maritime laws or federal employees' compensation act.”

Laws 2008, ch. 70, § 1, in subsec. (5), deleted “, workers tending to such divers,” following “RCW 79.135.210”, and deleted “and tenders” following “such divers”.

Source:

Laws 1911, ch. 74, § 18-a.

Laws 1925, Ex.Sess., ch. 111, § 1.

Laws 1931, ch. 79, § 1.

RRS § 7693a.

CROSS REFERENCES

Marine employees in extrahazardous employment, see § 47.64.070.

LAW REVIEW AND JOURNAL COMMENTARIES

Application of Workmen's Compensation Act to maritime workers. 19 Wash.L.Rev. 32 (1944).

LIBRARY REFERENCES

2010 Main Volume

Admiralty  1.20(5).
Workers' Compensation  260, 262.
Westlaw Topic Nos. 16, 413.
C.J.S. Admiralty §§ 11, 13, 63, 67 to 69, 80.
C.J.S. Flags § 5.
C.J.S. Workmen's Compensation §§ 170, 172.

RESEARCH REFERENCES

ALR Library

56 ALR 352, Workmen's Compensation: Applicability of State Compensation Act to Injury Within Admiralty Jurisdiction.

50 ALR 223, Application for and Acceptance of Benefits Under Workmen Compensation Act as Affecting Right

C

West's Revised Code of Washington Annotated Currentness

Title 51. Industrial Insurance (Refs & Annos)

Chapter 51.12. Employments and Occupations Covered (Refs & Annos)

→ **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 (a) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and (b) 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.

(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 maritime laws of the United States:

(a) 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;

(b) For the purpose of pursuing recovery under this subsection, the department shall be subrogated to all of the rights of the worker or beneficiary receiving 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 receiving 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 against equity 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, self-insurer, or federal program insurer by failing to provide information that, in the opinion of the department, is relevant in determining the liable insurer, 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 information obtained 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 suit. 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 attorneys' fees incurred in bringing the third party suit.

CREDIT(S)

[1993 c 168 § 1; 1988 c 271 § 1.]

HISTORICAL AND STATUTORY NOTES

Applicability--1993 c 168: "This act applies to all claims without regard to the date of injury or date of filing of the claim." [1993 c 168 § 2.]

Effective date--1993 c 168: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 168 § 3.]

Report to legislature--1988 c 271 § 1: "The department of labor and industries shall conduct a study of the program established by RCW 51.12.102. The department's study shall include the use of benefits under the program and the cost of the program. The department shall report the results of the study to the economic development and labor committee of the senate and the commerce and labor committee of the house of representatives, or the appropriate successor committees, at the start of the 1993 regular legislative session." [1988 c 271 § 4.]

Effective date--Applicability--1988 c 271 §§ 1-4: "Sections 1 through 4 of this act shall take effect July 1, 1988, and shall apply to all claims filed on or after that date or pending a final determination on that date." [1988 c 271 § 5.]

Laws 1993, ch. 168, § 1, in subsec. (4), added subd. (d); in subsec. (5), in the second sentence, inserted "or if the worker or beneficiary fails to cooperate with the department in pursuing benefits from the federal program insurer,"; and deleted a former subsec. (7), which read: "This section shall expire July 1, 1993."

ADMINISTRATIVE CODE REFERENCES

Special assistant attorneys general, see WAC 296-14-900 et seq.

LIBRARY REFERENCES

2010 Main Volume

Workers' Compensation ↪ 262, 2085.
Westlaw Topic No. 413.
C.J.S. Workmen's Compensation §§ 170, 172, 1593 to 1596.

RESEARCH REFERENCES

ALR Library

56 ALR 352, Workmen's Compensation: Applicability of State Compensation Act to Injury Within Admiralty Jurisdiction.

Treatises and Practice Aids

Modern Workers' Compensation § 104:19, Maritime Injuries.

16 Wash. Prac. Series § 0.15, Preemption of State Law by Federal Law--Maritime Cases.

NOTES OF DECISIONS

In general 1

1. In general

APPENDIX B

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

FLOOR SYNOPSIS
SUBSTITUTE HOUSE BILL 1592

A. WHAT THE BILL DOES:

THE DEPARTMENT OF LABOR AND INDUSTRIES IS DIRECTED TO PAY PROVISIONAL BENEFITS TO CLAIMANTS IN ASBESTOS-RELATED OCCUPATIONAL DISEASE CASES WHEN THERE IS A DISPUTE AS TO LIABILITY FOR THE CLAIM. THE DEPARTMENT IS THEN REQUIRED TO DETERMINE WHETHER THE STATE FUND, A SELF INSURER, OR A FEDERAL MARITIME INSURER IS RESPONSIBLE FOR THE CLAIM AND SEEK REPAYMENT OF THE PROVISIONAL BENEFITS IF APPROPRIATE. THE COST OF PROVISIONAL BENEFITS IS SHARED EQUALLY BETWEEN WORKERS AND EMPLOYERS.

OCCUPATIONAL DISEASE CLAIMS ARE TO BE PAID BASED ON THE SCHEDULE IN EFFECT AT THE TIME THE DISEASE REQUIRES TREATMENT OR BECOMES DISABLING, WHICHEVER IS EARLIER. THE PROVISIONAL BENEFITS PART OF THE BILL SUNSETS IN 1993.

EFFECT OF COMMITTEE AMENDMENT: THE REFERENCES TO RECOUPMENT FROM FEDERAL PROGRAM INSURERS AND SELF INSURERS ARE REORGANIZED INTO SEPARATE SECTIONS. THE REQUIREMENT THAT A WORKER RECEIVE FULL RECOVERY FROM A FEDERAL PROGRAM BEFORE THE DEPARTMENT CAN RECOUP PROVISIONAL BENEFITS FROM THE WORKER IS CHANGED TO A REQUIREMENT THAT THE WORKER RECEIVE SOME RECOVERY FROM ANOTHER INSURER.

B. WHY IT IS NEEDED:

ASBESTOS RELATED OCCUPATIONAL DISEASE CLAIMS OFTEN INVOLVE BOTH MARITIME RELATED EMPLOYMENT AND NONMARITIME RELATED EMPLOYMENT. THE

Page 2

DETERMINATION OF WHETHER THE STATE PROGRAM OR THE FEDERAL PROGRAM IS RESPONSIBLE FOR THE CLAIM IS OFTEN VERY COMPLICATED AND TIME CONSUMING, EVEN THOUGH THERE IS NO QUESTION BUT WHAT ONE PROGRAM OR THE OTHER IS RESPONSIBLE.

MEANWHILE, THE WORKER IS OFTEN TOTALLY DISABLED WITH NO SOURCE OF INCOME AND IS RUNNING UP LARGE MEDICAL BILLS.

OCCUPATIONAL DISEASE CLAIMS ARE CURRENTLY PAID ACCORDING TO THE SCHEDULE OF BENEFITS IN PLACE AT THE TIME THE DISEASE WAS CONTRACTED. THAT COULD EASILY BE 20 YEARS BEFORE THE CLAIM IS FILED. AS A RESULT OF INFLATION DURING THE INTERVENING YEARS, OCCUPATIONAL DISEASE CLAIMANTS CAN RECEIVE VERY SMALL AWARDS OR TIME LOSS PAYMENTS.

C. FISCAL IMPLICATIONS:

PROVISIONAL BENEFITS FOR THE FIRST BIENNIUM TOTAL \$4,300,000 AND ADMINISTRATIVE COSTS WILL RUN \$133,000. THE CLAIMS SECTION OF THE DEPARTMENT WILL HAVE TO SET UP A SPECIAL UNIT TO HANDLE ADJUDICATION OF ASBESTOS RELATED DISEASE CLAIMS.

D. PERSONS WHO TESTIFIED:

RHONNA GOLDMAN, AWB (FOR); CHUCK BAILEY, WASHINGTON STATE LABOR COUNCIL, AFL-CIO (FOR); BOB DILGER, WASHINGTON STATE BUILDING TRADES COUNCIL (FOR); BRETT BUCKLEY, DEPARTMENT OF LABOR AND INDUSTRIES;

Page 3

MELANIE STEWART, WASHINGTON SELF INSURERS (FOR); BRENT KNOTT,
WASHINGTON ASSOCIATION OF PULP AND PAPER WORKERS (FOR)

E. COMMENTS:

DC:D7-13

FLOOR NOTES - EHB 1353

PRIME SPONSOR

REP. GRACE COLE

WHY THIS BILL IS NEEDED

UNLESS RENEWED, "ASBESTOS FUND" ADMINISTERED BY L & I EXPIRES JULY 1.

WHAT THIS BILL DOES

ASBESTOS INJURIES ARE DIFFERENT FROM OTHER INDUSTRIAL INJURIES. THEY ARE PROGRESSIVE AND OFTEN DO NOT SHOW UP FOR 20 TO 30 YEARS AFTER EXPOSURE. ALSO, ASBESTOS WORKERS OFTEN WORKED AT MANY JOB SITES. THESE FACTORS CAUSE PROBLEMS WHEN WORKERS SEEK INDUSTRIAL INSURANCE BENEFITS. THIS BILL:

1. DETERMINES WHO HAS TO PAY INDUSTRIAL INSURANCE BENEFITS TO ASBESTOS WORKERS WHO HAVE BOTH STATE-COVERED AND FEDERALLY-COVERED CLAIMS. THIS USED TO TAKE MONTHS, SOMETIMES YEARS; THIS PROGRAM HAS CUT THE PROCESS TO ABOUT 3 1/2 MONTHS. PARTY FOUND LIABLE MUST REIMBURSE THE FUND.

2. PROVIDES INTERIM INDUSTRIAL INSURANCE BENEFITS UNTIL THAT LIABILITY IS ESTABLISHED.

3. IF THE FEDS ARE FOUND LIABLE, THE ATTY GENL MAY APPOINT "SPECIAL AG'S" TO PURSUE THE FEDS BOTH FOR STATE REIMBURSEMENT AND ALSO TO SECURE BENEFITS FOR THE INJURED WORKER.

FISCAL IMPACT

FISCAL NOTE ENCLOSED. ABOUT \$1 MILLION/BIENNIUM.

PERSON WHO TESTIFIED

ALL PRO: L & I; WSTLA; WA STATE LABOR COUNCIL; ASSN OF WA BUSINESS.

APPENDIX C

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

State of Washington

Department of Labor and Industries

ASBESTOS-RELATED DISEASE

A Report to the

Commerce and Labor Committee

of the Washington State House of Representatives

and

Labor and Commerce Committee

of the Washington State Senate

January, 1993

TABLE OF CONTENTS

Page(s)

Executive Summary.....	ii-iv
Overview.....	1-3
Claims Management Practices.....	4-8
Tables:	
Asbestos Fund Claims Allowed.....	9
Asbestos-Related Death Benefit Claims Allowed.....	9
Asbestos-Related Cancer Claims Allowed.....	9
Allowance/Rejection of Asbestos Disease Claims	
Filed After 07-01-88.....	10
Allowance/Rejection by Year of Determination.....	10
Allowance/Rejection of Asbestos Claims Filed	
Prior to 07-01-88.....	10
Average Adjudication Time for Validity	
Determination.....	11
Initial Diagnosis - All Allowed Asbestos Claims.....	11
Initial Diagnosis - All Asbestos Fund Claims.....	12
Allowed Claims by Responsible Insurer.....	12
Reason for Rejection (Claims Filed After 07-01-88)....	13
Reason for Rejection (All by Year of Determination)....	14
Benefit Costs/Funding.....	15-17
Tables:	
Summary of All Asbestos Fund Payments.....	18
Payment for Medical Services.....	19
Time Loss Compensation Benefit Payments.....	20
Permanent Impairment Awards.....	21
Pension Benefit Payments.....	22
Miscellaneous Payments.....	23
Charts:	
All Expenses by Category of Payment.....	24
Medical Treatment Expenses by Category.....	25
Conclusions and Recommendations.....	26-27
APPENDIX:	
Detailed Summary of Asbestos Fund Payments by	
Fiscal Quarter.....	A1-A23
Asbestos Fund Payments by Category	
by Fiscal Year.....	A24-A27
Asbestos Fund Payment Summary by Fiscal Year....	A28-A29

*We listen
We care
We respond*

1-800-LISTENS



State of Washington
Department of Labor and Industries
General Administration Building • Olympia, Washington 98504-4401

EXECUTIVE SUMMARY

Substitute House Bill 1592 was signed into law in 1988 and created a special fund for the payment of workers' compensation benefits to victims of asbestos-related diseases caught in a dispute between federal and state programs over which program is responsible for the claim. As a result of the legislative act, codified as RCW 51.12.102, benefits under the Industrial Insurance Act are to be paid from the Medical Aid Fund until the responsible federal program insurer begins making payment. The Department of Labor and Industries was also directed to report to the legislature at the beginning of the 1993 session regarding the use of these benefits and the cost of the program. Unless renewed, the payment of all jurisdictional (Asbestos Fund) benefits will cease on July 1, 1993.

Prior to the passage of SHB 1592, a variety of problems were identified from a study of the management of asbestos disease claims under Washington's program. In addition to questions over coverage, the process of determining whether to accept or deny a claim was extremely slow. Claim validity determinations took an average of more than one year. Contested claims remained in limbo for many years. Denials were common because of both jurisdictional questions and because of a reluctance to provide the department with information that could be easily obtained by asbestos manufacturers and other third party defendants. Claims management policies were not consistently applied or designed to deal with diseases which could take thirty or more years to develop and were progressive in nature.

Validity determinations on asbestos disease claims are now made by the Asbestos Fund Section which consists of four adjudicative and one support staff who also manage the claims accepted under the Asbestos Fund and

Washington State Fund. Specific policies have been developed and WAC Rules adopted to deal with unique problems faced by asbestos disease victims. A special emphasis has been placed on quality customer service and communication. The time required to obtain information needed to make a decision on claim validity has been reduced from more than 13 months to an average of 99 days. A total of 114 workers and surviving beneficiaries have been found eligible for Asbestos Fund benefits during the first four years of the fund's existence. More than 300 claims had been previously rejected and were pending in litigation for as long as 17 years. Two-thirds of these claims have now been allowed, the vast majority under the State Fund.

The cost of Asbestos Fund benefits is shared by both State Fund and Self-Insured employers and workers. Self-Insurers have paid one assessment thus far which amounted to \$0.0004 per worker hour and raised \$390,686.46. The amount assessed averaged less than \$1,100.00 per Self-Insured employer and has been sufficient to cover their share of the first four years of benefits.

Asbestos Fund benefit payments to disease victims during the first four fiscal years have been made as follows:

FISCAL YEAR	TOTAL PAYMENTS	THIRD PARTY RECOVERIES	NET PAYMENT
1989	\$159,382.93	0.00	\$159,382.93
1990	\$148,389.93	\$13,685.53	\$134,704.40
1991	\$526,798.11	\$64,702.96	\$462,095.15
1992	\$478,960.07	\$72,691.47	\$406,268.60

Awards for pension and death benefits represented 47% of the payments made from the Asbestos Fund. The remaining categories of benefits involving the most significant awards included payment for permanent partial disability (20%), medical services (18%), and time loss compensation (15%).

Hospitals received 49% of payments for medical services, two-thirds of which involved outpatient care including specialized pulmonary function testing. Physicians received 38% of all payments for medical services, while

prescriptions accounted for 6%. Equipment such as oxygen containers and durable supplies represented 3% of all medical charges.

Increasing success has been demonstrated in recovering benefit payments from asbestos manufacturers and other third parties, however, federal program insurers continue to deny and contest claims under those programs. Only one death benefit claim has been accepted under the Longshore and Harbor Workers Act and it remains in litigation as the insurer attempts to avoid reimbursing the Asbestos Fund for interim payments.

An average of 28 claims per year have been accepted for the payment of Asbestos Fund benefits. It is estimated that the number of claims accepted for interim coverage will decline slightly to an average of 25 per year. Expenditures during the next biennium are estimated to be \$1.07 million, rising to \$1.7 million by the third biennium.

Companion legislation to this report calls for the continuation of the Asbestos Fund program and also includes a provision to permit the appointment of private attorneys to pursue repayment by federal program insurers. This approach is modeled after the Special Assistant Attorney General program now used to obtain recoveries from liable third parties in tort actions arising out of State Fund claims. The legislation also mandates worker or beneficiary cooperation in pursuing valid claims against federal program insurers as a prerequisite to receiving Asbestos Fund benefits.

With these additional tools, the Department of Labor and Industries supports the continued existence of interim Asbestos Fund benefits for qualified workers and their survivors.



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO Box 44000 • Olympia, Washington 98504-4000

OVERVIEW

A study prepared by the Department of Labor and Industries in 1987 at the request of the House Commerce and Labor Committee acknowledged that a growing problem existed in providing the prompt payment of benefits to workers with asbestos-related diseases.

Delays in making eligibility determinations on claims filed under Washington's Industrial Insurance Act averaged more than 400 days per claim with some denied claims still in legal limbo for as long as 17 years. More than half of the claims were denied with a majority of denials based on a determination that the asbestos-related condition was the responsibility of a federal workers' compensation program, primarily the Longshore and Harbor Workers' Act. Many of those with asbestos caused diseases were exposed to asbestos fibers during employment in work in various shipyards subject to federal coverage, as well as in industries subject to the provisions of the state workers' compensation program.

The primary reasons for delayed determinations and the frequent denial of claims for coverage of asbestos-related disease included the following:

- The long "incubation" period to develop asbestos related diseases;
- Difficulties in establishing proof of exposure;
- Reluctance of insurers to admit liability;
- Conflicts with product liability lawsuits;
- A lack of internal procedures for dealing with unique issues presented by asbestos disease claims.

Legislation creating the Asbestos Fund program was enacted and signed into law and went into effect on July 1, 1988. Codified as RCW 51.12.102, that legislation provided for:

- 1) Workers' compensation benefits for those who may have a right to a claim under maritime laws if (a) objective clinical findings substantiated the presence of an asbestos-related occupational disease; and, (b) the worker's employment history had a "prima facie indicia" of injurious exposure to asbestos fibers in employment subject to Title 51 RCW;
- 2) Payment of these benefits to be made from the Medical Aid Fund, with funding by self-insured and state fund employers and employees based on reported worker hours;
- 3) Reimbursement by the State Fund or Self-Insurer if either program were found to be responsible for the claim;
- 4) Authority to pursue the federal insurer on behalf of the worker or beneficiary to recoup claim benefit expenses;
- 5) A requirement for the worker or beneficiary to cooperate in making a determination of coverage and protecting the information obtained during this process from discovery by others;
- 6) A dollar for dollar lien on any third party recovery;
- 7) Application of the statute to all claims filed on or after July 1, 1988, as well as to those claims in which a final determination of eligibility had not yet been made;
- 8) Termination of the program and benefits on July 1, 1993.

The 1988 enabling legislation also contained the following provision:

The department of labor and industries shall conduct a study of the program established by RCW 51.12.102. The department's study shall include the use of benefits under the program and the cost of the program. The department shall report the results of the study to the economic development and labor committee of the senate and the commerce and labor committee of the house of representatives, or the appropriate successor committees, at the start of the 1993 regular legislative session.

Laws of 1988, ch. 271, § 4.

The purpose of this report is to comply with the directive contained in Substitute House Bill 1592 and to provide elected officials with information concerning the management of asbestos-related disease claims during the period since the 1988 legislation went into effect.

CLAIMS MANAGEMENT PRACTICES

In response to the 1988 legislation, the Asbestos Fund Section was established within the Industrial Insurance Division of the Department of Labor and Industries. This Section, consisting of four adjudicative and one support staff, was given the charge to develop an in-depth understanding of the causation, nature and progression of asbestos-related diseases and for bringing consistency to benefit eligibility determinations.

A Quality Assurance review of a random selection of claims assigned to the Asbestos Fund Section recently found that unit currently provides the highest quality of measured service within the Claims Administration Program. In addition to the highest overall quality, the performance of those employees set high marks in all measured areas, including technical, communication, management and adjudication skills.

The primary guideline for determining the responsible insurance program has been the "last injurious exposure" rule. The same rule is applied in determining the responsible carrier in other occupational diseases under workers' compensation programs in a variety of jurisdictions. Under this practice, the insurance program on risk at the time of the last injurious exposure to asbestos fibers is held to be the program ultimately responsible for the payment of benefits to an otherwise eligible injured worker or beneficiary. This concept was upheld between State Fund and Self-Insured coverage by the Washington State Supreme Court in Weyerhaeuser v. Tri, 117 Wn.2d 128 (1991). A case is currently pending before that court which will address a situation involving subsequent exposures outside of coverage under this state's Industrial Insurance Act.

If the last injurious exposure to asbestos fibers took place under employment covered by Title 51 RCW, and a causally related asbestos disease is present, the claim is accepted under the State Fund or by a Self-Insured employer. If the last exposure under these circumstances was with an employer covered under a federal program and there was prior Title 51 exposure but the federal claim is disputed, the claim is accepted for interim

benefits under the Asbestos Fund. If there was no prior exposure under Title 51 or the last injurious exposure was subject to coverage in another state or nation, the claim is denied for lack of coverage.

Because it may take 30 years or more for an asbestos-related disease to "incubate" or become manifest, a primary difficulty facing the worker or beneficiary and staff is to obtain an accurate employment and exposure history. This obstacle has been addressed by a questionnaire developed for use immediately following receipt of each claim and supplementation with records obtained from the Social Security Administration as needed. An increased emphasis is placed upon obtaining information necessary for adjudication by telephone contact and correspondence. Depositions, interrogatories and other discovery devices from third party litigation are also used as a source of information.

Prior to the enactment of RCW 51.12.102, efforts by the department to establish an employment history, history of asbestos exposure and prior medical history were often met with opposition by legal counsel representing asbestos disease victims in tort actions against asbestos manufacturers and distributors. The opposition to the release of this information centered over a concern that investigation of the claim may provide damaging information to the third party defendants. As a result, many asbestos claims were denied solely for failing to provide sufficient information to make an eligibility determination.

A provision was added to RCW 51.12.102 prior to final passage which required rejection of the claim in the absence of cooperation on the part of the applicant. No information provided by the applicant, however, was to be released to non-parties and was exempted from being subject to subpoena or other legal process. The new approach made a significant difference in the sufficiency of the information being provided to the department and the level of cooperation between our staff and the workers' third party legal representatives. During the last two fiscal years, only two claims have been denied because of a failure to cooperate in investigating the validity of a claim.

Validity determinations for all State Fund and Asbestos Fund claims are made by the Asbestos Fund Section staff. In addition, any request for claim rejection by a Self-Insured employer must be approved by the Asbestos Fund Section to ensure that a worker or beneficiary eligible for benefits under Title 51 RCW does not suffer from lack of coverage because of a dispute over which program under that Title is responsible.

Medical criteria for claim allowance were also established to ensure consistent validity (allowance or rejection) determinations. For a claim to be allowed, a worker must have objective evidence of a condition which a physician finds to be related to the past exposure to asbestos fibers on a more probable than not basis. Coverage is extended, however, even if the asbestos-related condition is not yet disabling. An early sign of asbestos disease may involve the development of pleural plaques. These abnormalities of tissues lining the body cavity are a unique identifier of asbestos exposure and, although they do not cause impairment by themselves, the presence of plaques is an indicator of a need for medical surveillance for early detection of more serious conditions.

The question of which schedule of benefits should apply to claims filed prior to July 1, 1988 was settled by the Washington State Supreme Court in Landon v. Department of Labor and Industries, 117 Wa.2d 122 (1991), an asbestos disease claim. Legislation that went into effect on July 1, 1988 established the date of injury for compensation purposes as "the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first . . ." (RCW 51.32.180.) The "last injurious exposure" rule had also been applied to pre-1988 claims to determine the appropriate benefit rate. The court held in Landon that the compensation rate should be established under the law in effect as of the date an occupational disease manifests itself, rather than on the date of the worker's last injurious exposure to the harmful material.

Another area which presented unique problems with asbestos disease victims involved claim closure. Asbestos-related diseases are generally considered to be progressive in nature without known "cures", although symptomatic treatment may be necessary. Periodic medical evaluations are recommended, initially at one to two year intervals and more frequently as changes are noted between examinations. No treatment other than medical

surveillance examinations may be necessary in the early stages of disease even though some functional impairment may be present.

Awards for permanent partial disability are only made upon closure of a claim and keeping a claim open solely for the coverage of periodic medical surveillance examinations would keep a worker from receiving an award that would be paid to any other injured worker. Workers, however, were reluctant for claims to be closed because the right to reopen a claim for disability benefits ends seven years from the time of the first closure.

The Department of Labor and Industries responded by the adoption of two rules, WAC 296-20-124 and 296-14-400. The amendment to WAC 296-20-124 contained the following text:

(3) Periodic medical surveillance examinations will be covered by the department or self-insurer for workers with closed claims for asbestos-related disease, to include chest x-ray abnormalities, without the necessity of filing a reopening application when such examinations are recommended by accepted medical protocol.

As a practical matter, this rule amendment provided specific authority for the department or self-insurer to extend coverage for the necessary medical surveillance examinations even if the claim itself had been closed.

The concerns of asbestos disease victims over the statute of limitations for reopening workers' compensation claims was addressed by the amendment to WAC 296-14-400 which reads in part:

The seven-year reopening time limitation shall be waived by the director in claims where objective evidence of worsening is present and proximately caused by a previously accepted asbestos-related disease.

Establishing whether or not the progression of asbestos-related diseases has taken place tends to be a much more objective determination than with many musculoskeletal conditions. Verification may be made by radiological comparisons, blood studies and a variety of pulmonary function tests. In

effect, a guarantee was given to asbestos disease victims that the statutory limitation on their right to reopen a claim for disability benefits would be waived if the standard requirement for claim reopening within seven years was met.

In addition, a loophole which allowed the payment of benefits under both Title 51 and the Federal Employees Compensation Act (FECA) was closed by department requested legislation in 1991 (Laws of 1991, ch. 88, § 3). Workers at the Bremerton Naval Shipyards and other smaller federal facilities who would normally have been covered under the LSHWA were subject to the same workers' compensation coverage as other federal employees. An administrative court ruling had previously held that existing law did not prohibit duplicative benefits.

Data concerning determinations made on asbestos-related disease claims is summarized in the following tables on a fiscal year basis. Fiscal year summaries were used since the program was established on July 1, 1988 in the middle of a calendar year. Data has been included on all claims received from that date through July 1, 1992. Information is being reported on all asbestos disease claim applications received during this four year period as well as for those claims accepted for Asbestos Fund benefits. Where specifically noted, information has been provided on the asbestos claims filed prior to July 1, 1988 in which a final determination had not been made by that date.

Asbestos Fund Claims Allowed

By Fiscal Year of Determination

	FY 89	FY 90	FY 91	FY 92	TOTAL
	24	35	40	15	114

Asbestos-Related Death Benefit Claims Allowed

	FY 89	FY 90	FY 91	FY 92	TOTAL
All Asbestos Claims	12	12	20	12	56
Asbestos Fund Claims	3	3	5	0	11

Asbestos-Related Cancer Claims Allowed

	FY 89	FY 90	FY 91	FY 92	TOTAL
All Asbestos Claims	15	18	29	20	82
Asbestos Fund Claims	3	6	7	1	17

Allowance/Rejection of Asbestos Disease Claims Filed After 07-01-88
By Fiscal Year of Filing

	FY 89	FY 90	FY 91	FY 92	TOTAL
# of Claims	163	124	122	164	573
# Allowed	99	86	67	70	322
% Allowed	61%	69%	55%	50%	59%
% Rejected	39%	31%	45%	50%	41%

Allowance/Rejection by Year of Determination

	FY 89	FY 90	FY 91	FY 92	TOTAL
# of Claims	259	208	214	185	866
# Allowed	152	132	159	97	540
% Allowed	59%	64%	74%	52%	62%
# Rejected	107	76	55	88	326
% Rejected	41%	36%	26%	48%	38%

Allowance/Rejection of Asbestos Claims Filed Prior to 07-01-88

Year Filed	Allowed	Rejected
1971	1	1
1978	0	1
1979	1	1
1980	4	5
1981	1	5
1982	2	2
1983	6	1
1984	10	9
1985	13	9
1986	41	14
1987	101	37
1988	44	24
TOTAL	224	108

Of Claims Rejected Prior to 07-01-88 and Later Allowed: 96

Average Adjudication Time for Validity Determination

All Pending Claims Filed Prior
to July 1, 1988: 1041 days

All Claims Filed After July 1, 1988:

	FY 89	FY 90	FY 91	FY 92
# Days	319.6	216.9	148.4	99.4

All Asbestos Fund Claims Filed After July 1, 1988:

	FY 89	FY 90	FY 91	FY 92
# Days	497.4	242.8	188.3	129.5

Initial Diagnosis - All Allowed Asbestos Claims

(Filed after July 1, 1988)

Diagnosis	FY 89	FY 90	FY 91	FY 92	TOTAL
Asbestosis	28	17	17	22	84
Fibrosis	6	8	1	5	20
Plaques	38	38	27	28	131
Mesothelioma	7	12	10	8	37
Adenocarcinoma	2	2	2	3	12
Other Cancer	4	3	4	2	13
Other	14	6	6	2	28

Initial Diagnosis - All Asbestos Fund Claims

(By Date of Determination)

Diagnosis	FY 89	FY 90	FY 91	FY 92	TOTAL
Asbestosis	7	6	9	7	29
Fibrosis	0	5	6	0	11
Plaques	9	13	16	7	45
Mesothelioma	2	2	4	1	9
Adenocarcinoma	1	1	0	0	2
Other Cancer	0	2	3	0	5
Other	5	6	2	0	13

Allowed Claims by Responsible Insurer

Insurer/Program	FY 89	FY 90	FY 91	FY 92	TOTAL
State Fund	117	88	110	76	391
Self-Insurer	11	9	8	4	32
Longshore & Harbor Workers' Act	21	25	35	16	97
Jones Act	1	1	1	0	3
Federal Employees Compensation Act	2	9	5	1	17

Reason for Rejection

(Denied Claims Filed after July 1, 1988)

Reason	FY 89	FY 90	FY 91	FY 92	TOTAL
No Disease	17	15	28	50	110
Excluded Employment	8	0	2	0	10
Other State	9	0	4	1	14
Federal Coverage Only	21	13	15	9	58
Non-Cooperation					
Investigation	4	3	1	1	9
Examination	0	0	0	0	0
Claim Withdrawn	0	2	0	0	0
Not Occ. Disease	2	0	0	6	8
No Medical Proof	0	1	1	1	3
Not Timely	0	0	0	0	0
Other	3	3	3	1	10

Reason for Rejection

(All Claims by Fiscal Year of Determination)

Reason	FY 89	FY 90	FY 91	FY 92	TOTAL
No Disease	12	25	23	61	121
Excluded Employment	6	7	3	0	16
Other State	9	5	3	3	20
Federal Coverage Only	67	21	15	16	119
Non-Cooperation Investigation	3	9	3	2	17
Examination	1	0	0	0	1
Claim Withdrawn	0	1	1	0	2
Not Occ. Disease	5	0	0	4	9
No Medical Proof	0	0	2	0	2
Not Timely	0	0	0	0	0
Other	4	7	5	2	18

BENEFIT COSTS / FUNDING

The largest category of benefits paid over the four year period covered by this evaluation was for pension and death benefits. Of all benefits paid, 47% consisted of pension and death awards. Pension benefits are provided to an injured worker when permanent and total disability results from a covered illness. Death benefits are awarded to eligible beneficiaries (if any) in the form of an "immediate payment" of up to \$1,600.00 and a monthly pension award. In addition, a burial award of up to \$2,000.00 is available.

The remaining categories of benefits involving the most significant awards included payment for permanent partial disability (20%), medical services (18%), and time loss compensation benefits (15%).

Awards for permanent partial disability are based upon an objective medical evaluation of pulmonary function and, in a majority of cases, the criteria for determining the amount of any award is classified according to increasing loss of function under WAC 296-20-200 through 296-20-670.

Hospitals were the largest recipient of payments for medical services during the four year period, accounting for nearly one-half of all medical payments. Outpatient services including pulmonary function and screening tests accounted for 57% of the hospital payments with inpatient services responsible for the remaining 43%.

Physicians received 38% of all payments for services associated with treating asbestos disease victims. Prescriptions accounted for 6% of benefit payments and equipment such as oxygen tanks and durable supplies represented 3% of all charges. Summaries of all Asbestos Fund payments by fiscal year quarter immediately follow this section of the report.

Various options were considered by the Legislature as a source of funding for the benefits to be paid in the event of a jurisdictional dispute between state and federal workers' compensation benefits in asbestos-related disease cases. Those funding sources included payment of claims from the

State Fund (including the Accident Fund), the Supplemental Pension Fund, the Second Injury Fund, the Medical Aid Fund and by creation of a "Special Fund.

The Medical Aid Fund is primarily utilized by the State Fund for the payment of bills from medical vendors such as physicians, hospitals and pharmacies. The Accident Fund is primarily used for payment of wage loss (time loss compensation) benefits and awards for permanent partial disability. Transfers from the Accident Fund are made to the Pension Fund to establish reserves for total disability and death benefit claims. The Supplemental Pension Fund is the source of funding for annual adjustments to compensation rates for temporary total disability, permanent total disability and death benefit recipients.

As enacted, benefits authorized under RCW 51.12.102 are to be paid from the Medical Aid Fund with Self-Insurers and State Fund employers paying a pro rata share based upon the number of worker hours reported under each program. Workers covered under the State Fund and Self-Insurance pay one-half of the respective shares.

To avoid the expense of creating new benefit payment systems, the existing payment delivery and notification systems were utilized in Asbestos Fund claims. All expenses from sources other than the Medical Aid Fund were tracked and monthly transfers have been made from the Medical Aid Fund to replenish any such payments.

Only one assessment has been made thus far against Self-Insured employers to cover the costs of the Asbestos Fund benefits. That assessment amounted to \$0.0004 per worker hour for each employee covered by a Self-Insuring employer. This assessment raised a total of \$390,686.46 during the FY 1989-90 period.

An average of \$68,600 per year has been recovered during the past two years from third party actions instituted against the manufacturers and distributors of asbestos products. These actions have resulted in recovery of 16% of all payments made during this period of time, up from just 5% recovery during the first two years of the program.

Legal representation by the department to recover benefit payments from federal program insurers has been undertaken on only one death benefit claim. Although the insurer has been ordered by an Administrative Law Judge to pay benefits, the decision has been appealed to the Benefits Review Board. A favorable decision is expected within the next six months in the case, however, an appeal to the 9th Circuit Court of Appeals is possible. Reimbursement for back benefits will be sought following the BRB decision.

The lack of reimbursement by federal program insurers is addressed in companion legislation to this report in two ways. First, the department would be given authority to retain private attorneys to represent the interest of the Trust Funds in pursuing recovery from the responsible employer and insurer. This approach is modeled after the Special Assistant Attorney General program utilized in connection with third party recoveries on State Fund workers' compensation claims. This approach would be used in the event an unrepresented worker or beneficiary appears eligible for federal benefits but has been unsuccessful in obtaining them. The second prong is in language that gives authority to reject the claim unless the worker or beneficiary cooperates with the department in pursuing benefits from the federal program insurer. This language is intended to ensure that valid claims against federal program insurers are vigorously pursued in order to remain eligible for Asbestos Fund benefits.

The estimates of fiscal impact which accompanied Substitute House Bill 1592 projected that 40 claims per year would meet criteria to become eligible for benefits from the Asbestos Fund and that payments would amount to a total of \$10.2 million over the first six years. Actual experience of the Fund during the first four years has seen an average of 28 claims accepted each year and net benefit costs averaging \$435,000 per year during the past two years.

Estimates of fiscal impact accompanying the current legislation assume that an annual average of 25 claims will be accepted for Asbestos Fund benefits. Net expenses during the first biennium are estimated to be \$1.07 million, rising to \$1.7 million by the third biennium.

SUMMARY OF ALL ASBESTOS FUND PAYMENTS

	TOTAL PAYMENTS	THIRD PARTY RECOVERIES	NET PAYMENT
FISCAL YEAR 1989			
First Quarter	\$10,611.47	0	\$10,611.47
Second Quarter	6,345.05	0	6,345.05
Third Quarter	109,173.63	0	109,173.63
Fourth Quarter	33,252.78	0	33,252.78
TOTAL	\$159,382.93	0	\$159,382.93
FISCAL YEAR 1990			
First Quarter	\$29,705.29	\$7,785.08	\$21,920.21
Second Quarter	33,000.02	5,900.45	27,099.57
Third Quarter	37,014.55	0	37,014.55
Fourth Quarter	48,670.07	0	48,670.07
TOTAL	\$148,389.93	\$13,685.53	\$134,704.40
FISCAL YEAR 1991			
First Quarter	\$130,014.15	\$148.86	\$129,865.29
Second Quarter	89,761.12	21,608.84	68,152.28
Third Quarter	84,748.59	18,564.98	66,183.61
Fourth Quarter	222,274.25	24,380.28	197,893.97
TOTAL	\$526,798.11	\$64,702.96	\$462,095.15
FISCAL YEAR 1992			
First Quarter	\$103,128.29	\$14,114.31	\$89,013.98
Second Quarter	193,230.67	33,931.72	\$159,298.95
Third Quarter	94,825.87	13,844.44	80,981.43
Fourth Quarter	87,775.24	10,801.00	76,974.24
TOTAL	\$478,960.07	\$72,691.47	\$406,268.60

PAYMENT FOR MEDICAL SERVICES

Medical Treatment

TOTAL PAYMENTS

FISCAL YEAR 1989

First Quarter	\$4,354.49
Second Quarter	2,334.80
Third Quarter	2,691.71
Fourth Quarter	7,636.89

TOTAL **\$17,017.89**

FISCAL YEAR 1990

First Quarter	\$10,151.40
Second Quarter	6,884.50
Third Quarter	4,571.79
Fourth Quarter	12,793.23

TOTAL **\$34,400.92**

FISCAL YEAR 1991

First Quarter	\$19,895.09
Second Quarter	21,557.40
Third Quarter	17,305.05
Fourth Quarter	46,559.27

TOTAL **\$105,316.81**

FISCAL YEAR 1992

First Quarter	\$35,039.09
Second Quarter	15,897.72
Third Quarter	21,078.88
Fourth Quarter	10,734.29

TOTAL **\$82,749.98**

TIME LOSS COMPENSATION BENEFIT PAYMENTS

Temporary Total Disability

	BASE AWARD	COST OF LIVING ADJUSTMENT	TOTAL PAYMENTS
FISCAL YEAR 1989			
First Quarter	\$2,425.11	\$53.37	\$2,478.48
Second Quarter	0	0	0
Third Quarter	0	0	0
Fourth Quarter	5,837.82	17.79	5,855.61
TOTAL	\$8,262.93	\$71.16	\$8,334.09
FISCAL YEAR 1990			
First Quarter	\$3,637.63	\$204.46	\$3,842.09
Second Quarter	6,347.06	316.09	6,663.15
Third Quarter	8,024.57	3,018.44	11,043.01
Fourth Quarter	15,411.95	3,468.33	18,880.28
TOTAL	\$33,421.21	\$7,007.32	\$40,428.53
FISCAL YEAR 1991			
First Quarter	\$11,934.55	\$2,456.50	\$14,391.05
Second Quarter	22,867.55	4,201.28	27,068.83
Third Quarter	10,671.76	2,650.84	13,322.60
Fourth Quarter	49,809.10	4,479.34	54,288.44
TOTAL	\$95,282.96	\$13,787.96	\$109,070.92
FISCAL YEAR 1992			
First Quarter	\$11,625.57	2,390.30	\$14,015.87
Second Quarter	11,332.65	921.28	12,253.93
Third Quarter	5,806.26	838.50	6,644.76
Fourth Quarter	6,189.75	893.70	7,083.45
TOTAL	\$34,954.23	\$5,043.78	\$39,998.01

PERMANENT IMPAIRMENT AWARDS

Permanent Partial Disability

TOTAL PAYMENTS

FISCAL YEAR 1989

First Quarter	0
Second Quarter	0
Third Quarter	\$12,700.01
Fourth Quarter	9,985.51

TOTAL	\$22,685.52
--------------	--------------------

FISCAL YEAR 1990

First Quarter	\$6,531.71
Second Quarter	568.50
Third Quarter	4,850.25
Fourth Quarter	4,001.56

TOTAL	\$15,952.02
--------------	--------------------

FISCAL YEAR 1991

First Quarter	\$14,044.38
Second Quarter	15,947.58
Third Quarter	12,224.87
Fourth Quarter	48,693.12

TOTAL	\$90,909.95
--------------	--------------------

FISCAL YEAR 1992

First Quarter	\$19,281.88
Second Quarter	44,020.87
Third Quarter	27,592.53
Fourth Quarter	35,374.56

TOTAL	\$126,269.84
--------------	---------------------

PENSION BENEFIT PAYMENTS

Permanent Total Disability and Death

	BASE PENSION	COST OF LIVING ADJUSTMENT	BURIAL INM. PMT.	TOTAL PAYMENTS
FISCAL YEAR 1989				
First Quarter	\$1,120.12	\$1,358.38	\$1,300.00	\$3,778.50
Second Quarter	1,680.18	2,037.57	0	3,717.75
Third Quarter	16,570.73	74,161.18	3,050.00	93,781.91
Fourth Quarter	2,475.18	6,199.59	800.00	9,474.77
TOTAL	\$21,846.21	\$83,756.72	\$5,150.00	\$110,752.93
FISCAL YEAR 1990				
First Quarter	\$2,475.18	\$6,571.16	0	\$9,046.34
Second Quarter	7,951.25	7,263.87	3,600.00	18,815.12
Third Quarter	5,867.43	6,980.07	3,600.00	16,447.50
Fourth Quarter	5,867.43	6,980.07	0	12,847.50
TOTAL	\$22,161.29	\$27,795.17	\$7,200.00	\$57,156.46
FISCAL YEAR 1991				
First Quarter	\$43,996.36	\$33,889.27	3,600.00	\$81,485.63
Second Quarter	13,419.36	11,635.95	0	25,055.31
Third Quarter	14,707.69	21,122.95	5,984.43	41,815.07
Fourth Quarter	54,558.02	18,095.40	0	72,653.42
TOTAL	\$126,681.43	\$84,743.57	\$9,584.43	\$221,009.43
FISCAL YEAR 1992				
First Quarter	\$14,556.11	\$15,582.84	\$4,600.00	\$34,738.95
Second Quarter	90,589.42	26,299.44	4,169.29	121,058.15
Third Quarter	21,853.54	15,718.62	1,803.04	39,375.20
Fourth Quarter	16,975.29	15,532.65	2,000.00	34,507.94
TOTAL	\$143,974.36	\$73,133.55	\$12,572.33	\$229,680.24

MISCELLANEOUS PAYMENTS

TOTAL PAYMENTS

FISCAL YEAR 1989

First Quarter	0
Second Quarter	\$292.50
Third Quarter	0
Fourth Quarter	300.00
TOTAL	\$592.50

FISCAL YEAR 1990

First Quarter	\$133.75
Second Quarter	68.75
Third Quarter	102.00
Fourth Quarter	147.50
TOTAL	\$452.00

FISCAL YEAR 1991

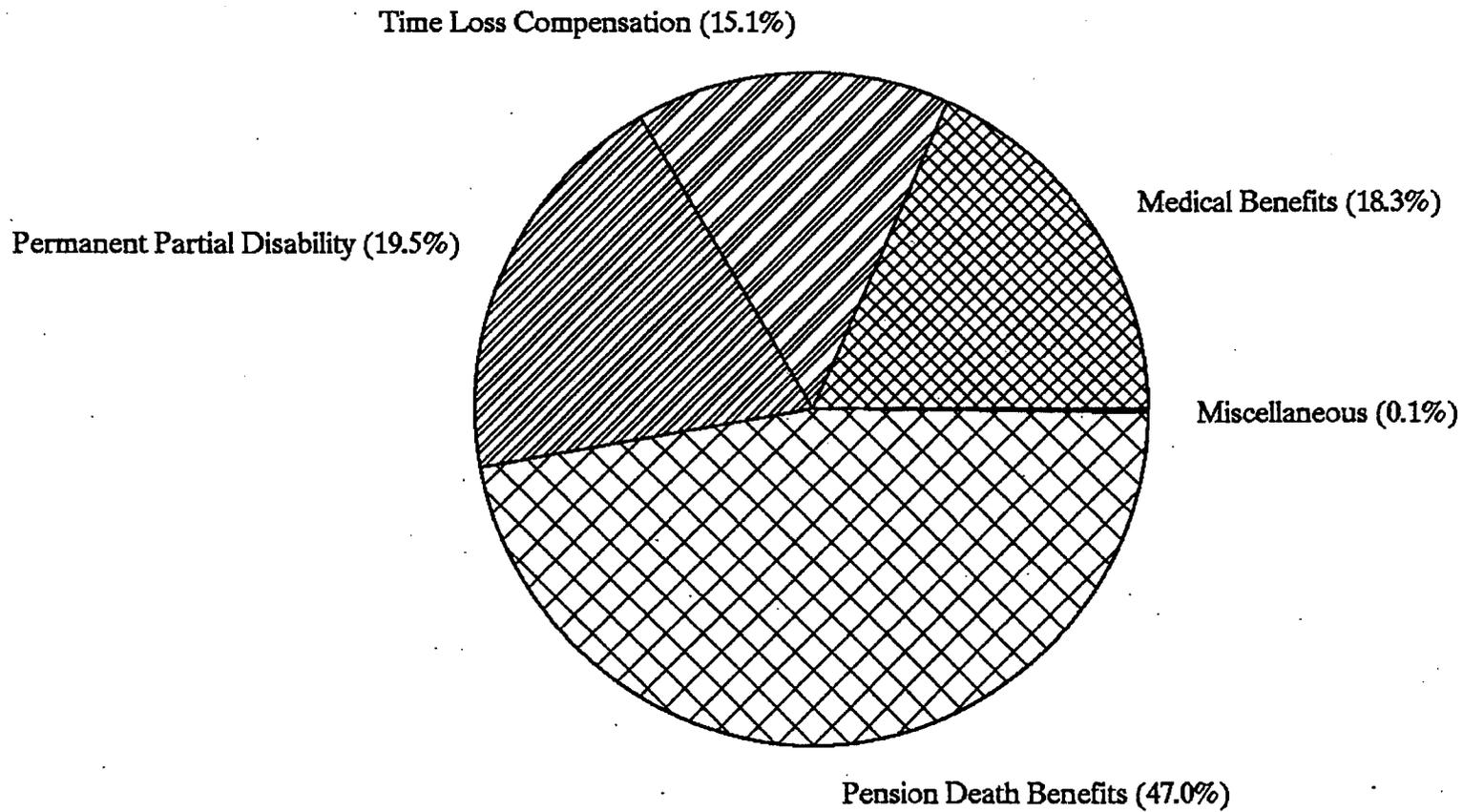
First Quarter	\$198.00
Second Quarter	132.00
Third Quarter	81.00
Fourth Quarter	80.00
TOTAL	\$491.00

FISCAL YEAR 1992

First Quarter	\$52.50
Second Quarter	0
Third Quarter	134.50
Fourth Quarter	75.00
TOTAL	\$262.00

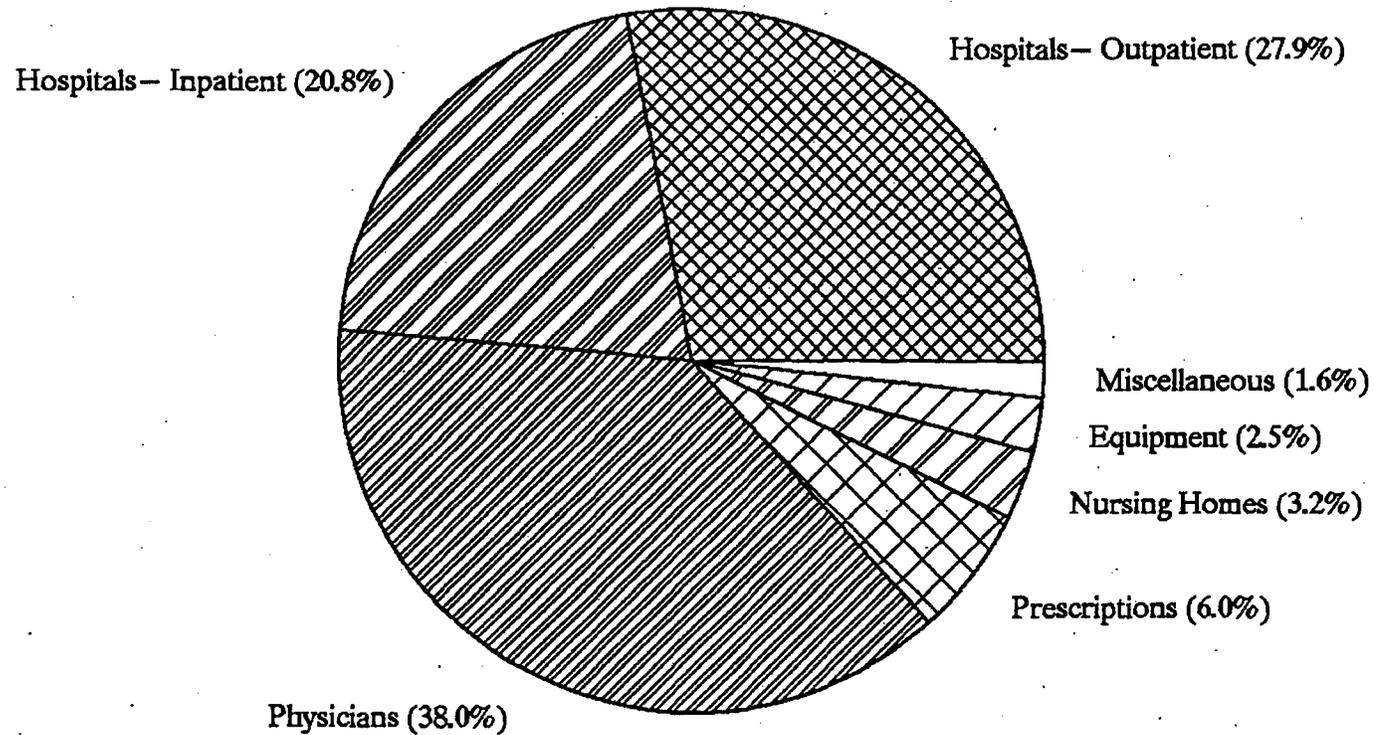
ASBESTOS FUND EXPENSES

All Expenses by Category of Payment



ASBESTOS FUND PAYMENTS FOR MEDICAL TREATMENT

Medical Treatment Expenses by Category



CONCLUSIONS AND RECOMMENDATIONS

The conditions which created jurisdictional conflicts between state and federal coverage continue to exist for asbestos-related disease victims. Insurers under federal programs routinely deny such claims, requiring workers or beneficiaries to obtain legal representation to pursue benefits from those programs.

An average of 143 asbestos disease claims per year have been filed with Washington's workers' compensation program during the past four fiscal years. An average of 20% of these claims continue to qualify for benefits from the Asbestos Fund because of the lack of benefits from the responsible insurance program. The benefits paid to eligible workers have averaged \$440,000 per year during the past two years.

The focus on asbestos-related disease claims has resulted in a significant improvement in service to a variety of customers. The time before a final determination of eligibility is made on a claim has been reduced from more than one year to an average of less than 100 days. Policies have been refined and adapted to the special nature of asbestos-related diseases. Unnecessary burdens upon physicians treating asbestos victims have been lifted. Greater cooperation exists between workers and their representatives in securing employment and exposure information needed for a valid decision.

Despite the progress in these areas, if the program is to achieve a primary goal it must have the tools to secure reimbursement from insurers for the various federal programs determined to be ultimately responsible for Asbestos Fund benefit payments. The Department of Labor and Industries proposes that this be accomplished through two approaches, both of which are elements of the proposed legislation accompanying this report.

The first approach is to expand the resources available to pursue recovery from federal program insurers through establishment of authority to hire private attorneys appointed as Special Assistant Attorneys General. The

program would be modeled after a similar program currently in existence in the Third Party Recovery Section where payment for damages is sought in civil actions against liable entities. Any fees or costs would be taken from the recovery made from the federal program insurer.

Second, workers or beneficiaries would be required to cooperate with the department in pursuing benefits from the liable federal program insurer as a prerequisite to receiving continued Asbestos Fund benefits.

With the additional tools contained in the companion legislation that has been requested, it is the recommendation of the Department of Labor and Industries that Asbestos Fund benefits should continue to be made available to asbestos-related disease victims and their survivors. In the absence of either this measure or a similar one being signed into law, those currently receiving these benefits will have their claims terminated on July 1, 1993. The prospect of terminating benefits solely because of the passage of time and in the absence of coverage by the appropriate federal program insurer should be eliminated.

APPENDIX

First Quarter, Fiscal Year 1989

ASBESTOS CLAIM TRACKING REPORT-- FIRST QUARTER FISCAL YEAR 1989

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER EST DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
J711385			455.28				
K368199				1,300.00			
K394325			698.44				
K604257			438.47				
K604270			438.47				
K842927	2,425.11	53.37					
TOTAL:	2,425.11	53.37	2,030.66	1,300.00			
ASBESTOS FUND PENSION							
K368199					1,358.38		1,120.12
TOTAL:					1,358.38		1,120.12
REJECTED							
K002705			737.02				
K249746			375.10				
K263969			41.80				
K394366			421.40				
K477071			310.04				
K565874			438.47				
TOTAL:			2,323.83				
SECOND QUARTER '89							
GRAND TOTAL:	2,425.11	53.37	4,354.49	1,300.00	1,358.38		1,120.12

Revised 1-4-93

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER EST DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
J686854			569.92				
J754399	67.50						
K394325			(15.93)				
K604257			89.80				
K604270			170.60				
TOTAL:	67.50		814.39				
ASBESTOS FUND PENSION							
K368199					2,037.57		1,680.18
SECTION TOTAL:					2,037.57		1,680.18
REJECTED							
J433625			382.12				
K004755	90.00		241.80				
K146430			15.00				
K294783	54.00						
K314279			33.30				
K394366			53.54				
K477071			731.35				
K565874			33.30				
K604261	81.00		30.00				
K657100							
K746082							
TOTAL:	225.00		1,520.41				
SECOND QUARTER '89							
GRAND TOTAL:	292.50		2,334.80		2,037.57		1,680.18

Third Quarter- Fiscal Year 1989

ASBESTOS CLAIM TRACKING REPORT- THIRD QUARTER FISCAL YEAR 1989

	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
H553145				850.00			
J471741				1,200.00			
J711385						750.91	
J754399						124.00	
K263975						774.32	
K368188	1,000.00						
K527337				12,700.01			
K604257			298.55				
K604270			43.30				
K745997						252.16	
TOTAL:	1,000.00		341.85	14,750.01		1,901.39	
ASBESTOS FUND PENSION							
H553145					31,775.40		5,995.88
J471741					40,348.21		8,894.67
K368199					2,037.57		1,680.18
TOTAL:					74,161.18		16,570.73
REJECTED							
K604261			438.47				
8301360			10.00				
TOTAL:			448.47				
THIRD QUARTER '89							
GRAND TOTAL:	1,000.00		790.32	14,750.01	74,161.18	1,901.39	16,570.73

Revised 1-4-93

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund
ALLOWED ASBESTOS FUND			
H652026			
J364503			
J378186			
J686854			
K004106			212.80
K263975			
K368188	800.00		
K408351			
K604257			298.55
K604263			
K724958	78.75		
K745997			
K842927			
K996169	72.50		
TOTAL:	951.25		511.35
ASBESTOS FUND PENSION			
H553145			
J471741			
K368199			
TOTAL:			
REJECTED			
J376109			562.77
J520881			15.00
K003560	80.00		
K306773	68.75		
K394360			823.97
K523799			457.13
K819883	5,029.45		
8301360			10.00
TOTAL:	5,178.20		1,868.87
FOURTH QUARTER '89			
GRAND TOTAL:	6,129.45		2,380.22

PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
		34.45	
		569.81	
		241.39	
		372.59	
4,220.00		308.99	
5,765.51		30.00	
		18.94	
		144.64	
808.37	17.79	3,535.86	
TOTAL:	17.79	5,256.67	
			375.00
	2,103.51		420.00
	2,058.51		1,680.18
	2,037.57		
	6,199.59		2,475.18
TOTAL:			
FOURTH QUARTER '89			
GRAND TOTAL:	10,793.88	6,217.38	2,475.18

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
H652026						589.92	
H710503			65.45				
H729049			197.53				
J260964						643.64	
J364503						43.34	
J378186						64.50	
J581309						831.39	
J586854						120.93	
J711385						1,600.12	
K178658						64.50	
K263975				3,767.55			
K408351				2,764.16			
K604257			(298.55)				
K724987			772.25				
K725036			35.70				
K768107						290.25	
K842927				3,637.63	204.46	3,752.68	
K996169			0.26				
M051555			1.00				
TOTAL:			773.64	10,169.34	204.46	8,001.27	
ASBESTOS FUND PENSION							
H553135					2,209.67		375.00
J471741					2,164.67		420.00
K368199					2,196.82		1,680.18
SECTION TOTAL:					6,571.16		2,475.18
REJECTED							
H809137			27.09				
J376109			457.13				
K210666	83.00		180.60				
K230257			398.04				
K523799			33.70				
K657158			70.00				
K767003			194.93				
K819883			15.00				
K949858	50.75						
TOTAL:	133.75		1,376.49				
THIRD PARTY DEPOSITS							
J659981				(7,433.01)	(352.07)		
TOTAL:				(7,433.01)	(352.07)		
FIRST QUARTER '90 GRAND TOTAL:	133.75		2,150.13	2,736.33	6,423.55	8,001.27	2,475.18

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
H652026						24.50	
H710503						457.13	
H729049						290.25	
J681309						378.86	
J711385						73.89	
J749289						237.47	
K178658						41.44	
K263975				13.39			
K264990			59.58				
K266287				3,600.00			
K408351				555.11			
K604271						177.56	
K724969						550.60	
K768107						1,091.04	
K842927				3,637.62	216.60	2,782.54	
K996169			14.74				
M051555	2,709.44	99.49					
M051558						77.79	
TOTAL:	2,709.44	99.49	74.32	7,806.12	216.60	6,183.07	
ASBESTOS FUND PENSION							
H553145					2,194.50		375.00
J471741					2,149.50		420.00
K266287					745.80		5,476.07
K368199					2,174.07		1,680.18
TOTAL:					7,263.87		7,951.25
REJECTED							
H809137			290.25				
K604278			243.11				
K744635	68.75		93.75				
TOTAL:	68.75		627.11				
THIRD PARTY DEPOSITS							
H553145						(5,900.45)	
TOTAL:						(5,900.45)	
SECOND QUARTER '90							
GRAND TOTAL:	2,778.19	99.49	701.43	7,806.12	7,480.47	282.62	7,951.25

A-6

Third Quarter-- Fiscal Year 1990

ASBESTOS CLAIM TRACKING REPORT-- THIRD QUARTER FISCAL YEAR 1990

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
H710503				1,493.55	875.93		
H899215			60.30				
J659981				2,785.88	1,925.91	992.75	
K178658						153.00	
K264990						23.99	
K394340			21.50				
K604208						901.59	
K604218						315.49	
K604252						229.78	
K604271				4,850.25		271.32	
K679544						40.68	
K724969						257.56	
K725036	75.00						
K768107						59.34	
K842927				3,637.65	216.60		
K940792			30.00				
K996169				3,600.00		82.90	
M051558						516.63	
M763952	107.49						
TOTAL:	182.49		111.80	16,367.33	3,018.44	3,845.03	
ASBESTOS FUND PENSION							
H553145					2,194.50		375.00
J471741					2,149.50		420.00
K266287					462.00		3,392.25
K368199					2,174.07		1,680.18
TOTAL:					6,980.07		5,867.43
REJECTED							
K604278			423.56				
K624724			120.00				
K744635			30.00				
K894169			41.40				
M058508	27.00						
	27.00		614.96				
THIRD QUARTER '90							
GRAND TOTAL:	209.49		726.76	16,367.33	9,998.51	3,845.03	5,867.43

A-7

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
H710503				2,613.71	1,532.86	3,715.59	
H899215			10.00			23.50	
J260964						18.00	
J493933				2,278.86	1,575.42	1,316.34	
J659981						1,043.38	
K004106						179.37	
K264990						105.94	
K394395						156.87	
K527328						634.18	
K604208						24.80	
K604244				4,001.56		103.20	
K604271						16.57	
K679544						461.08	
K724969						829.70	
K745783						2,485.09	
K745822	3,906.05	143.45				24.55	
K746119	83.00						
K746147	64.50						
K768107							
K842927				3,637.68	216.60		
K996169							
M763952	2,975.65						
TOTAL:	7,029.20	143.45	10.00	12,531.81	3,324.88	11,138.16	
ASBESTOS FUND PENSION							
H553145					2,194.50		375.00
J471741					2,149.50		420.00
K266287					462.00		3,392.25
K368199					2,174.07		1,680.18
TOTAL:					6,980.07		5,867.43
REJECTED							
H848274			88.50				
J376109			168.27				
K523799			320.79				
K657175			10.00				
K872649			354.49				
K981275			53.48				
L608565			215.54				
M159735			184.52				
M383491			144.64				
M407053			104.84				
TOTAL:			1,645.07				
FOURTH QUARTER '90							
GRAND TOTAL:	7,029.20	143.45	1,655.07	12,531.81	10,304.95	11,138.16	5,867.43

First Quarter - Fiscal Year 1991

ASBESTOS CLAIM TRACKING REPORT-FIRST QUARTER FISCAL YEAR 1991

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
H710503						14,497.21	
J378186						57.73	
J575431				5,794.53			
J659981				2,278.86	1,710.83	1,558.87	
J751808				1,800.00			
K004106				4,325.38			
K178658						94.50	
K368128				1,800.00			
K394367						364.18	
K604238						71.02	
K604244						251.43	
K604257						15.00	
K604271				3,924.47			
K679544						51.60	
K724958						588.73	
K745783						690.32	
K745811						339.35	
K745822	3,820.26	303.32					
K746048						477.43	
K746103	67.50						
K746211	75.00						
K842927				3,637.65	355.43	630.04	
M763952	2,197.78	86.92					
TOTAL:	6,160.54	390.24		23,560.89	2,066.26	19,687.41	
ASBESTOS FUND PENSION							
H553145					2,262.26		375.00
J471741					2,217.26		420.00
J751808					9,068.01		6,188.39
K266287					563.62		3,392.25
K368128					525.75		809.81
K368199					2,275.69		1,680.18
K368128					16,976.68		31,130.73
SECTION TOTAL:					33,889.27		43,996.36
REJECTED							
H844284	22.50						
K394360			(116.50)				
K735343			268.48				
K872649			55.70				
M439743				33.00			
TOTAL:	22.50		207.68	33.00			
THIRD PARTY DEPOSITS							
K604252A						(148.86)	
TOTAL:						(148.86)	
FIRST QUARTER - 1991							
GRAND TOTAL:	6,183.04	390.24	207.68	23,593.89	35,955.53	19,538.55	43,996.36

A-9

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
H710503							
J575431				9,338.06			
J659981				2,278.83	1,727.79	1,506.14	
J681309				99.39		77.89	
J754399						536.61	
K394360						35.00	
K394389						329.18	
K527302						851.06	
K597838						234.93	
K604238						41.44	
K604257						298.55	
K604271				947.53			
K861099				10,647.04	1,520.29		
K679544						51.60	
K724958						1,241.40	
K724965						937.67	
K724987						216.43	
K725036						216.43	
K744658						3.35	
K745822	2,415.78	187.74				183.34	
K748541						232.20	
K746048				5,562.60		632.87	
K746064						248.08	
K746103						178.77	
K746147						116.10	
K746203						790.49	
K746211						25.80	
K768107				3,637.62	369.00	3,181.66	
K842927						404.20	
M051555						1,104.34	
M051558							
M746257	67.50						
M763952				1,930.00			
M766355						932.38	
TOTAL:	2,483.28	187.74		34,441.07	3,617.08	20,793.50	

A-10

Second Quarter-- Fiscal Year 1991

ASBESTOS CLAIM TRACKING REPORT-- SECOND QUARTER FISCAL YEAR 1991

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ASBESTOS FUND PENSION							
H553145					2,296.14		375.00
J471741					2,251.14		420.00
J751808					2,430.18		1,576.50
K266287					614.43		3,392.25
K368128					1,577.25		2,429.43
K368199					2,326.50		1,680.18
M763952					140.31		3,546.00
TOTAL:					11,635.95		13,419.36
REJECTED							
J376109						(949.67)	
K246496			75.58				
K394360			568.07				
K746070				1,958.28	396.46		
K746195	64.50						
L608565			92.28				
M407053			16.57				
M422560			170.44				
M571602			95.62				
M758289			38.70				
8301360			656.31				
TOTAL:	64.50		1,713.57	1,958.28	396.46	(949.67)	
THIRD PARTY DEPOSITS							
K745811A						(199.70)	
K745997A						(574.79)	
K604218A						(206.01)	
K746077A						(21.95)	
K266287B						(13,254.34)	
K368199A						(7,352.05)	
TOTAL:						(21,608.84)	
SECOND QUARTER '91							
GRAND TOTAL:	2,547.78	187.74	1,713.57	36,399.35	15,649.49	(1,765.01)	13,419.36

A-11

Third Quarter Fiscal Year 1991

ASBESTOS CLAIM TRACKING REPORT-- THIRD QUARTER FISCAL YEAR 1991

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
H710503						824.00	
H977892				900.00		1,505.11	
J613219				1,089.84			
J659981				2,278.80	1,727.82	619.88	
J695484						75.79	
J719125						126.00	
K002994				1,484.43			
K185644				659.13	26.07	2,145.09	
K228042						5.80	
K394391						97.24	
K527302						38.93	
K527328						763.87	
K604298						195.93	
K679544						249.61	
K724958						50.00	
K745822	2,013.15	156.45		402.64	31.29		
K745827						856.38	
K745836				5,342.19			
K745840						84.04	
K746057						451.77	
K746064				653.83			
K746211						125.50	
K842927				3,637.62	369.00	381.32	
M051545						96.87	
M051555						2,832.61	
M746257						2,407.40	
M763952				3,600.00			
M766355				5,139.01		450.38	
TOTAL:	2,013.15	156.45		25,187.49	2,154.18	14,383.52	

Revised 1-4-93

Third Quarter-- Fiscal Year 1991

ASBESTOS CLAIM TRACKING REPORT-- THIRD QUARTER FISCAL YEAR 1991

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
PROVISIONAL/NOT YET ALLOWED--ASBESTOS FUND							
J689277			803.55				
M549728	81.00						
TOTAL:	81.00		803.55				
ASBESTOS FUND PENSION							
H553145					2,296.14		375.00
J471741					2,251.14		420.00
J751808					2,430.18		1,576.50
K002994					9,507.10		1,794.88
K266287					614.43		3,392.25
K368128					1,577.25		2,429.43
K368199					2,326.50		1,680.18
M763952					120.21		3,039.45
SECTION TOTAL:					21,122.95		14,707.69
REJECTED							
J376109						933.10	
K246496			39.83				
K744681			312.34				
K744682			362.04				
K746070	1,680.42	340.21					
M494089			156.42				
M494090			153.84				
M766771			160.41				
TOTAL:	1,680.42	340.21	1,184.88			933.10	
THIRD PARTY DEPOSITS							
K604208A						(552.22)	
K263975B						(5,929.37)	
J749289A						(154.12)	
M051555B						(1,806.68)	
K604271A				(4,271.18)		(1,377.08)	
K604257						(24.55)	
K178658B						(234.20)	
K996169A				(981.93)		(1,014.67)	
J711385B						(1,998.05)	
K679544A						(220.93)	
TOTAL:				(5,253.11)		(13,311.87)	
THIRD QUARTER-- 1991							
GRAND TOTAL:	3,774.57	496.66	1,988.43	19,934.38	23,277.13	2,004.75	14,707.69

A-13

	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
H710503						1,705.00	
H977892						274.54	
J493933						270.00	
J497730						855.88	
J613219						303.48	
J659981				2,278.80	1,727.82	2,242.64	
J681309				4,213.74			
J711385						16.52	
J719125						65.14	
K004233			652.54				
K85644						8,865.95	
K228042						1,231.15	
K394340						256.69	
K394367						449.81	
K394389						137.14	
K527302						270.00	
K527337				9,000.00			
K597838						(129.00)	
K604257						(298.55)	
K604298				7,574.62		288.41	
K724987						16.57	
K745822				30,655.42	2,382.52	2,439.40	
K745827				13,598.48			
K745836				5,565.06		572.02	
K745959						553.36	
K745992						414.78	
K746057				8,681.76			
K746064				642.73			
K746103						1,216.93	
K746119						414.79	
K842927				3,637.62	369.00	601.78	
K940792						216.00	
M051558						344.05	
M439891						592.10	
M687254	80.00						
M687256						1,012.49	
M726813						2,396.18	
M746257						7,593.00	
M763952						8,847.40	
M766355				8,416.73		25.00	
TOTAL:	80.00		652.54	94,264.96	4,479.34	44,060.65	

A-14

Fourth Quarter Fiscal Year 1991		ASBESTOS CLAIM TRACKING REPORT-- FOURTH QUARTER FISCAL YEAR 1991					
PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE				
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
PROVISIONAL/NOT YET ALLOWED--ASBESTOS FUND							
J689277			948.34				
TOTAL:			948.34				
ASBESTOS FUND PENSION							
H553145					2,296.14		375.00
J471741					2,251.14		420.00
J751808					2,430.18		1,576.50
K002994					2,251.14		420.00
K266287					614.43		3,392.25
K368128					1,577.25		2,429.43
K368199					2,326.50		1,680.18
K661099					4,228.41		41,225.21
M763952					120.21		3,039.45
TOTAL:					18,095.40		54,558.02
REJECTED							
M510195			270.00				
M510440	4,237.26						
M729298			140.24				
T226398						487.50	
TOTAL:	4,237.26		410.24			487.50	
THIRD PARTY DEPOSITS							
K368199B				(678.84)		(11,659.48)	
K724969A						(546.09)	
J493933						(11.94)	
K004106A						(811.49)	
K679544C						(898.84)	
K004106B				(2,879.57)		(1,785.83)	
J286648B				(633.23)	(194.25)	(732.84)	(1,399.92)
K679544D						(1,200.00)	
J497730A						(9.90)	
K527328A						(604.71)	
K679544F						(333.35)	
TOTAL:				(4,191.64)	(194.25)	(18,594.47)	(1,399.92)
FOURTH QUARTER '91 GRAND TOTAL:	4,317.26		2,011.12	90,073.32	22,380.49	25,953.68	53,158.10

A-15

First Quarter-- Fiscal Year 1992

ASBESTOS CLAIM TRACKING REPORT-- FIRST QUARTER FISCAL YEAR 1992

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
J493933						101.25	
J497730						46.65	
J659981				4,937.48	1,579.60	1,079.86	
J681309				678.15			
J719125						116.10	
K004233						496.46	
K185644				5,139.01		93.25	
K228042						423.84	
K237463						6.00	
K394340						270.00	
K394367				4,771.57		440.01	
K408351						178.03	
K527302						706.16	
K527308						433.93	
K527337						15.48	
K604298				1,436.58			
K745822				2,372.32	265.40	23,870.00	
K745833						27.00	
K745836				5,458.22			
K745959						640.74	
K746057				1,844.87			
K746064				631.63			
K746103						1,561.59	
K746147						411.27	
K842927				3,637.62	545.30		
M439891				3,000.00			
M687256						43.63	
M726813				1,600.00		257.68	
M746257						3,257.91	
TOTAL:				35,507.45	2,390.30	34,476.84	

Revised 1-4-93

First Quarter— Fiscal Year 1992

ASBESTOS CLAIM TRACKING REPORT— FIRST QUARTER FISCAL YEAR 1992

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ASBESTOS FUND PENSION							
H553145					2,446.64		375.00
J471741					2,401.64		420.00
J751808					2,655.93		1,576.50
K002994					2,401.64		420.00
K266287					301.56		1,130.75
K368128					1,803.00		2,429.43
K368199					2,552.25		1,680.18
K661099					721.96		3,484.80
M763952					298.22		3,039.45
TOTAL:					15,582.84		14,556.11
REJECTED							
K657181	52.50						
M561074			562.25				
TOTAL:	52.50		562.25				
THIRD PARTY DEPOSITS							
J681309B						(225.89)	
K394367A						(264.81)	
K604244A						(179.85)	
K746048A						(469.94)	
K604238A						(74.56)	
J575431A				(3,298.43)		(3,301.57)	
K724958A						(1,236.16)	
K604208B						(420.60)	
K745827A				(4,367.45)		(275.05)	
TOTAL:				(7,665.88)		(6,448.43)	
FIRST QUARTER '92							
GRAND TOTAL:	52.50		562.25	27,841.57	17,973.14	28,028.41	14,556.11

Revised 1-4-93

ALLOWED ASBESTOS FUND	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
H977892				2,895.59			
J613219				4,500.00			
J659981				1,469.14			
J681309				665.04			25.80
J695484							71.78
K185644				5,730.11			275.01
K228042							736.51
K368127				3,600.00			
K394340							777.37
K394367							17.91
K527302							65.00
K679544				4,850.25			70.23
K724958				7,235.77			
K724965							214.30
K725036							234.02
K745822				2,764.64	358.78		7,491.33
K745836				2,254.72			
K745959				5,139.01			697.71
K746048							1,909.64
K746057				7,538.18			112.28
K746064				620.53			
K746103							169.00
K746119							478.94
K746203				6,052.91			
K746211							125.69
K842927				3,637.63	562.50		366.50
K940792							115.67
M051555							1,000.00
M051558							63.30
M726813				569.29			
M746257							696.54
TOTAL:				59,522.81	921.28	15,714.53	

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ASBESTOS FUND PENSION							
H553145					2,425.14		375.00
J471741					2,380.14		420.00
J751808					2,623.68		1,576.50
K002994					2,380.14		420.00
K368127					10,881.22		73,200.74
K368128					1,770.75		2,429.43
K368199					2,520.00		1,680.18
K661099					689.91		3,484.80
M726813					355.67		3,963.32
M763952					272.79		3,039.45
SECTION TOTAL					26,299.44		90,589.42
REJECTED							
J376109						(391.95)	
K523799			124.69				
M394648			18.00				
M561074			432.45				
TOTAL:			575.14			(391.95)	
THIRD PARTY DEPOSITS							
K746057A				(4,555.51)		(195.51)	
J198213A				(1,146.41)	(10,595.46)	(3.60)	(7,351.57)
K368128A				(358.87)		(9,591.36)	
K679544F						(129.57)	
K228042A						(3.86)	
TOTAL:				(6,060.79)	(10,595.46)	(9,923.90)	(7,351.57)
SECOND QUARTER '92							
GRAND TOTAL:			575.14	53,462.02	16,625.26	5,398.68	83,237.85

PAYMENTS MADE BETWEEN REC V DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ALLOWED ASBESTOS FUND							
J681309				41.86			
K185644				2,785.14		41.44	
K228042						54.00	
K394340						68.50	
K527308						477.60	
K604271						201.38	
K604298				4,227.64			
K679544				4,453.45		688.78	
K724958				1,481.00		1,142.60	
K724987						265.04	
K745822				2,126.75	276.00	11,077.67	
K745959				1,922.48		206.54	
K746048						1,410.59	
K746057						117.40	
K746064				609.43			
K746203				4,533.72			
K842927				3,637.65	562.50		
K940792				7,579.67		65.50	
M687254						1,261.75	
M687256						34.50	
M726813				203.04			
M746257				1,600.00		1,730.04	
TOTAL:				35,201.83	838.50	18,843.33	
PROVISIONAL/NOT YET ALLOWED— ASBESTOS FUND							
J689277							
K745881	52.50		243.52				
TOTAL:	52.50		243.52				

Third Quarter-- Fiscal Year 1992

ASBESTOS CLAIM TRACKING REPORT-- THIRD QUARTER FISCAL YEAR 1992

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ASBESTOS FUND PENSION							
H553145					2,425.14		375.00
J471741					2,380.14		420.00
J751808					2,623.68		1,576.50
K002994					2,380.14		420.00
K368127					892.29		3,230.55
K368128					1,770.75		2,429.43
K368199					2,520.00		1,680.18
M726813					181.89		2,026.68
M746257					271.80		6,655.75
M763952					272.79		3,039.45
TOTAL:					15,718.62		21,853.54
REJECTED							
K523799			1,116.60				
K604261			227.03				
M394648			195.98				
M561074			283.44				
M575342			112.28				
N005136			56.70				
N115089	82.00						
TOTAL:	82.00		1,992.03				
THIRD PARTY DEPOSITS							
K368128B				(332.41)		(12,981.63)	
J260964B						(441.74)	
K745783A						(88.66)	
TOTAL:				(332.41)		(13,512.03)	
THIRD QUARTER '92							
GRAND TOTAL:	134.50		2,235.55	34,869.42	16,557.12	5,331.30	21,853.54

A-21

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund
ALLOWED ASBESTOS FUND			
J659981			
K228042			
K263975			
K264990			
K527302			
K527308			
K604244			
K679544			
K745822			
K745827			
K746048			
K746064			
K746203			
K842927			
K940792			
M051558			
M687282			
M687284	75.00		
M687285			
M746257			
TOTAL:	75.00		
PROVISIONAL/NOT YET ALLOWED			
M549728			15.48
TOTAL:			15.48

PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
		216.66	
		67.50	
		488.06	
		420.20	
		1,927.80	
6,800.38			
4,850.25			
4,388.15			
2,552.10	331.20	2,260.20	
		85.28	
8,424.16			
598.33			
4,449.71			
3,637.65	562.50	243.52	
5,863.58		287.20	
		155.70	
		1,751.22	
		2,450.36	
2,000.00			
43,564.31	893.70	10,353.70	

Fourth Quarter— Fiscal Year 1992

ASBESTOS CLAIM TRACKING REPORT— FOURTH QUARTER FISCAL YEAR 1992

	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
ASBESTOS FUND PENSION							
H553145					2,425.14		375.00
J471741					2,380.14		420.00
J751808					2,623.68		1,576.50
K002994					2,380.14		420.00
K368127					892.29		3,230.55
K368128					1,770.75		2,429.43
K368199					2,520.00		1,680.18
M726813					181.89		2,026.68
M746257					85.83		1,777.50
M763952					272.79		3,039.45
TOTAL:					15,532.65		16,975.29
REJECTED							
M685623			258.16				
K523799			106.95				
TOTAL:			365.11				
THIRD PARTY DEPOSITS							
K745833B						(17.50)	
K745822A				(2,429.15)	(191.95)	(3,746.10)	
K604271B				(858.34)		(618.70)	
J751808B				(24.12)		(575.88)	
M766355A				(497.28)		(548.92)	
K185644A				(171.58)	(0.31)	(137.75)	
K394340A						(250.55)	
K724965A						(732.87)	
TOTAL:				(3,980.47)	(192.26)	(6,628.27)	
FOURTH QUARTER '92							
GRAND TOTAL:	75.00		380.59	39,583.84	16,234.09	3,725.43	16,975.29

A - 23

TOTAL BY CATEGORY - FISCAL YEAR 1989

PAYMENTS MADE BETWEEN REC'D DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
FIRST QUARTER '89							
Allowed Asbestos Fund	2,425.11	53.37	2,030.66	1,300.00			
Asbestos Fund Pension Rejected			2,323.83		1,358.38		1,120.12
TOTAL:	2,425.11	53.37	4,354.49	1,300.00	1,358.38		1,120.12
SECOND QUARTER '89							
Allowed Asbestos Fund	67.50		814.39				
Asbestos Fund Pension Rejected	225.00		1,520.41		2,037.57		1,680.18
TOTAL:	292.50		2,334.80		2,037.57		1,680.18
THIRD QUARTER '89							
Allowed Asbestos Fund	1,000.00		341.85	14,750.01			
Asbestos Fund Pension Rejected			448.47		74,161.18	1,901.39	16,570.73
TOTAL:	1,000.00		790.32	14,750.01	74,161.18	1,901.39	16,570.73
FOURTH QUARTER '89							
Allowed Asbestos Fund	951.25		511.35	10,793.88	17.79	5,256.67	
Asbestos Fund Pension Rejected	5,178.20		1,868.87		6,199.59		2,475.18
TOTAL:	6,129.45		2,380.22	10,793.88	6,217.38	5,256.67	2,475.18
GRAND TOTAL:	9,847.06	53.37	9,859.83	26,843.89	83,774.51	7,158.06	21,846.21

TOTAL BY CATEGORY- FISCAL YEAR 1990

PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE				PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
FIRST QUARTER '90							
Allowed Asbestos Fund			773.64	10,169.34	204.46	8,001.27	
Asbestos Fund Pension Rejected	133.75		1,376.49	(7,433.01)	6,571.16		2,475.18
Third Party Deposits					(352.07)		
TOTAL:	133.75		2,150.13	2,736.33	6,423.55	8,001.27	2,475.18
SECOND QUARTER '90							
Allowed Asbestos Fund	2,709.44	99.49	74.32	7,806.12	216.60	6,183.07	
Asbestos Fund Pension Rejected	68.75		627.11		7,263.87		7,951.25
Third Party Deposits						(5,900.45)	
TOTAL:	2,778.19	99.49	701.43	7,806.12	7,480.47	282.62	7,951.25
THIRD QUARTER '90							
Allowed Asbestos Fund	182.49		111.80	16,367.33	3,018.44	3,845.03	
Asbestos Fund Pension Rejected	27.00		614.96		6,980.07		5,867.43
TOTAL:	209.49		726.76	16,367.33	9,998.51	3,845.03	5,867.43
FOURTH QUARTER '90							
Allowed Asbestos Fund	7,029.20	143.45	10.00	12,531.81	3,324.88	11,138.16	
Asbestos Fund Pension Rejected			1,645.07		6,980.07		5,867.43
TOTAL:	7,029.20	143.45	1,655.07	12,531.81	10,304.95	11,138.16	5,867.43
GRAND TOTAL:	10,150.63	242.94	5,233.39	39,441.59	34,207.48	23,267.08	22,161.29

TOTAL BY CATEGORY— FISCAL YEAR 1991

	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
FIRST QUARTER '91							
Allowed Asbestos Fund	6,160.54	390.24		23,560.89	2,066.26	19,687.41	
Asbestos Fund Pension Rejected	22.50		207.68	33.00	33,889.27		43,996.36
Third Party Deposits						(148.86)	
TOTAL:	6,183.04	390.24	207.68	23,593.89	35,955.53	19,538.55	43,996.36
SECOND QUARTER '91							
Allowed Asbestos Fund	2,483.28	187.74		34,441.07	3,617.08	20,793.50	
Asbestos Fund Pension Rejected	64.50		1,713.57	1,958.28	11,635.95		13,419.36
Third Party Deposits					396.46	(949.67)	
						(21,608.84)	
TOTAL:	2,547.78	187.74	1,713.57	36,399.35	15,649.49	(1,765.01)	13,419.36
THIRD QUARTER '91							
Allowed Asbestos Fund Provisional/Not Yet	2,013.15	156.45		25,187.49	2,154.18	14,383.52	
Allowed— Asbestos Fund	81.00		803.55				
Asbestos Fund Pension Rejected	1,680.42	340.21	1,184.88		21,122.95		14,707.69
Third Party Deposits				(5,253.11)		933.10	
						(13,311.87)	
TOTAL:	3,774.57	496.66	1,988.43	19,934.38	23,277.13	2,004.75	14,707.69
FOURTH QUARTER '91							
Allowed Asbestos Fund Provisional/Not Yet	80.00		652.54	94,264.96	4,479.34	44,060.65	
Allowed— Asbestos Fund			948.34				
Asbestos Fund Pension Rejected	4,237.26		410.24		18,095.40		54,558.02
Third Party Deposits				(4,191.64)	(194.25)	487.50	
						(18,594.47)	(1,399.92)
TOTAL:	4,317.26		2,011.12	90,073.32	22,380.49	25,953.68	53,158.10
GRAND TOTAL:	16,822.65	1,074.64	5,920.80	170,000.84	97,262.64	45,731.97	125,281.51

A - 26

TOTAL BY CATEGORY FISCAL YEAR 1992

	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
FIRST QUARTER '92							
Allowed Asbestos Fund				35,507.45	2,390.30	34,476.84	
Asbestos Fund Pension					15,582.84		14,556.11
Rejected	52.50		562.25	(7,665.88)		(6,448.43)	
Third Party Deposits							
TOTAL:	52.50		562.25	27,841.57	17,973.14	28,028.41	14,556.11
SECOND QUARTER '92							
Allowed Asbestos Fund				59,522.81	921.28	15,714.53	
Asbestos Fund Pension					26,299.44		90,589.42
Rejected			575.14	(6,060.79)	(10,595.46)	(391.95)	(7,351.57)
Third Party Deposits						(9,923.90)	
TOTAL:			575.14	53,462.02	16,625.26	5,398.68	83,237.85
THIRD QUARTER '92							
Allowed Asbestos Fund				35,201.83	838.50	18,843.33	
Provisional/not yet							
Allowed- Asbestos Fund	52.50		243.52		15,718.62		21,853.54
Asbestos Fund Pension							
Rejected	82.00		1,992.03	(332.41)		(13,512.03)	
Third Party Deposits							
TOTAL:	134.50		2,235.55	34,869.42	16,557.12	5,331.30	21,853.54
FOURTH QUARTER '92							
Allowed Asbestos Fund	75.00			43,564.31	893.70	10,353.70	
Provisional/not yet Allowed			15.48				
Asbestos Fund Pension					15,532.65		16,975.29
Rejected			365.11	(3,980.47)	(192.26)	(6,628.27)	
Third Party Deposits							
TOTAL:	75.00		380.59	39,583.84	16,234.09	3,725.43	16,975.29
GRAND TOTAL:	262.00		3,753.53	155,756.85	67,389.61	42,483.82	136,622.79

A-27

ASBESTOS FUND TRACKING REPORT- TOTALS BY FISCAL YEAR

	PAYMENTS MADE BETWEEN RECV DATE & INSURER EST DATE			PAYMENTS MADE BETWEEN INSURER ESTE DATE & INSURER RESP DATE			
	Accident Fund	S.P.R.F.	Medical Aid Fund	Accident Fund	S.P.R.F.	Medical Aid Fund	Pension Reserve Fund
FISCAL YEAR 1989							
First Quarter	2,425.11	53.37	4,354.49	1,300.00	1,358.38		1,120.12
Second Quarter	292.50		2,334.80		2,037.57		1,680.18
Third Quarter	1,000.00		790.32	14,750.01	74,161.18	1,901.39	16,570.73
Fourth Quarter	6,129.45		2,380.22	10,793.88	6,217.38	5,256.67	2,475.18
TOTAL:	9,847.06	53.37	9,859.83	26,843.89	83,774.51	7,158.06	21,846.21
FISCAL YEAR 1990							
First Quarter	133.75		2,150.13	2,736.33	6,423.55	8,001.27	2,475.18
Second Quarter	2,778.19	99.49	701.43	7,806.12	7,480.47	282.62	7,951.25
Third Quarter	209.49		726.76	16,367.33	9,998.51	3,845.03	5,867.43
Fourth Quarter	7,029.20	143.45	1,655.07	12,531.81	10,304.95	11,138.16	5,867.43
TOTAL:	10,150.63	242.94	5,233.39	39,441.59	34,207.48	23,267.08	22,161.29
1991							
First Quarter	6,183.04	390.24	207.68	23,593.89	35,955.53	19,538.55	43,996.36
Second Quarter	2,547.78	187.74	1,713.57	36,399.35	15,649.49	(1,765.01)	13,419.36
Third Quarter	3,774.57	496.66	1,988.43	19,934.38	23,277.13	2,004.75	14,707.69
Fourth Quarter	4,317.26		2,011.12	90,073.32	22,380.49	25,953.68	53,158.10
TOTAL:	16,822.65	1,074.64	5,920.80	170,000.94	97,262.64	45,731.97	125,281.51
1992							
First Quarter	52.50		562.25	27,841.57	17,973.14	28,028.41	14,556.11
Second Quarter			575.14	53,462.02	16,625.26	5,398.68	83,237.85
Third Quarter	134.50		2,235.55	34,869.42	16,557.12	5,331.30	21,853.54
Fourth Quarter	75.00		380.59	39,583.84	16,234.09	3,725.43	16,975.29
TOTAL:	262.00		3,753.53	155,756.85	67,389.61	42,483.82	136,622.79
GRAND TOTAL:	37,082.34	1,370.95	24,767.55	392,043.27	282,634.24	118,640.93	305,911.80

Revised 1-4-93

TOTAL ASBESTOS (MEDICAL AID) FUND CHARGES	
FISCAL YEAR 1989	
First Quarter	10,611.47
Second Quarter	6,345.05
Third Quarter	109,173.63
Fourth Quarter	33,252.78
TOTAL:	159,382.93
1990	
First Quarter	21,920.21
Second Quarter	27,099.57
Third Quarter	37,014.55
Fourth Quarter	48,670.07
TOTAL:	134,704.40
1991	
First Quarter	129,865.29
Second Quarter	68,152.28
Third Quarter	66,183.61
Fourth Quarter	197,893.97
TOTAL:	462,095.15
1992	
First Quarter	89,013.98
Second Quarter	159,298.95
Third Quarter	80,981.43
Fourth Quarter	76,974.24
TOTAL:	406,268.60

Revised 1-4-93

APPENDIX D

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ASBESTOS RELATED DISEASE

**A Report to the House Commerce &
Labor Committee**

Prepared by
The Department of Labor & Industries

September 12, 1987

**INDUSTRIAL INSURANCE BENEFITS
FOR CLAIMANTS WITH ASBESTOS RELATED DISEASE**

Prepared by

The Department of Labor and Industries

I. STATEMENT OF THE PROBLEM

A review of occupational asbestos disease claims has revealed a growing problem regarding prompt payment of benefits to those claimants where employer liability presents a jurisdictional question. It is further noted that occupational asbestos claims filed with the department have increased dramatically during the recent years: 70 claims in 1985, 156 claims in 1986, and 149 claims by August 1987.

II. POLICIES AND PROCEDURES

Currently, the Department of Labor and Industries (the department) does not have a policy that specifically addresses the adjudication of occupational asbestos related disease claims. Adjudication of an asbestos claim is treated like any occupational disease claim. The Department or the Self-Insurer accepts responsibility for an asbestos related disability providing the last injurious exposure occurred under Title 51.

In most cases where a claim has been filed for coverage of an occupational disease there will be insufficient factual or medical information available at the time of filing to make a final determination regarding claim validity.

In general, field investigation becomes a necessity under these circumstances to fill in the gaps in the history of exposure provided by the worker (as well as work history where more than one employer is involved). The Department must establish the diagnosis of the condition for which compensation is sought and secure the current and past treatment records related to the disease as well as clarify the basis for the attending or consulting physician's opinion regarding causal relationship to the work duties or exposure.

The Department must next determine if there is a jurisdictional problem. When an occupational disease claim for asbestos is established and there are multiple employers who are all state

fund insured, the claim is allowed. The claim is then sent to the Ratings Department to determine the percentage of compensation chargeable to each fund employer.

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. If the last injurious exposure occurred under the Longshore and Harbor Workers Act (L&H) or under a Self-Insured employer the claim is automatically rejected by the State Fund. Either the ~~Self-Insurer or the Longshore and Harbor Worker Carrier~~ who is responsible for the last injurious exposure pays the claim.

III. DATA ANALYSIS

A review of asbestos data has revealed that the average adjudication of an occupational asbestos disease claim is approximately 1.1 years. Cost projections are based upon this average. A total of 624 asbestos claims were filed with the department from 1979 through 1986.

As of August 1987, of the adjudicated asbestos claims 236 or 46% were accepted and 277 or 54% were rejected. If the remaining 111 claims still to be adjudicated are similar to the adjudicated claims an additional 60 claims or 54% will ultimately be rejected. The data shows that L&H claims equal approximately 35% of the rejected occupational asbestos related claims.

If the number of asbestos claims reported each year continues below 200, or fewer than 40 L&H claims per year one can assume there will be a continuation of the 35% rejection rate of asbestos claims which qualify as L&H claims. However, should the L&H claims continue to increase by doubling each year as noted in paragraph one the annual prediction of 40 L&H claims may be too low.

See Appendix for Graph 1 and Graph 2 respectively. Graph 1 shows the total asbestos claims received each year. Graph 2 shows the total number of adjudicated claims, accepted claims, rejected L&H claims, rejected Federal employee claims, and rejected claims for other reasons. Note - Graph 2 does not include the 111 claims that are currently being adjudicated. Once the 111 claims are adjudicated the total number of L&H claims rejected will probably show an increase.

IV. MAJOR REASONS FOR ASBESTOS CLAIM REJECTION

The department has found four major reasons for rejection of an asbestos claim. First, the claim is rejected when the injury

(disease) occurred while in the course of employment subject to Federal Longshore and Harbor Workers Act Jurisdiction (represents 35% of the rejected asbestos claims from 1979 through 1986).

Second, the claim is rejected when there is no proof of a specific injury or occupational exposure at a definite time and place in the course of employment (represents 13% of the rejected asbestos claims from 1979 through 1986).

Third, the claim is rejected when the claimant's condition is not the result of the alleged exposure (represents 11% of the rejected asbestos claims from 1979 through 1986).

Fourth, a claim is rejected when the claimant was a Federal employee at the time of the injury and is not subject to the provisions of industrial insurance law (represents 6% of the rejected asbestos claims from 1979 through 1986).

VI. TREATMENT OF ASBESTOS CLAIMS BY OTHER STATES

A survey of several states has distinguished three basic alternatives to the jurisdictional question:

1. The state develops a strict policy towards rejection of asbestos claims and therefore few if any claimants qualify for benefits.
2. The state develops a broad policy towards asbestos claims and provides necessary benefits prior to determination of employer liability.
3. The state also underwrites the Federal Longshore and Harbor Workers Act thus guaranteeing coverage to the claimants.

VII. DEPARTMENT RESOLUTIONS

1. SHOULD THE DEPARTMENT POLICY REGARDING THE TREATMENT OF ASBESTOS CLAIMS THAT INDICATE A JURISDICTIONAL QUESTION BE MODIFIED.

Benefits are not normally paid until the jurisdictional question has been settled. Our review of claims has revealed a few exceptions where a claims adjudicator has paid time loss and medical benefits prior to that determination. But this practice is rare.

A legitimate criticism of this policy from the claimant's perspective is that a jurisdictional question should not affect

their ability to obtain timely benefits once the condition has been found to be occupational in nature. The feasibility of a policy change by the department is however clouded by the uncertainty of receiving federal reimbursement in those cases eventually found to be under L&H coverage.

2. **ASSUMING THAT ASBESTOS CLAIMS WITH A JURISDICTIONAL QUESTION WILL RECEIVE SPECIAL TREATMENT, WHAT BENEFITS ARE FEASIBLE.**

There are basically, four types of benefits that could be considered for payment while the jurisdictional issue is being resolved. First, payment of medical and time loss until the claim is allowed or rejected. On the average each claimant would receive \$13,200 in time loss for 1.1 years and \$3,000 for medical costs. A total of 98 L&H claims have been rejected from 1979 through 1986. If time loss and medical benefits had been paid on these claims the cost would have been approximately \$1,587,600. Based upon a projection of approximately 40 L&H claims filed annually the cost is approximately \$650,000.

Second, payment of medical benefits only until claim allowance or rejection. Again, predicting at the worst end of the spectrum that 40 L&H claims will be filed annually the cost is approximately \$120,000.

Third, payment of medical and time loss benefits until the federal insurer assumes jurisdiction and makes a benefit payment. At this time we do not have any data to compute this figure. The time between the departments rejection of the claim and the Federal insurers assumption of the claim must be established.

Fourth, the department pays the total claim after adjudication because the Federal government does not assume jurisdiction. Assuming the worst scenario that the claimant will receive lifetime benefits it will cost the state as much as \$200,000 for each claimant, this includes payment from the Supplemental Fund. Therefore, the 98 L&H claims filed from 1979 through 1986 would have cost the state approximately \$20,000,000 or \$,000,000 annually for 40 L&H claims.

On the other hand, if the L&H claims are similar to the previously accepted claims where the state paid temporary and partial benefits the average cost would decrease to \$70,000 for each claimant with a total cost of \$7,000,000 to date or \$2,800,000 annually for the 40 L&H claims.

Many factors may contribute to the upward trend in the asbestos claim filings but two worth noting are: greater public awareness of the disease and the average length of time (40 years in some cases) before the disease is manifested.

Should benefits be paid to the claimant prior to determination of liability the Department would probably adopt a special approach to ensure prompt adjudication, payment of benefits, and recovery of monies paid from the responsible insurer.

3. **ASSUMING THAT THE DEPARTMENT IMPLEMENTS A PROGRAM TO COMPENSATE CLAIMANTS FOR AN OCCUPATIONAL ASBESTOS RELATED DISABILITY PRIOR TO DETERMINATION OF EMPLOYER LIABILITY WHAT ARE THE POTENTIAL FUNDING SOURCES.**

In order to determine the appropriate funding source the question to be answered is who should pay for the benefit costs accrued prior to determination of employer liability? Should the monies be generated by the public, state fund employers, self-insured employers, and the employees? This report lists four potential funding sources, advantages, disadvantages, and requirements for implementation of each type of fund.

A. The State Fund. The state fund is made up of several funds. The funds that would be affected to make benefit payment when there is a jurisdictional problem are the accident fund, the medical aid fund, and the supplemental pension fund.

The accident fund consists of payments from state fund employers. Self-Insurers do not contribute to this fund.

The medical aid fund consists of payments from the state fund employers and employees.

The supplemental pension fund consists of contributions from the state fund employer and employees; the self-insured employer and employee.

Advantage:

-Use of the state fund allows the Department to handle the asbestos claim as any other state fund claim. No procedural change would be necessary.

Disadvantage:

-The burden of funding the benefit payments falls on the state fund employer except to the extent that both state fund and self-insurers contribute to the supplemental pension fund.

Implementation:

-If option A is chosen the Department would administer all benefits in potential Self-Insurer claims up to the point proper jurisdiction has been established.

B. Supplemental Pension Fund. The supplemental pension fund is a cash flow fund. Monies in this fund come from both the state and self-insurer employers and employees.

Advantage:

- The cost is spread between employers and employees based on contributions per worker hour.
- No special assessment of self-insured necessary.
- Mechanics of administration currently in effect.

Disadvantage:

- The supplemental pension funds have been limited to cost of living increases.
- Risk is spread equally among all employers which affects those employers who have not contributed to the asbestos problem.

Implementation:

- If option B is chosen the following statutes would have to be amended, RCW 51.44.033 and RCW 51.32.073. The amendment would allow payment of benefits from the supplemental pension fund for asbestos related disease claims prior to determination of employer liability.

C. Second Injury Fund. The second injury fund can be broken down into two segments: State Fund and Self-Insurer Fund. When a state fund pension qualifies for second injury fund relief, dollars are transferred from the accident fund and labeled as second injury fund relief. The dollars are then placed in the pension reserve fund to guarantee future claim liability.

The self-insurer segment of the second injury fund has a cash reserve which supports self-insured claims that qualify for second injury fund relief. The cash is actually moved from the second injury fund to the pension reserve fund to support claim liability.

The fund provides benefits for the preferred worker and job modification programs. This fund is designed to encourage employers to hire or retain previously disabled workers by limiting the employer's liability in the event an employee suffers a subsequent employment related injury.

Advantage:

- Utilization of the second injury fund affects both self insured and state fund employers.

Disadvantage:

- Self-Insurers use of Second Injury Fund is proportionally higher than the state fund.

Implementation:

- If option C is chosen a special assessment on the Self-Insurers may be necessary to ensure equal support from the Self- Insurers and the State Fund.

- D. Special Fund. The creation of a special fund requires the establishment of a new fund. The special fund would be set up specifically to pay benefits for claims when the jurisdiction issue arises because employer liability is undetermined.

Advantage:

- Creation of this fund would allow segregation of special fund monies from other state funds.

Disadvantage:

- The charge is inequitable unless it is prorated by exposure.

Implementation:

- If option D is chosen a draw from the Supplemental pension fund could be made for the initial capital outlay. However, to accomplish this the language of RCW 51.32.073 and RCW 51.44.033 must be amended. Additional funds could be generated by the state accident fund based on asbestos cost experience and through a special assessment for the Self-Insurers.

California has created an asbestos fund to guarantee prompt payment of benefits to claimants. The funds are appropriated from California's uninsured fund. The costs are not passed to the industry as a whole. The asbestos jurisdictional problem is considered in California to be a social rather than an industrial issue.

The suggested language for the creation of a Special Fund follows: New Section

Special Fund: There shall be, in the office of the State Treasurer, a fund to be known and designated as a "special fund": The director shall be the administrator thereof. Said fund

shall be used for the sole purpose of making payments for claims where a jurisdictional question arises. Benefits shall be paid on the industrial condition until such time as the insurer is identified and benefits are initiated by the liable party. Reimbursement shall be made immediately from the State Fund, Self-Insurer, or Federal program upon determination of jurisdiction. The benefits shall be provided upon establishment that the condition is occupational in nature and there has been title 51 exposure and shall continue until such time as the jurisdictional issue is resolved.

4. SHOULD THE DEPARTMENT PAY BENEFITS RETROACTIVELY TO INCLUDE ALL CLAIMS NOT ADJUDICATED OR SHOULD BENEFITS BE PAID PROSPECTIVELY FROM PASSAGE OF THE LEGISLATION.

If claims not adjudicated are to be paid benefits it is probable that the Department will ultimately accept 50 of the 111 claims that were not adjudicated at the time of this report. The cost would be approximately \$3,500,000. If the department only paid claims prospectively the cost would be based upon the prior projections noted above.

5. WHETHER THE DEPARTMENT CAN RECEIVE REIMBURSEMENT FOR BENEFITS PAID TO THE CLAIMANT PRIOR TO DETERMINATION OF JURISDICTION WHEN THE CLAIM SUBSEQUENTLY FALLS UNDER THE LONGSHORE AND HARBOR WORKERS ACT.

Prior to 1984, the Department had the ability to receive reimbursement for any benefits paid to the claimant prior to determination of employer liability when the jurisdiction subsequently was determined to be L&H coverage. In 1984, the Longshore and Harbor Workers Act was amended which limited the Department's ability to be reimbursed for benefits paid prior to determination of jurisdiction.

The Longshore and Harbor Workers amendment states:

3(e) Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers compensation law or section 20 ...shall be credited against any liability imposed by this Act.

Application of section 3(e) allows a credit for the Longshore and Harbor Worker's insurance carrier for benefits paid to the employee by the Department prior to determination of liability under the Longshore and Harbor Workers Act.

The issue raised by the amendment to the L&H Act affects the Department's ability for reimbursement if benefits are paid by the Department prior to determination of employer liability. The courts have held that the states and the federal government have concurrent jurisdiction in these cases.

The Department is involved as an intervenor in the case of In Re Arthur McDougal. In McDougal, a claim for benefits was filed with the State Fund. Under the state law the claimant is paid benefits if it is established that the condition is occupational in nature and it is not apparent that Longshore and Harbor Workers coverage is applicable. In McDougal, the state fund began making benefit payments after he filed with the Department.

However, McDougal also filed a claim under the Longshore and Harbor Workers Act. The employer, E.P. Paup, protested the L&H claim. Once the Department was informed of the L&H claim benefits were discontinued to McDougal. The Department then made a demand for reimbursement from the employers L&H carrier but was denied reimbursement.

The case was heard before a Federal Administrative Law Judge. The issue was whether McDougal should be allowed benefits under the L&H Act. The Administrative Law Judge found in the Department's favor by granting benefits under L&H and ruled that the Department was due reimbursement for disability benefits paid. However, medical benefits paid were not granted to the claimant under the L&H Act.

The Department and the claimant appealed the ruling on medical benefits. The employer is contending that according to Section 3(e) of the Longshore and Harbor Workers Act that they should receive a credit for the benefits paid by the Department prior to determination of employer liability.

The McDougal case, is currently before the Federal Benefits Review Board. Should the employer prevail the case will probably be appealed to the 9th. Circuit-Court of Appeals. The last avenue of appeal is the U.S. Supreme Court.

Beside seeking recoupment from the Federal government, the Department could attempt to collect directly from the claimant once they begin receiving payments under the Longshore and Harbor Workers Act. However, pursuit of this method for reimbursement actually penalizes the claimant.

Under this method of reimbursement the claimant receives only half of the monies owing. The Longshore and Harbor Worker carrier pays the difference between the state and the federal benefit schedule. If the claimant reimbursed the Department for benefits paid during the period where jurisdiction was an issue the claimant would receive only half of the scheduled benefit.

6. IS IT COST EFFECTIVE FOR THE STATE TO UNDERWRITE THE LONGSHORE AND HARBOR WORKERS ACT.

Historically, the Washington State Insurance Fund has not underwritten the Federal Longshore and Harbor Workers Act. The coverage is obtained through private carriers. The issue has been raised with the Department as to the possibility of the state underwriting Longshore and Harbor Workers coverage because an L&H carrier in the state is going out of business. ~~The Department is studying the issue.~~

California, Oregon, and Ohio were contacted regarding the underwriting of the Federal Longshore and Harbor Workers Act. Inquiry was made as to administration of the Act, current Federal rates, and the affect of underwriting the L&H act on the state fund.

One advantage of the state underwriting both the state and L&H coverage is that as a insurance carrier the Department may be able to recoup payments as the L&H carrier. However, at the present time there is no mechanism in place with the federal government to guarantee reimbursement to the state.

A major disadvantage to underwriting L&H coverage is that reimbursement or a credit would only apply when the employer has dual coverage with the state for both state fund and L&H coverage. The state would be only one of the L&H carriers within the state. Several other disadvantages noted in underwriting L&H coverage are listed below.

Additional expenses are incurred for administration, processing the claims, premium costs, and the initial cash outlay. Benefits paid under the Federal Longshore and Harbor Workers Act are approximately twice that of the states. Also, special procedures will need to be implemented to handle the processing and administration of the claims.

Personnel must be trained to process Federal L&H claims. Furthermore, the premium costs to the employers is extremely expensive. The rates range from a low of \$10/\$100 of payroll to \$40/\$100 of payroll. Under dual coverage the employer pays premiums for two policies which can create confusion as to premium payments. It was noted that underwriting L&H coverage will increase the state insurance fund premiums over the long run. Potentially the prospect of the Department underwriting Federal Longshore and Harbor Workers Act could be an expensive proposition.

Several of the states surveyed suggested the establishment of a separate fund to segregate the L&H monies from the state fund monies. This could be accomplished in Washington by establishment of a Special Fund as mentioned in 3D, page 7.

**SURVEY OF SEVERAL STATES REGARDING OCCUPATIONAL
ASBESTOS RELATED DISEASE**

WASHINGTON

In Washington, as soon as a claim is marked occupational disease it is sent to be investigated, based upon the assumption that multiple employers will be involved. If indeed multiple employers are found then the claim is sent to the Ratings Dept. to determine the percentage of payment due from each employer involved. However, if the last employer falls under the Longshore and Harbor Workers Act, then the claim is automatically rejected by the Department.

There is no specific policy for processing asbestos claims. The asbestos claims are treated like all other Occupational Disease claims.

In Occupational Disease claims, the time period for filing begins when the claimant is advised by a physician, in writing, that his condition is occupational in nature. The claimant then has two years in which to file a claim. Liability is based on last injurious exposure (note: U.S. court of Appeals 9th district in the case of Todd Shipyards V. Gerald L. Black(1983) , ruled that under the Longshore and Harbor Workers Act, when two employers may be responsible for a work related injury or disease, the last employer is completely liable).

CALIFORNIA

California has created a special fund to deal with asbestos claims. It is known as "The California Asbestos Workers Account" (fund). This fund handles all asbestos claims regardless of last injurious exposure. The fund was created in an effort to fulfill the states declared policy of providing qualified asbestos victims (claimants) with workers compensation, promptly and without delay due to litigation in determining the responsible employer.

The fund is a section of the uninsured employers fund in the state treasury. The uninsured employers fund is a fund continuously appropriated.

The fund is administered by the director of Industrial Relations (note: the state compensation insurance fund is a division of the Dept. of Industrial Relations). It appears that all the funds appropriated for this account are taken from the State General

Fund, and have no tie to the California Compensation Insurance Fund.

Asbestos claimants may qualify for this fund if they are unable to locate the responsible employer (or insurance carrier), or if the claimant has filed with the employer (or its workers Compensation Insurance Carrier), and the liable party failed or denies to pay benefits (note: a claim must be filed within 30 days after the insurer has rejected the original claim.)
Once a claim has been submitted to the Asbestos Workers Fund, the claimant must demonstrate:

- A. Asbestosis exists (medical documentation).
- B. Asbestosis developed from employment.
- C. The claimant is entitled to compensation as otherwise provided.
- D. The claimant must submit to an independent medical examination (Unless accurate data exists documenting the asbestosis).
- E. The claimant must file an application before the Workers' Compensation Appeals Board to determine the responsible employer for payment of compensation, and for reimbursement back into the Asbestos Workers' Account.

Once a decision establishing the responsible employer or carrier has been agreed upon (or ruled upon) by the Workers Compensation Appeals Board, any further payments to the claimant are immediately terminated, and the board (on the behalf of the claimant) will notify, all interested parties, and seek to collect reimbursement for the amount which has been paid (note: California automatically files a lien on the liable party, and expects payment in full within 30 days of the notice).

If it is found that the liable employer was not insured, the Asbestos Workers Account is not allowed to take money for reimbursement purposes from the Uninsured Employers fund. This prevents the Asbestos workers' Account from drawing from the state account twice, since the original funds for the Asbestos Workers' Account were appropriated out of the Uninsured Employers Fund.

If it is determined that the liable employer is uninsured, all future benefits paid will come from the Uninsured Employers Fund. Utilization of the fund does not prevent the claimant from filing a third party suit. The Asbestos Worker's Account is entitled to recover any benefits paid from any award recovered by the claimant, pursuant to civil judgement.

California addresses the problem of asbestos as a social issue, and not as an industrial one. This fact is evident because they collect funds from the General Treasury, instead of attaching the costs to industry across the board.

MICHIGAN

Michigan does not have a special policy for dealing with asbestos claims in which jurisdiction is a concern. The liability always falls on the last injurious exposure, and it is up to that employer to provide the necessary benefits. Since Michigan does not go by percentages of exposure or by the number of years employed, they allege not to have any jurisdictional problems with asbestos claims.

Michigan has developed a "Silicosis and Dust Disease Fund." This fund is paid into by self insurers and private carriers based on an assessment of each firm's claims from the previous year. The last injurious employer is responsible for paying the asbestosis claims.

However, if the injury date took place before July 1, 1985 then the carrier is reimbursed from this fund for any amount paid after the first \$12,500. If the injury date occurred after July 1, 1985 the carrier is reimbursed for any amount over \$25,000 or after 104 weeks of benefits have been paid (note: this does not include medical expenses, which are the sole responsibility of the insurer).

GEORGIA

Georgia reported only one asbestos claim in 1985, and only two claims in 1986. In other states these figures would appear extremely low. However, in Georgia, the regulations regarding asbestos compensation are so strict that few claimants qualify. The general ruling is that in order to receive benefits in the state of Georgia for asbestos, the claim must be filed within seven years of the last injurious exposure. (note: prior to July 1, 1987 claims had to be filed within 3 years of the last injurious exposure). Considering the length of time it takes for asbestosis to develop, it would seem understandable that few claimants receive benefits in Georgia.

Georgia has developed a policy that if the state is found liable for a claim which has received benefits from the Longshore and Harbor Workers Act, only the benefits which are greater than that which has already been paid, will be awarded. Considering the fact that federal benefits are consistently greater than state benefits, it is safe to assume that Georgia seldom pays for any additional benefits for periods previously covered under the Longshore and Harbor Workers Act.

Because of the nature of the asbestos compensation policy in Georgia, it would be hard to find a jurisdictional problem if it ever existed. However, if a jurisdictional problem does exist it seems highly unlikely that the state would provide benefits to a claim in question.

OREGON

In Oregon, a person filing for compensation for an occupational disease as a result of exposure to asbestos, must do so within 40 years of last exposure and within 180 days of disability or knowledge of the disability. Generally the court has upheld the policy of basing liability on the last injurious exposure.

If a claimant's last exposure was under the Longshore and Harbor Worker's Act, regardless of the percent of the injury which occurred from the particular employment, under Oregon law the Longshore and Harbor Workers Act would be solely responsible for the payment of benefits. The inverse of this situation also holds true.

Oregon also states that the claimant need only prove that the last injurious exposure "could have" caused the illness, in order to receive benefits. This enhances the ability for asbestos claimants to collect compensation. Oregon observes no problem concerning jurisdiction because of their cut and dry legislative approach to liability.

In no way does the fact that a claim has been rejected by State of Oregon, automatically entitle the worker to benefits under the Longshore and Harbor Workers Act. (note: The Oregon statute does not address what should be done if the claim is rejected under Longshore and Harbor Workers Act).

Although, it appears that Oregon has solved the jurisdictional problems regarding liability for asbestos claims, it must be understood that this only solves the policy problem, and not the problem of claimants spending years attempting to receive benefits.

NEW YORK

New York does not note any jurisdictional problem regarding asbestos claim adjudication. The state underwrites Longshore and Harbor Workers coverage, as well as the state's own Workers Compensation Insurance. Therefore, if a claim is paid out of the state fund and is later found to be covered under the Longshore and Harbor Workers Act, a credit is made to L&H coverage and the difference is paid to the claimant.

If the state underwrites both State Workers Compensation and Federal Longshore and Harbor Workers coverage it appears that the State should receive a credit for benefits paid under state compensation similar to the credit given to private carriers that underwrite L&H coverage. However, at this time it does not appear that states who underwrite L&H have recouped the state costs.

New York's Supreme Court has held that the employer in whose employment the employee was last exposed to an injurious dust hazard shall be liable for payments when disability or death is due to dust disease. The employment in which the employee was last exposed refers to the last employer over whom the state compensation board has had jurisdiction (note: a significant court case, McKee V. Armstrong Construction and Services Corp.)

New York has also adopted a special fund to help reimburse insurers who have paid asbestos benefits. The liable insurer is responsible to initially pay all awards of compensation and all medical expenses (note: if death is involved the insurer is also responsible for funeral and death benefits.) However, the insurer is entitled to be reimbursed from the special disability fund. The fund reimburses all compensation and medical expenses (including funeral and death benefits) subsequent to those paid the first 260 weeks. (note: insurer only pays for the first 104 weeks of expenses if illness due to dust exposure occurred prior to July 1, 1947.)

NEW JERSEY

New Jersey does not have a problem with asbestos claims resulting from jurisdictional disputes. The fact that a person was exposed at one time or another under the New Jersey compensation laws is the key point (a claim is not based on last injurious exposure). Federal benefits are consistently much greater than state benefits. Therefore, if a claimant qualifies for L&H coverage they normally will apply for benefits under the Longshore and Harbor Workers Act.

FLORIDA

Florida does not have a special policy regarding asbestos claims. Asbestos claims are treated like all other Occupational Diseases. Date of injury is based on the date claimant is informed of the occupational disease by a physician. The liable employer is determined by the last injurious exposure. If last exposure was covered by the Longshore and Harbor Workers Act, Florida drops all responsibility for any liability (note: it would appear that Florida is unable to see the problem of asbestos claimants not receiving benefits while liability is being determined, because the State policy is vague).

In the case of Hyatt V. Armstrong Cork Co. (1960) the U.S. district court ruled that all laws in effect at the time of employment are a part of the contract of employment.

Therefore, all benefits paid are bound by the laws governing benefits at the time of last injurious exposure. This means that claimants in Florida are restricted in the amount of benefits they can receive for injuries which occurred several years ago. In this particular case the defendant was limited to \$5000 due to the fact that the victim was last exposed to asbestos back in 1945, and \$5000 was the maximum amount allowed at that time.

DATA ANALYSIS

This report examines asbestos claims filed with the Washington State Department of Labor and Industries over a period of eight years, beginning in 1979 and ending in 1986. The primary purpose in gathering this data is to obtain an understanding of the magnitude and trends associated with the jurisdiction problem of asbestos claims. This report will begin with a breakdown of the data by year and will conclude with an assimilation of the data (note: Data on occupational diseases in general has been included for comparison purposes).

PART I.

DATA BY THE YEAR

1979

7175 Occupational Disease claims were filed during this year. Of that number 828 claims were rejected. Out of the original 7175 claims filed:

57 were asbestos related, representing .79% of all Occupational Disease claims filed in that year. Of the 57 asbestos claims filed 26 claims were rejected, this figure represents .36% of all Occupational Disease claims filed, 3.14% of all the Occupational Disease claims which were rejected, and 45.61% of all the asbestos claims filed.

Of the asbestos claims rejected 4 were on the grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 15.38% of all the asbestos claims which were rejected, or 7.02% of all asbestos claims filed. If one looks on the broadest scale the 4 rejected claims would represent .06% of all Occupational Disease claims filed, and .48% of all the Occupational Disease claims rejected.

In this same year 2 claims were rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 7.9% of all the asbestos claims rejected, and 3.51% of all asbestos claims filed. If the federal jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (4 fed. jur. + 2 fed. emp. = 6). The total would represent 23.08% of all asbestos claims rejected, and 10.53% of all asbestos claims filed.

1980

5775 Occupational Disease claims were filed during this year. From that number 608 claims were rejected. Out of the original 5775 claims filed:

61 claims were asbestos related, representing 1.05% of all Occupational Disease claims filed in that year. Of the 61 asbestos claims filed 36 claims were rejected, this figure represents .62% of all Occupational Disease claims filed, 5.92% of all Occupational Disease claims which were rejected, and 59.02% of all the asbestos claims filed.

Of the asbestos claims rejected 12 were rejected on grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 33.33% of all the asbestos claims which were rejected, or 12.67% of all asbestos claims filed. If one looks on the broadest scale the 12 rejected claims would represent .21% of all Occupational Disease claims filed, and 1.79% of all the Occupational Disease claims rejected.

In this same year 2 claims were rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 5.56% of all the asbestos claims rejected, and 3.28% of all asbestos claims filed. If the federal jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (12 fed. jur. + 2 fed. emp.=14). The total would represent 38.89% of all asbestos claims rejected, and 22.95% of all asbestos claims filed.

1981

5572 Occupational Disease claims were filed during this year. From that number 706 claims were rejected. Out of the original 5572 claims filed:

62 were asbestos related, representing 1.11% of all Occupational Disease claims filed in that year. Of the 62 asbestos claims filed 36 claims were rejected, this figure represents .65% of all Occupational Disease claims filed, 5.10% of all the Occupational Disease claims which were rejected, and 58.06% of all the asbestos claims filed.

Of the asbestos claims rejected 15 were rejected on grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 41.67% of all the asbestos claims which were rejected, or 24.19% of all asbestos claims filed. If one looks on the broadest scale the 15 claims would represent .27% of all

Occupational Disease claims filed, and 2.12% of all the Occupational disease claims rejected.

In this same year 4 claims were rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 11.11% of all the asbestos claims rejected, and 6.45% of all asbestos claims filed. If the federal jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (15 fed. jur. + 4 fed. emp. = 19). The total would represent 52.78% of all asbestos claims rejected, and 30.65% of all asbestos claims filed.

1982

3908 Occupational Disease claims were filed during this year. From that number 554 claims were rejected. Out of the original 3908 claims filed:

38 claims were asbestos related, representing .97% of all Occupational Disease claims filed in that year. Of the 38 asbestos claims filed 25 claims were rejected, this figure represents .64% of all Occupational Disease claims filed, 4.51% of all Occupational Disease claims which were rejected, and 65.79% of all the asbestos claims filed.

Of the asbestos claims rejected 12 were rejected on grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 48.% of all the asbestos claims which were rejected, or 31.58% of all asbestos claims filed. If one looks on the broadest scale the 12 rejected claims would represent .31% of all Occupational Disease claims filed, and 2.17% of all the Occupational Disease claims rejected.

In this same year 2 claims were rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 8.% of all the asbestos claims rejected, and 5.26% of all asbestos claims filed. If the Federal Jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (12 fed. jur. + 2 fed. emp. = 14). The total would represent 56.% of all asbestos claims rejected, and 36.84% of all asbestos claims filed.

1983

1600 Occupational Disease claims were filed during this year. From that number 318 claims were rejected. Out of the original 1600 claims filed:

99 were asbestos related, representing 6.19% of all Occupational Disease claims filed in that year. Of the 99 asbestos claims filed 45 claims were rejected, this figure represents 2.81% of all Occupational Disease claims filed, 14.51% of all the Occupational Disease claims which were rejected, and 45.45% of all the asbestos claims filed.

Of the asbestos claims rejected 21 were rejected on grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 46.67% of all the asbestos claims which were rejected, or 21.21% of all the asbestos claims filed. If one looks on the broadest scale the 21 rejected claims would represent 1.31% of all Occupational Disease claims filed, and 6.60% of all the Occupational Disease claims rejected.

In this same year 1 claim was rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 2.22% of all the asbestos claims rejected, and 1.01% of all asbestos claims filed. If the federal jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (21 fed. jur. + 1 fed. emp. = 22). The total would represent 48.89% of all asbestos claims rejected, and 22.22% of all asbestos claims filed.

1984

2677 Occupational Disease claims were filed during this year. From that number 516 claims were rejected. Out of the original 2677 claims filed:

81 claims were asbestos related, representing 3.03% of all Occupational Disease claims filed in that year. Of the 81 asbestos claims filed 43 claims were rejected, this figure represents 1.61% of all Occupational Disease claims filed, 8.33% of all Occupational Disease claims which were rejected, and 53.09% of all the asbestos claims filed.

Of the asbestos claims rejected 20 were rejected on grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 46.51% of all the asbestos claims which were rejected, or 24.69% of all asbestos claims filed. If one looks on the broadest scale the 20 rejected claims would represent .75% of all Occupational Disease claims filed, and 3.88% of all the Occupational Disease claims rejected.

In this same year 4 claims were rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 9.30% of all the asbestos claims rejected, and 4.94%

of all asbestos claims filed. If the federal employee jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (20 fed. jur. + 4 fed. emp.= 24). The total would represent 55.81% of all asbestos claims rejected, and 29.63% of all asbestos claims filed.

1985

1136 Occupational Disease claims were filed during this year. From that number 243 claims were rejected. Out of the original 1136 claims filed:

70 were asbestos related, representing 6.16% of all Occupational Disease claims filed in that year. Of the 70 asbestos claims filed 36 claims were rejected, this figure represents 2.64% of all Occupational Disease claims filed, 12.35% of all the Occupational Disease claims which were rejected, and 42.86% of all the asbestos claims filed.

Of the asbestos claims rejected 6 were rejected on grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 17% of all the asbestos claims which were rejected, or 8.57% of all asbestos claims filed. If one looks on the broadest scale the 6 claims would represent .53% of all Occupational Disease claims filed, and 2.47% of all the Occupational Disease claims rejected.

In this same year 1 claim was rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 3.33% of all the asbestos claims rejected, and 1.43% of all asbestos claims filed. If the federal jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (6 fed. jur.+ 1 fed. emp.= 7). The total would represent 23.33% of all asbestos claims rejected, and 10.% of all asbestos claims filed.

1986

413 Occupational Disease claims were filed during this year. From that number 123 claims were rejected. Out of the original 413 claims filed:

156 claims were asbestos related, representing 37.77% of all Occupational Disease claims filed in that year. Of the 156 asbestos claims filed 36 claims were rejected, this figure represents 8.72% of all Occupational Disease claims which were rejected, and 23.08% of all the asbestos claims filed.

Of the asbestos claims rejected 8 were rejected on ground that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act), which represents 22.22% of all the asbestos claims which were rejected, or 5.13% of all asbestos claims filed. If one looks on the broadest scale the 8 rejected claims would represent 1.84% of all Occupational Disease claims filed, and 6.50% of all the Occupational Disease claims rejected.

In this same year 1 claim was rejected on the grounds that the claimant was a federal employee at the time of injury and not subject to the provisions of the industrial insurance laws. This represents 2.78% of all the asbestos claims rejected, and .64% of all asbestos claims filed. If the federal jurisdiction claims rejected are combined with the federal employee jurisdiction claims rejected (8 fed. jur. + 1 fed. emp. = 9). The total would represent 25.% of all asbestos claims filed.

PART II.

ASSIMILATION OF DATA BY YEAR

Analysis of eight of the years (1979 through 1986) displayed definite trends and fluctuations in asbestos claims.

1. The percentage of asbestos claims rejected fluctuates at approximately 50% (note: the rejection rate in 1986 is much lower due to the complexity of asbestos claims that may require more than one year to adjudicate the claim). Therefore, one assumption based on the data is that a comparable percent of the 1986 claims will be rejected once adjudicated.
2. Due to the complexity of asbestos claims, many are still undetermined as to whether or not they should be compensated under the state's workers compensation. These are the cases noted as not yet adjudicated. The more recent the year, the greater the number of claims not yet adjudicated. Therefore, it is more difficult to accurately predict trends in the recent years data.
3. The percentage of asbestos claim rejects resulting from jurisdictional question has risen over the past several years despite fluctuations in the number of asbestos claims filed (note: the past two years have seen a considerable drop in the number of jurisdictional problems, however there are still many open claims in 1985-1986, which accounts for the lower percentages).

4. A total of 28,256 occupational disease claims were filed from 1979 to 1986. Of that number 3,896 claims were rejected. During this same time span 640 of the occupational disease claims were filed on grounds of asbestos exposure. 283 of the asbestos claims were rejected.
5. Out of all the occupational disease claims filed from 1979 to 1986, 2.27% were asbestos related.
6. The asbestos claims rejected from 1979 to 1986 represents:
 - 1.00% of all occupational disease claims filed
 - 7.26% of all occupational disease claims rejected.
 - 44.22% of all asbestos claims filed
7. From 1979 to 1986, 115 asbestos claims were rejected on the grounds that the injury occurred while in the course of employment subject to Federal Jurisdiction (Longshore and Harbor Workers Act, or Federal Employees), and thus represents 40.64% of all the asbestos claims rejected during that time period, or 17.97% of all asbestos claims filed. On a broad scale the 115 claims represents .41% of all the occupational disease claims filed during that time span, and 2.95% of all the occupational disease claims rejected.

SELF INSURERS DATA

This information is provided in an attempt to present the number of self insurer claims which filed occupational disease resulting from asbestos, and the outcome over the last the eight years:

1979

1213 Occupational Disease claims were filed under self insured during this year. Of that number 70 were rejected. Out of the original 1213 claims filed 5 were asbestos related, the 5 claims were categorized as follows:

- 1 claim was compensable;
- 3 claims paid medical only;
- 1 claim was rejected.

1980

980 Occupational Disease claims were filed under self insured during this year. Of that number 64 were rejected. Out of the original 980 claims filed 7 were asbestos related, the 7 claims were categorized as follows:

- 2 claims were compensable;
- 4 claims paid medical only;
- 1 claim was rejected.

1981

1126 Occupational Disease claims were filed under self insured during this year. Of that number 100 were rejected. Out of the original 1126 claims filed 7 were asbestos related, the 7 claims were categorized as follows:

- 1 claim was compensable;
- 3 claims paid medical only;
- 1 claim was fatal;
- 2 claims were rejected.

1982

534 Occupational Disease claims were filed under self insured during this year. Of that number 106 were rejected. Out of the original 534 claims filed 8 were asbestos related, the 8 claims were categorized as follows:

- 1 claim was compensable;
- 6 claims paid medical only;
- 1 claim was rejected.

1983

482 Occupational Disease claims were filed under self insured during this year. of that number 73 were rejected. Out of the original 482 claims filed 4 were asbestos related, the 4 claims were categorized as follows:

- 1 claim was compensable;
- 1 claim paid medical only;
- 2 claims were rejected.

1984

836 Occupational Disease claims were filed under self insured during this year. Of that number 151 were rejected. Out of the original 836 claims filed 7 were asbestos related, the 7 claims were categorized as follows:

- 2 claims were compensable;
- 2 claims paid medical only;
- 3 claims were rejected.

1985

352 Occupational Disease claims were filed under self insured during this year. Of that number 67 were rejected. Out of the original 352 claims filed 5 were asbestos related, the 5 claims were categorized as follows:

- 1 claim was compensable;
- 1 claim paid medical only;
- 3 claims were rejected.

1986

44 Occupational Disease claims were filed under self insured during this year. Of that number 10 were rejected. Out of the original 44 claims filed 12 were asbestos related, the 12 claims were categorized as follows:

- 2 claims were compensable;
- 3 claims paid medical only;
- 5 claims were rejected;
- 1 claim was fatal;
- 1 claim is unknown.

Washington Policy Regarding
Adjudication of Asbestos Claims

Currently, Washington does not have a policy that specifically addresses the adjudication of asbestos claims. Adjudication of the asbestos claim is treated like any occupational disease.

If a claim is marked occupational disease when it is received by the department, an investigation of the claim occurs to determine the liable employers (if there are more than one employer). If the claimant had multiple employers the claim is sent to the Ratings Department to determine the percentage of compensation due from each employer involved. However, if the last injurious exposure occurs under the Longshore and Harbor Workers Act, or under a self insured employer, then the claim is automatically rejected.

The following pages state the Department's policy for adjudication of occupational disease claims.

**OCCUPATIONAL
DISEASE:
DEFINITION**

An "occupational disease" is defined in the law under RCW 51.08.140 which states:

"Occupational disease' means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title."

Historically, the law made no provision for occupational diseases when it was initially enacted in 1911. The Act was amended in 1937 to permit coverage of specifically enumerated diseases. Because of apparent inequities in treating unquestioned work-attributable diseases which were not listed in the law, the coverage was extended in 1941 by adoption of the current definition. Slight modification to the definition was made in 1957 when coverage was extended from employment in "extra-hazardous" work to all employment covered under the Act including so-called elective adoption.

**PROXIMATE
CAUSE**

According to the definition of an occupational disease, the condition or disease must "arise naturally and proximately" out of employment. The initial test to be applied is whether the disease complained of is proximately caused by the employment activities of a worker. A "proximate cause" has been described by the court in the following manner:

"... the cause must be proximate in the sense that there existed no intervening independent and sufficient cause for the disease, so that the disease would not be contracted but for the condition existing in the employment. No disease can be held not to be occupational disease ... where it has been proved that the conditions of the employment in which the claimant was employed naturally and proximately produced the disease, and but for the exposure to such conditions, the disease would not have been contracted."

**OBJECTIVE
CIRCUMSTANCES**

It is also necessary that "objective circumstances" be present to establish whether the proximate cause test has been satisfied. This means that the conditions of work alleged to have resulted in the disease must be observable or measurable in some manner and not subjective in the sense that they are only perceived by the worker alone.

**PECULIAR TO
OCCUPATION**

A second test applied to claims involving a contention of a condition being an "occupational disease" is in the determination of whether the disease is one which is somehow inherent, or peculiar, to the worker's occupation, and exposes workers in that profession to certain hazards that are not experienced by all workers or the general public. This would mean, for example, that an office worker who comes down with a flu virus would not have sustained an occupational disease as the virus is common to the general population, however, a nurse who provides "hands-on" care to patients in a tuberculosis ward of a hospital who contracts that disease would have a valid claim if no other known exposures were established.

Exceptions to this rule will exist as, for example, in the case of an office worker who develops a lung condition from exposure to noxious fumes from an accident outside of the office from some type of hazardous material. Many close cases of this nature can be determined in the previous section.

**CAUSAL
RELATIONSHIP**

An important aspect of determining the validity of a claim for occupational disease is in establishing whether there is medical opinion either supporting or contesting the question of a causal connection between the conditions of work and the disabling disease. It is not sufficient that a physician present an opinion that the accident or injury might have, may have, could have or possibly did result in a subsequent physical condition. In other words, the possibility of a connection is not enough and the physician's opinion must be based on probable or "more probable than not" connections rather than fall within the realm of speculation.

**FREQUENCY
WITHIN
OCCUPATION**

In cases where the risk of exposure to a particular disease is substantially greater within a worker's particular occupation, than to the public or employment in general, it is not necessary to document a definite isolated incident of exposure to establish a causal relationship between the worker's occupation and his or her condition, if a reasonable person could conclude that the disease or infection more probably than not was caused by exposure on the job. For example, in Sacred Heart Hospital v. Carrado, a nurse whose job involved the worker with blood samples contracted hepatitis. Even though none of the samples she worked with were from patients known to have hepatitis or be carriers, the court ruled that a reasonable person could conclude that she contracted the disease on the job, as no off the job exposure was known, and the high risk of contracting hepatitis within her occupation had been established by medical testimony.

DATE OF INJURY

The date of injury for an occupational disease claim, which establishes the rate of compensation, is the date of the last exposure to the injurious substance(s) or hazard of disease which ultimately gives rise to the claim for compensation.

The beginning date of compensation or medical benefits is that date wherein the occupational disease reached a point of progression where it resulted in a disabling condition for which compensation benefits would otherwise be payable.

DOCUMENTATION

In most cases where a claim has been filed for coverage of an occupational disease there will be insufficient factual or medical information available at the time of filing to make a final determination regarding claim validity. In general, field investigation becomes a necessity under these circumstances to fill in the gaps in the history of exposure provided by the worker (as well as work history where more than one employer is involved), definitely establishing the diagnosis of the condition for which compensation is sought and in securing the current and past treatment records related to the disease as well as clarification of the basis for the attending or consulting physician's opinion regarding causal relationship to the work duties or exposure.

In the event of inadequate verification of a diagnosis, disputed medical opinion on a probable causal connection, opinion based solely on subjective considerations or other deficiencies from a medical standpoint, independent medical examination and testing should be requested with a specialist in the field with the assignment questions specifically addressing the issues raised by the case being handled and granting authority for the medical examiner to perform the diagnostic tests necessary to reach a well-founded opinion. Authorization may also be extended to the attending physician for the performance of such diagnostic tests where the results are necessary to adjudication of the claim. Where such authorization is granted prior to claim allowance or rejection, the online terminals should be so notified under "REMARKS" and a memo sent to the Claims Manager requesting that the authorization be entered in the MIPS system so that the bills for these services are not rejected by the Medical Aid Adjusters.

**OCCUPATIONAL
DISEASE CLAIM
PROCEDURES**

The responsibility for determination of claim validity on claims filed for (1) hearing loss, (2) chronic pulmonary diseases (black lung, silicosis, asbestosis, and cancer), and (3) any claim with multiple employers is assigned to the Disability Adjudicator.

The Claims Manager must identify these claims as they are delivered to the Unit with the daily new time loss. The original Report of Accident should be hand carried to the appropriate Disability Adjudicator. If time loss is indicated, the Disability Adjudicator will provide the Claims Manager with a copy of the Accident Report and instructions to review time loss eligibility.

When a claim is returned to the Disability Adjudicator after investigation and/or special examination, where more than one employer is involved, it is routed to Employer Services: Attn: Underwriting requesting the appropriate risk classification be assigned. The claim is also referred to the Industrial Insurance rates adjuster to determine and list the potentially chargeable employers. The Underwriter's response shall be returned to the Disability Adjudicator. A copy of the list of employers assigned to the claim will be sent for filming as a "TOP ROW" document.

If the claim is allowed, any subsequent disability benefits which are payable must be accompanied by an order of payment which lists each of the employers assigned to the claim. As the LHMIS system is capable of storing only one employer per claim, it is necessary to have a manual order of payment typed in the Unit.

No employer will face potential charges if less than ten percent of the total hazardous exposure period occurred during work with that particular firm. Therefore, the employers listed by the rates adjuster as being responsible for ten percent or more of the claim charges must receive notice of allowance, rejection, and any time loss payment made following claim allowance, and notice of claim closure. If no employer faces such charges, an automated order may be used for any of these claim actions. An automated order may also be used if they are returned to the unit for hand entry of the employer(s).

Time loss compensation payments made prior to the determination of allowance are made on a provisional basis on interlocutory orders. When multiple employers are assigned to a claim, no employer listing will show on the interlocutory order of payment. Until the Disability Adjudicator's determination on allowance of the claim is made, only interlocutory orders should be issued. Therefore, no manual orders need to be done until allowance is made.

OCCUPATIONAL
DISEASE CLAIM
PROCEDURE
(OTHER THAN
HEARING LOSS)

- 1) Claims for occupational disease shall be identified as such by Editors in Claims Index during the first pass. Where a claim has been identified as having been filed to cover an occupational disease (e.g., pulmonary conditions, conditions resulting from long periods of exposure), the Editor will make an entry of 500,000-00-5 for the firm number and 80-2 for the class. Such claims will proceed through the normal process until the point where assignment of firm and class numbers would normally be made in Audit, at which time they will be sorted for delivery to the Units. These Accident Reports will be delivered directly to the Claims Examiner.
- 2) Initial work-up, investigation and determination of claim validity will be performed by Disability Adjudicators on claims for chronic pulmonary disease and those other claims which have been assigned a firm number of 500,000-00-5. Claims Examiners will be responsible for identifying the new claims which would fall into this category and hand-delivering them to the Disability Adjudicator.
- 3) If the Adjudicator determines that a single employer is involved in the alleged exposure and a 500,000-00-5 firm number is shown on the Accident Report, a memo should be sent to AUDIT: ATTN. UNDERWRITING SECTION: with a copy of the Accident Report requesting the firm's account number and the proper class be assigned in the case. The claim should then be investigated to the extent necessary to establish claim validity and will subsequently be handled as any other disability claim.
- 4) If no single employer is identified or there is potential involvement of more than one employer, investigation into claim validity shall be requested to include securing as complete a past work record as possible where injurious exposure is contended, also to include verification with each employer still in business and otherwise available for contact. The employment record should be complete to within four months of the time the claim was filed.

Special medical examination where necessary to secure expert medical opinion regarding issues of diagnosis, causal relationship or extent of permanent impairment, if any, can be requested concurrently with the investigation assignment or subsequent to receipt of the investigation report depending upon the circumstances and/or issues raised by the claim for compensation.

- 5) The date of injury and schedule of benefits to be applied shall be determined by the date of the last exposure to the injurious substances or hazard of disease which gives rise to the claim for compensation.

The beginning date for compensation would be the date at which the occupational disease reached a point of progression where it resulted in a disabling condition for which compensation benefits (medical aid, time loss, permanent partial disability or total disability) can be paid, however, provisional time loss compensation where otherwise payable, shall normally not be paid for any period(s) prior to the date of receipt of the Accident Report in the Department.

- 6) Once the necessary investigative information has been obtained, to consider claim validity, the following must be available:

- A) **Timely filing:** The claim must have been filed within one year from the date the disease reached a stage of development for which it is compensable at least in some degree and the worker is given notice by a physician that the disease is occupational in nature and causation.
- B) **Diagnosis:** A definite diagnosis of the disease for which compensation is claimed.
- C) **Causal Relationship:** The causal relationship between the diagnosed condition and the contended exposure through medical opinion.

- 7) Claims for occupational cancer, silicosis and black lung are to be referred to the Pension Adjudicators for determination of claim validity after the initial work-up has been performed by the Adjudicator.

- 8) The Adjudicator makes a determination as to whether the claim should be allowed or rejected after necessary information has been obtained. At that point, in cases where hazardous exposure is contended or shown with more than one employer, that portion of the investigation report dealing with the claimant's employment history should be legibly copied and routed to "AUDIT - ATTN. UNDERWRITING SECTION" advising if the claim is to be allowed or rejected and requesting that the appropriate risk classification be assigned and the claim referred to

the Industrial Insurance Rates Adjuster ("42") to determine and list the potentially chargeable employers. This response shall be returned to the Adjudicator who will send a copy of the list for filming as a "TOP ROW" document. Any corrections in the firm number or risk classification assignment shall be made by the Underwriting Section. The adjudicator should not attempt to change the firm number from 500,000.

No employer will face potential charges if less than ten percent of the total hazardous exposure period occurred during work with that firm.

- 9) An Order is entered either rejecting or allowing the claim which lists all employers who were identified as facing potential charges by the Industrial Insurance Rates Adjuster. Copies of these Orders shall be mailed to each employer so listed with all chargeable employers listed on each employer's copy.

Provisional time loss compensation benefits being paid during the process of determining claim validity do not need to list the employers and, if a 500,000-00-5 firm number has been assigned to the case, no employer listing will show on the interlocutory order of payment.

- 10) Following claim allowance or rejection, all determinative Orders (abeyance, time loss compensation, permanent partial disability determinations, etc.) issued on claims with an assigned firm number of 500,000-00-5 shall reflect the employers outlined in Step 8, with copies sent to each employer listed. Again, each employer's copy should list all chargeable employers.

Where payments are made, it will be necessary to enter "manual" orders, typed within the Region, which identify each employer facing potential charges. Sufficient copies need to be made for mailing to each such employer prior to delivery of the "manual" order to the Warrant Desk.

- 11) Upon termination of the claim, a copy of the final order (other than Rejection Orders) and the microfiche must be routed to the Industrial Insurance Rates Adjuster to prorate the claim costs pursuant to WAC rules.

Existing claims in the system for conditions which are due to exposure from more than one employer which do not have sufficient documentation of the claimant's work record shall be referred for an investigation of the work history prior to the time any final Order is issued if the claim was filed on or after July 1, 1978. Where the only information needed is to establish the claimant's work record and history of exposure an assignment to obtain this information should be requested through the appropriate Service Location. A standard assignment format is

located in the WORD PROCESSING CENTER (WPC) - GENERAL ORDER section of the manual. The standard assignment can be requested through the Word Processing Center by dictating the format for an investigation assignment and requesting that the "Standard Employment Investigation Format" be typed. Any additional information that is desired may be added to this format by continuing with the dictation.

A step-by-step chart concerning the handling of occupational disease claims is found on the following page.

A statutory amendment to address the asbestosis jurisdiction issue was considered during the 1987 legislative session. The following represents the language considered at that time with the exception that we have designated the funding source to be a "special fund".

SHB 1015 - S Comm Amd by Committee on Commerce and Labor
Strike everything after the enacting clause and insert the following:

"NEW SECTION. Sec. 1. A new section is added to chapter 51.12 RCW amended to read as follows:

(1) The department shall furnish to any worker or beneficiary who may have a claim for benefits under the maritime laws of the United States resulting from an asbestos related disease, the benefits provided under this title if, except for the existence of such claim under the maritime laws, such worker or beneficiary would be entitled to benefits under this title or an asbestos-related occupational disease. The benefits will be paid from the special fund until such time as the liable employer initiates payment to the claimant.

(2) If the department determines that the benefits paid under subsection (1) of this section are actually owed to the worker or beneficiary by a self-insurer, the state fund, or federal program such self-insurer, state fund, or federal program shall reimburse the department special fund for all benefits paid and costs incurred.

(3) If the department determines that the benefits paid under subsection (1) of this section are actually owed to the worker or beneficiary by an insurer under the maritime laws of the United States:

(a) The department shall pursue the insurer on behalf of the worker or beneficiary to recover from the insurer the benefits due the worker or beneficiary and on its own behalf to recover the benefits the department had previously paid the worker or beneficiary;

(b) For the purpose of pursuing this recovery from the insurer, the department shall be subrogated to all of the rights of the worker or beneficiary receiving such compensation;

(c) The department shall not pursue the recovery of benefits previously paid under subsection (1) of this section from the worker or beneficiary except as provided for in RCW 51.12.100; and

~~(d) If-recovery-cannot-be-obtained-from-the-insurer, the department shall assess self-insurers for a pro-rata contribution through the second-injury fund.~~

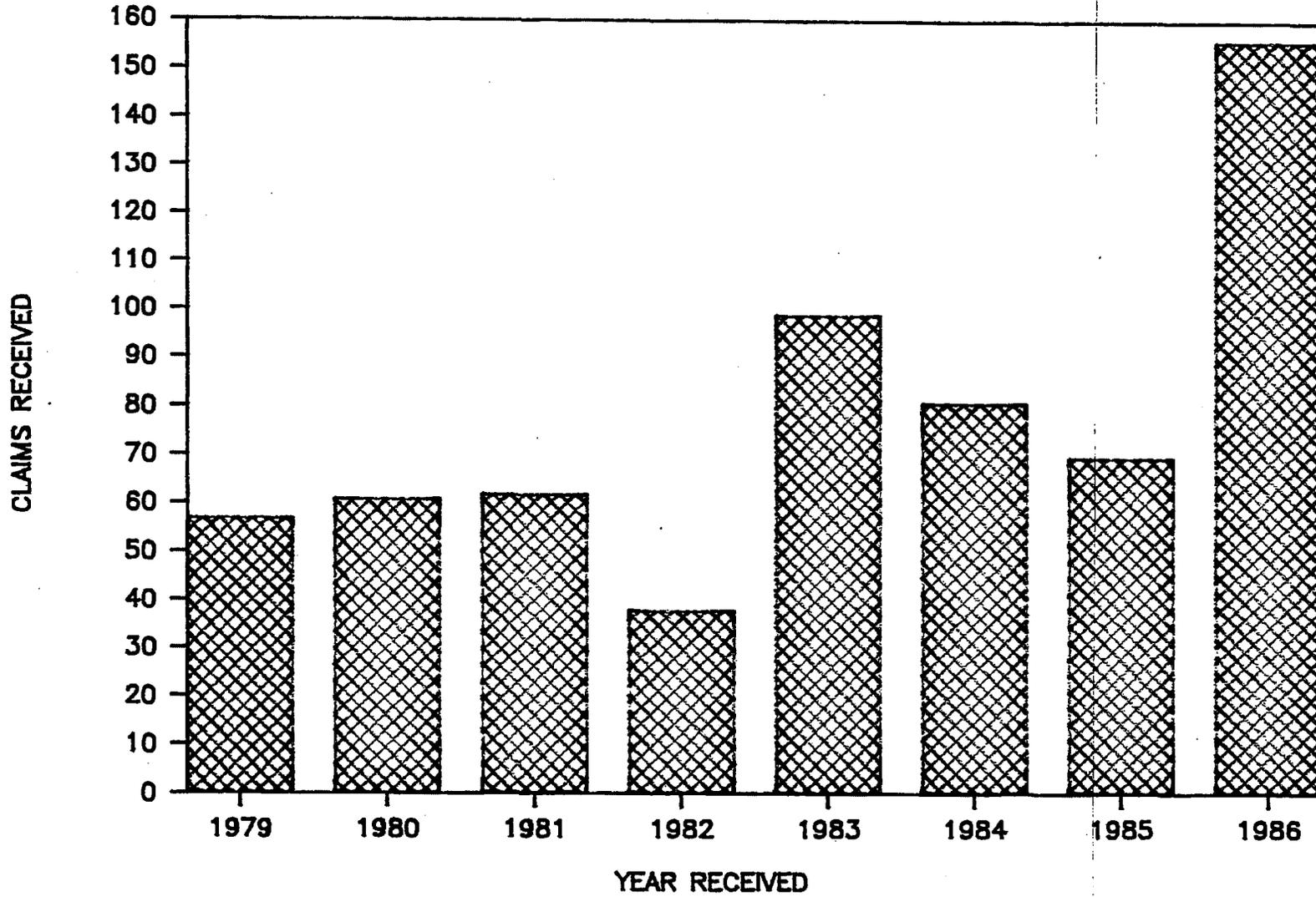
(4) The appropriate benefits shall continue until such time as ~~the claim has been accepted by another insurer~~ The insurer is identified and benefits are initiated by the liable insurer or benefits are otherwise properly terminated under this title.

(5) All benefits paid under this section shall be consistent with RCW 51.12.100".

APPENDIX

▣ CLAIMS RECEIVED

ASBESTOS CLAIMS BY YEAR



GRAPH 1

- Claims Rejected (Longshore & Harbor Workers)
- ▣ Claims Rejected (Federal Employee)
- ▨ Claims Rejected (Other)
- ▧ Claims Accepted

ASBESTOS CLAIMS BY YEAR

