

Buren, David

COVERAGE AND EXCLUSIONS

Longshore and Harbor Workers' Compensation Act

The Department must make its own determination regarding federal coverage, rather than wait for the pending federal claim to be resolved. [RCW 51.12.100.] ...*In re David Buren*, BIIA Dec., 65,127 (1984) [*Editor's Note*: See later statutory amendments, Laws of 1988, ch. 271, § 1 (RCW 51.12.102).]

Scroll down for order.

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

1 **IN RE: DAVID L. BUREN**) **DOCKET NO. 65,127**
2)
3 **CLAIM NO. J-212034**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, David L. Buren, by
8 Levinson, Friedman, Vhugen, Duggan, Bland and Horowitz, per
9 William S. Bailey

10
11 Employer, Todd Shipyards,
12 None

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 Linda McQuaid and William A. Garling, Jr., Assistants
17

18 This is an appeal filed by the claimant on June 14, 1983, from an order of the Department of
19 Labor and Industries dated May 25, 1983, which adhered to the provisions of a prior order rejecting
20 the claim for the reason that the injury occurred while in the course of employment subject to
21 federal jurisdiction (Longshore and Harbor Workers Act). **AFFIRMED.**
22
23

24 **DECISION**

25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
27 Proposed Decision and Order issued on January 25, 1984, in which the order of the Department
28 dated May 25, 1983 was reversed, and the claim remanded to the Department for further action as
29 indicated, authorized or required by law.
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32 The general nature and background of this appeal are as set forth in the Proposed Decision
33 and Order, and shall not be reiterated herein.
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36 Quite clearly, we think, the claimant was engaged in a maritime occupation. For that matter,
37 it does not appear that there is really any dispute herein as to that proposition. His job was that of a
38 shipscaler which involved scraping, chipping and clean-up aboard ships which, the claimant's trial
39 brief states, were "in the water as well as on land (in dry dock or being constructed on the ways)."
40 The federal Longshoremen's and Harbor Workers' Compensation Act (the federal Act) provides:
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43 "Compensation shall be payable under this Chapter in respect of
44 disability or death of an employee, but only if the disability or death
45 results from an injury occurring upon the navigable waters of the United
46 States (including any adjoining pier, wharf, dry dock, terminal, building
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1 way, marine railway or other adjoining area customarily used by an
2 employer in loading, unloading, repairing, or building a vessel)."
3 (Emphasis supplied) 33 U.S.C.A. § 903(a).
4

5 Thus, it would appear to be indisputable that Mr. Buren's claim is covered under the federal Act. In
6 point of fact, the claimant's trial brief notes that he has filed a claim for benefits for his asbestosis
7 under the federal Act. This being the case, the claimant's claim for asbestosis under our state's
8 Workers' Compensation Act is foreclosed by RCW 51.12.100, to wit:
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10 "The provisions of this title shall not apply to a master or member of a
11 crew of any vessel, or to employers and workers for whom a right or
12 obligation exists under the maritime laws for personal injuries or death of
13 such workers." (Emphasis added)
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16 The fact that the claim herein is predicated on an "occupational disease" rather than an "injury" is of
17 no legal consequence inasmuch as the two terms are synonymous under the federal Act.
18 Specifically 33 U.S.C.A. § 902(2) provides:
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20 "The term 'injury' means accidental injury or death arising out of and in
21 the course of employment, and such occupational disease or infection
22 as arises naturally out of such employment..." (Emphasis supplied).
23

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25 The claimant, however, contends that RCW 51.12.100, supra, cannot legally bar his claim for
26 benefits under our state Act prior to a formal adjudication of his claim under the federal Act by the
27 federal authorities. The claimant's position in this regard is set forth in his trial brief as follows:
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29 "Until such time as Mr. Buren is adjudicated to have a remedy under the
30 federal statute, RCW 51.12.100 cannot act as a bar to his recovery
31 under the Washington Workmen's [sic] Compensation Act. By definition,
32 no right or obligation exists under the federal maritime laws for the loss
33 of pulmonary function sustained by the claimant until there is a formal
34 adjudication. Mere filing for benefits under the federal law does not
35 mean he will receive them."
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37 We do not agree. In our opinion, the provisions of RCW 51.12.100 make it incumbent upon the
38 Department in those cases involving maritime employment to make its own determination as to
39 federal coverage for the purpose of determining if our Act is applicable to the claim. Our decision in
40 this regard accords with the court's disposition in the most recent case of Lindquist v. Department
41 of Labor and Industries, 36 Wn. App. 646 (1984), wherein the court made its own determination as
42 to coverage of the claim therein under the state and federal Act despite the fact that the claimant
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1 therein had also filed a claim under the federal Act which was pending before the federal
2 authorities.
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4 In sum, we hold and conclude that the claimant's remedy for coverage of his asbestosis
5 condition properly lies under the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C.A.
6 §901 et.seq. Therefore the provisions of Title 51, RCW, are inapplicable to his claim herein.
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8 The facts herein having been stipulated, and therefore uncontested, no findings will be
9 entered. RCW 51.52.106.
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11 It is so ORDERED.

12 Dated this 31st day of May, 1984.
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14 BOARD OF INDUSTRIAL INSURANCE APPEALS
15

16 /s/
17 _____
18 MICHAEL L. HALL Chairman
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20 /s/
21 _____
22 FRANK E. FENNERTY, JR. Member
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24 /s/
25 _____
26 PHILLIP T. BORK Member
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