

## **Kutzer, Robert**

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### **TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)**

#### **Occupational disease [prior to 1984 amendment to RCW 51.28.055]**

##### **Compensable disability**

No cause of action for an occupational disease accrues until the worker receives notification from a physician that he has an occupational disease resulting in a compensable disability. A worker who was able to continue working without impairment did not have a compensable disability. The statute of limitations did not begin to run until the worker's condition rendered him temporarily totally disabled, despite the fact that he was earlier advised by his doctor that he had an occupational disease. ...*In re Robert Kutzer*, BIIA Dec., 44,305 (1976) [dissent]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1     **IN RE: ROBERT D. KUTZER**                     )     **DOCKET NO. 44,305**  
2   )  
3     **CLAIM NO. G525281**                             )     **DECISION AND ORDER**  
4

5 **APPEARANCES:**

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7         Claimant, Robert D. Kutzer, by  
8         William A. Stiles, Jr.

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10        Employer, Marine Asphalt Company, Inc., by  
11        John Cheney

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13        Department of Labor and Industries, by  
14        The Attorney General, per  
15        James D. Pack, Assistant  
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17        This is an appeal filed by the claimant on July 15, 1974, from an order of the Department of  
18 Labor and Industries dated June 7, 1974, which rejected this claim on the grounds: 1. The  
19 claimant's condition is not the result of injury alleged; 2. That the claimant's condition pre-existed  
20 the alleged injury and is not related thereto; 3. That no claim was filed within one year from the date  
21 on which the claimant was informed by a physician that an occupational disease had been  
22 contracted. **REVERSED AND REMANDED.**

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26   **DECISION**

27        Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
28 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
29 Proposed Decision and Order issued by a hearing examiner for this Board on July 15, 1975, in  
30 which the order of the Department dated June 7, 1974 was reversed, and the claim remanded to  
31 the Department with direction that the Department allow the claim as an occupational disease and  
32 take such other and further action as may be indicated and authorized or required by law.  
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35        The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no  
36 prejudicial error was committed and said rulings are hereby affirmed.  
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38        The record establishes that on June 11, 1973, and for some period of time prior thereto,  
39 perhaps several years, the claimant had been suffering from a lung condition diagnosed as allergic  
40 bronchitis. According to the claimant's attending physician and the medical witness herein, Dr.  
41 Lawrence A. Whoolery, the cause of this condition may be various things, among which are toxic  
42 fumes from welding and hot oil and diesel fumes and smoke. The claimant had been a welder for a  
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1 number of years, the last 3½ years prior to June 11, 1973, involving a full-time work for this  
2 employer, Marine Asphalt Co., Inc., where he was constantly exposed to such substances. It was  
3 Dr. Whoolery's firm opinion that such occupational exposure was the cause of claimant's allergic  
4 bronchitis.  
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7 On June 11, 1973, the claimant suffered symptoms of extreme shortness of breath and  
8 nausea while working as a welder for this employer, and inhaling fumes from hot grease on a gear  
9 and flux from a welding rod. He started to leave for home in his own vehicle, but "passed out" while  
10 still on the employer's premises, and was thereafter taken to Dr. Whoolery for treatment. At that  
11 time, he was told that he should not continue to pursue his occupation, for the reason that the  
12 welding and other fumes were exacerbating and causing a worsening of his bronchitis. He  
13 accordingly ceased the employment, and said he hasn't worked since.  
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18 In the Proposed Decision and Order, the hearing examiner found that the claimant's  
19 bronchitis condition was related to his occupational exposure and constituted an occupational  
20 disease, in accord with Dr. Whoolery's medical opinion. The hearing examiner also found that  
21 claimant "filed his claim within one year from the date he was informed by a physician that he had  
22 contracted an occupational disease." Accordingly, the Proposed Decision and Order directed  
23 allowance of the claim.  
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27 It was this latter determination, as to the timely filing of the claim, which Department's  
28 counsel specifically challenges in his Petition for Review.  
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30 The claim was not filed with the Department until December 11, 1973, and therefore counsel  
31 argues that it is invalid and not compensable because it was not filed within one year following  
32 November 1972, during which month the claimant was advised by Dr. Whoolery, on more than one  
33 occasion, that his lung troubles were caused by his occupational exposure. Dr. Whoolery's  
34 testimony does clearly establish that he so notified the claimant of the occupational nature and  
35 causation of his bronchial disease, in November 1972. The following quotes from the doctor's  
36 testimony are clearly illustrative:  
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40 "A. On the physical examination on November of-- 9, 1972, according to my  
41 records here, he was advised at that time that the hot oil and diesel  
42 fumes and exhaust fumes and what not, were causing his--his trouble."  
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44 ....

45 Q Back in November, 1972, is it likely that you discussed with him the  
46 situation of his lung problems and the possible or probable relation-  
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1 ship of those lung problems to this exposure that you mentioned of the  
2 hot oil and diesel fumes and exhaust fumes at work?

3  
4 A Yes, I'm sure I discussed this with Mr. Kutzer in November of '72. He  
5 was seen by me on November 19, 1972, complaining of shortness of  
6 breath and I'm sure, at that time, that I discussed the probability of his  
7 condition being aggravated by hot oil and diesel fumes.

8 Q Is it likely, Doctor, that at that time you advised him of your opinion as to  
9 the probability of relationship of his troubles to the exposure at work?

10 A I feel that that is true, yes.

11 Q Did you also discuss with him the same subject on a visit of November  
12 16, 1972?

13 A I imagine my description at that time would be along the same lines as  
14 the one earlier in November. My diagnosis in my record indicates that  
15 or states that he was allergic to diesel oil and welding fumes."  
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18 However, under our Supreme Court's interpretations of the one-year statutory limitation for filing of  
19 occupational disease claims, this physician's notification is not enough, of itself, to hold that the  
20 statute had run. RCW 51.28.055 reads as follows:  
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22 "Claims for occupational disease or infection to be valid and  
23 compensable must be filed within one year following the date the work-  
24 man had notice from a physician of the existence of his occupational  
25 disease, without reference to its date of origin."  
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28 Our Court has interpreted this to mean that the running of the statute of limitations does not  
29 commence until the workman is given notice by a doctor "that his disabling disease is occupational  
30 in its nature and causation." In other words, he must be made aware of the fact, by a doctor, that  
31 he has a disease that in the doctor's opinion is related to his occupation. Williams v. Department of  
32 Labor and Industries, 45 Wn. 2d 574; Nygaard v. Department of Labor and Industries, 51 Wn. 2d  
33 659. As above pointed out, this requirement was met in November of 1972, in this case.  
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36 There is, however, an additional event which must occur before the one-year period  
37 commences to run, which was established by the Williams and Nygaard cases, supra. This further  
38 requirement was not alluded to in the Department's Petition for Review. The Court said, in  
39 Williams:  
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42 "No cause of action, of course, can accrue for an occupational disease  
43 before it reaches a stage of development for which it is compensable at  
44 least in some degree." (Emphasis supplied)  
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1 Any doubt as to the meaning of this statement was dispelled in Nygaard, supra, when the Court  
2 explained:  
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4 "A disease, and full knowledge of it, may exist long before a  
5 compensable disability develops. This court has already adopted the  
6 rule that the period allowed for filing a claim for an occupational disease  
7 does not commence to run prior to the time some degree of disability,  
8 amounting to a compensable disability, results." (Emphasis supplied)  
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10 In applying this principle to the facts in Nygaard, the Court observed that at no time prior to the date  
11 of Nygaard's collapse on the job was he required to miss work due to his alleged occupational  
12 disease, and the record did not show that "his ailment had, in any way, impaired his efficiency as a  
13 workman until his collapse..." In other words, there was no temporary, permanent partial, or  
14 permanent total disability, until the time of his "collapse," at which time of course a status of  
15 temporary total disability -- a "compensable" disability -- existed. Since the claim was filed by  
16 Nygaard well within a year after this compensable disability began, the Court concluded that it was  
17 timely filed.  
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22 Thus, it can be seen that two events must take place to start the running of the one-year  
23 claim filing period: (1) Notice to the workman by a doctor that his disease is occupational in its  
24 nature and causation; and (2) The disease must have reached the point where some sort of  
25 compensable disability results from it. Until one year has passed from the occurrence of both of  
26 these events, a claim is not invalid because of untimely filing.  
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30 Applied to the facts of the instant case, it is clear, as we have heretofore pointed out, that  
31 event (1) occurred in November 1972.  
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33 However, as to event (2), careful review of the record convinces us that the first time  
34 claimant can be said to have suffered a known compensable disability from his allergic bronchitis  
35 was on June 11, 1973, when he had the severe episode at his job and had to quit work on his  
36 doctor's advice, thus becoming temporarily totally disabled. Although he had some previous milder  
37 allergic bronchitis attacks requiring him to see the doctor, specifically in November 1972, and  
38 apparently on one occasion in 1968, there is no definite evidence that he was required to lay off  
39 work thereby, or that his welding work which he regularly performed was in any way impaired prior  
40 to the incident of June 11, 1973. He testified that the condition began to "bother" him more in about  
41 February 1973, but he still worked steadily and full-time up until the June 11, 1973 incident. The  
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1 satisfactory way in which he performed, and the fact of his regular full-time work up until that date,  
2 was corroborated to a considerable degree by the employer's witnesses.  
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4 The filing of this claim on December 11, 1973, was obviously within one year from the date of  
5 first apparent development of compensable disability on June 11, 1973. The claim was therefore  
6  
7 timely.  
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### 9 **FINDINGS OF FACT**

10 After a careful review of the record, and in view of the foregoing discussion, the Board finds  
11 as follows:  
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- 13 1. On December 11, 1973, the claimant filed a report of accident with the  
14 Department of Labor and Industries alleging an injury or occupational  
15 disease occurring to the claimant on June 11, 1973, while in the course  
16 of his employment with Marine Asphalt Co., Inc., as a welder. On June  
17 7, 1974, the Department entered an order rejecting the claim on the  
18 grounds: (1) That claimant's condition is not the result of injury alleged;  
19 (2) That the claimant's condition pre-existed the alleged injury and is not  
20 related thereto; (3) That no claim was filed within one year from the date  
21 on which claimant was informed by a physician that an occupational  
22 disease had been contracted. Claimant appealed to this Board on July  
23 15, 1974, and on July 26, 1974, the Board granted the appeal and  
24 ordered hearing proceedings thereon.  
25
- 26 2. For several years prior to June 11, 1973, the claimant had been  
27 employed steadily and full-time as a welder by the Marine Asphalt Co.,  
28 Inc., and in connection with his duties he was exposed to inhalation of  
29 toxic welding fumes and hot oil and diesel fumes and smoke.  
30
- 31 3. For some period of time, perhaps several years, prior to June 11, 1973,  
32 the claimant had been suffering from a lung condition described as  
33 allergic bronchitis.  
34
- 35 4. On or about November 9, 1972, the claimant was informed by his doctor  
36 that his allergic bronchitis condition was related to the inhalation of  
37 welding fumes and other irritating smoke and fumes at work. He was  
38 not advised by the doctor at that time to cease his employment as a  
39 welder or to limit his work activity in any way. On November 9, 1972,  
40 and thereafter, the claimant's efficiency and ability to perform his work  
41 was not noticeably affected by his bronchitis condition, and he continued  
42 to work regularly and full-time for this employer until June 11, 1973.  
43
- 44 5. On June 11, 1973, the claimant developed a further exacerbation and  
45 worsening of his allergic bronchitis, as the result of inhaling smoke and  
46 fumes from welding and from hot grease on gears on which he was  
47 working in the course of his employment. Medical treatment was  
necessary, and he had to quit his employment on his doctor's advice on  
June 11, 1973, because of the bronchitis condition.

1 6. The claimant's allergic bronchitis was caused by his occupational  
2 exposure to welding fumes and other irritating smoke and fumes in his  
3 employment.  
4

5 **CONCLUSIONS OF LAW**

6 Based on the foregoing findings of fact, the Board makes the following conclusions of law:  
7

- 8 1. This Board has jurisdiction of the parties and subject matter of this  
9 appeal.  
10 2. This claim filed on December 11, 1973, was a timely claim for an  
11 occupational disease, within the one-year limitation imposed by RCW  
12 51.28.055 and the judicial interpretations of said statute.  
13 3. The claimant sustained an occupational disease, within the meaning of  
14 the Workmen's Compensation Act, naturally and proximately resulting  
15 from his employment with Marine Asphalt Co., Inc.  
16 4. The Department's order of June 7, 1974, rejecting this claim, is incorrect  
17 and should be reversed, and this matter should be remanded to the  
18 Department with direction to allow the claim as an occupational disease  
19 and to take such further action as may be indicated and authorized or  
20 required by law.  
21

22 It is so ORDERED.

23 Dated this 27th day of February, 1976.  
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25 BOARD OF INDUSTRIAL INSURANCE APPEALS  
26

27  
28 /s/  
29 PHILLIP T. BORK Chairman

30 /s/  
31 SAM KINVILLE Member  
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33 **DISSENTING OPINION**

34 The claim filed by Mr. Kutzer on December 11, 1973, was some 13 months and 2 days from  
35 November 9, 1972, when Dr. Whoolery advised the claimant that fumes at work were causing his  
36 lung trouble to worsen.  
37

38 I believe there is no jurisdiction to reach the merits of this case, since an essential  
39 jurisdictional requirement, i.e., filing of the claim within the one-year period provided in RCW  
40 51.28.055, has not been met. I therefore dissent from the Board's majority decision, and would  
41 uphold the Department's rejection of the claim.  
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44 Dated this 27th day of February, 1976.  
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46 /s/  
47 R. M. GILMORE Member