

Aalmo, Christopher, Dec'd

[TIMELINESS OF CLAIM \(RCW 51.28.050; RCW 51.28.055\)](#)

Survivor's benefits where worker dies of occupational disease

If the worker was never provided with the written notification mandated by RCW 51.28.055 (as amended in 1984), the beneficiary's claim for survivor's benefits is not extinguished by the mere passage of two years from the date of the worker's death. **...*In re Christopher Aalmo, Dec'd*, BIIA Dec., 87 4382 (1989)** [dissent] [*Editor's Note: Affirmed Department of Labor & Indus. v. Aalmo*, 117 Wn.2d 222 (1991).]

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

1 **IN RE: CHRISTOPHER AALMO, DEC'D) DOCKET NO. 87 4382**
2)
3 **CLAIM NO. K-368164) DECISION AND ORDER**
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5 APPEARANCES:
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7 Beneficiary-Petitioner, Pearl Aalmo, by
8 Schroeter, Goldmark & Bender, P.S., per
9 Sidney Stillerman Swan

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11 Employer, Multiple,
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 John R. Wasberg, Assistant, and
17 Laurel Anderson, Paralegal
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19 This is an appeal filed by Pearl Aalmo, widow of Christopher Aalmo, on December 18, 1987
20 from an order of the Department of Labor and Industries dated October 22, 1987. The October 22,
21 1987 order rejected Mrs. Aalmo's claim for spouse's benefits on the sole ground that the claim was not
22 timely filed since Mr. Aalmo died on August 16, 1984, from lung cancer allegedly due to asbestos
23 exposure and Mrs. Aalmo's claim was not filed until August 5, 1987. **REVERSED AND REMANDED.**
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26 **DECISION**
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28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
29 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
30 Proposed Decision and Order issued on August 18, 1988 in which the order of the Department dated
31 October 22, 1987 was reversed and the matter remanded to the Department to consider the merits of
32 the claim based on a timely application for benefits filed by Pearl Aalmo.
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35 The issue on appeal is whether Mrs. Aalmo's claim for widow's benefits, premised on the
36 contention that her husband died as the result of an occupational disease, was timely filed.
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38 The Department contends that the last sentence of RCW 51.28.055, as amended in 1984,
39 requires a beneficiary or dependent to file an occupational disease claim within two years of the date
40 of the worker's death, irrespective of whether the worker has received the requisite written statutory
41 notification. The widow, on the other hand, refers to the first sentence of RCW 51.28.055 and argues
42 that the statutory time limitation only applies if the worker has received the statutory notification prior to
43 his death.
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1 The Proposed Decision and Order relied on RCW 51.28.050, not RCW 51.28.055, to determine
2 the timeliness of Mrs. Aalmo's claim. RCW 51.28.050 provides a one-year period for filing claims
3 following the occurrence of an injury or the accrual of the rights of dependents or beneficiaries. Up
4 until June 6, 1984, RCW 51.28.050 could be interpreted to apply to deaths resulting from either an
5 industrial injury or an occupational disease. However, Laws of 1984, ch. 159,]] 1 & 2, p. 792 became
6 effective on June 6, 1984. Section 1 of that legislation amended RCW 51.28.050 to read as follows:
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10 No application shall be valid or claim thereunder enforceable unless filed
11 within one year after the day upon which the injury occurred or the rights
12 of dependents or beneficiaries accrued, except as provided in RCW
13 51.28.055.
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15 Section 2 amended RCW 51.28.055 to read as follows:
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17 Claims for occupational disease or infection to be valid and compensable
18 must be filed within ~~((one year))~~ two years following the date the worker
19 had written notice from a physician: (1) Of the existence of his or her
20 occupational disease ((without reference to its date of origin)) and (2) that
21 a claim for disability benefits may be filed. The notice shall also contain a
22 statement that the worker has two years from the date of the notice to file
23 a claim. The physician shall file the notice with the department. The
24 department shall send a copy to the worker and to the self-insurer if the
25 worker's employer is self-insured. However, a claim is valid if it is filed
26 within two years from the date of death of the worker suffering from an
27 occupational disease.
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29 These amendments, read in concert, clearly indicate that the time period for filing occupational
30 disease claims by either the worker or beneficiaries is now governed by RCW 51.28.055, not RCW
31 51.28.050. Therefore, contrary to the assertion in the Proposed Decision and Order, it is not
32 necessary to determine when ". . . the rights of dependents or beneficiaries accrued . . ." under RCW
33 51.28.050.
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36 We further note that neither party has challenged the applicability of the 1984 amendments to
37 this claim. We agree that the 1984 amendments are applicable, since Mr. Aalmo died on August 16,
38 1984, after the June 6, 1984 effective date.
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40 The widow alleges that her husband died as the result of an asbestos-related occupational
41 disease. The parties stipulated that neither Mr. Aalmo nor his widow was ever notified in writing or
42 orally of the occupational nature of his condition. Indeed, the treating physician was unaware that
43 either Mr. Aalmo or his widow might have a claim under the Washington Industrial Insurance Act.
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1 This appeal raises a question of first impression, which has not been addressed previously by
2 any reported appellate court decision or by this Board. Attached to the Department's Petition for
3 Review is material regarding the legislative history of the 1984 amendments. However, if a statute is
4 unambiguous, there is no need to refer to legislative history as an aid to interpretation. Jepson v.
5 Department of Labor and Industries, 89 Wn.2d 394, 400-401 (1977). Thus our starting point is the
6 specific language of RCW 51.28.055 and 51.28.050, as amended in 1984, as set forth above.
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10 The first sentence of RCW 51.28.055 simply refers to "claims" for occupational disease or
11 infection, without any reference to who has filed the claim. Under the last phrase of RCW 51.28.050,
12 RCW 51.28.055 governs the rights of beneficiaries or dependents, as well as workers, when an
13 occupational disease claim is filed. Thus, the term "claims for occupational disease or infection" must
14 encompass any claim based on an occupational disease allegation, whether the claim is filed by the
15 worker, dependents or beneficiaries.
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19 RCW 51.28.055, like RCW 51.28.050, is a nonclaim statute. See, e.g., Wheaton v. Department
20 of Labor and Industries, 40 Wn.2d 56 (1952). Under the first sentence of RCW 51.28.055, the right to
21 seek benefits is not extinguished unless and until two years have passed from the date "the worker
22 had written notice from a physician: (1) of the existence of his or her occupational disease, and (2) that
23 a claim for disability benefits may be filed." Under the terms of the statute, this written notice must
24 "also contain the statement that the worker has two years from the date of the notice to file a claim."
25 Mr. Aalmo never received such notice. Thus the right to seek benefits under this occupational disease
26 claim had not been extinguished, as against either the worker or his dependents and beneficiaries.
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31 The Department relies on the final sentence of RCW 51.28.055, arguing that Mrs. Aalmo's right
32 to benefits was extinguished by her failure to file a claim within two years of Mr. Aalmo's death,
33 irrespective of whether the requisite statutory written notification had been received. We disagree.
34 Clearly that sentence provides dependents and beneficiaries an additional two years from the date of
35 death in which to file a claim, but just as clearly, it does not eliminate the notification requirement. If
36 written notification has not been provided the worker as mandated by the first sentence of RCW
37 51.28.055, it is irrelevant when the beneficiaries or dependents file their claim; their right to benefits is
38 not extinguished.
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43 The Department raises the specter of stale claims and the associated evidentiary problems
44 which will result from this interpretation of the statute. By their very nature, long-developing
45 occupational disease claims involve evidence from years gone by, since it is not uncommon for many
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1 years to pass between the last injurious exposure and the manifestation of the disease. Thus,
2 adherence to the statutory notification requirement imposes no greater burden on the Department in
3 defending against a claim than is already imposed, by the very nature of an occupational disease
4 claim, on the worker or beneficiary who is asserting, and must prove, the claim.
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7 While not strictly applicable here, White v. Johns-Manville Corp., 103 Wn.2d 344 (1985)
8 contains compelling language regarding the difficulties facing a person seeking redress for a
9 long-developing occupational disease. The question before the court in that case was whether the
10 "discovery rule" applied to the widow's wrongful death and survival actions so that the time for filing
11 those actions was tolled "until such time as plaintiff, . . ., discovers or should reasonably have
12 discovered the essential elements of her possible causes of action." White, at 345. In adopting the
13 discovery rule, the court addressed the defendant corporation's "contention that application of the
14 discovery rule to wrongful death actions will have a "slippery slope" effect on occupational hazard
15 litigation", as follows:
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21 While the Legislature may in the future decide otherwise, we find the
22 problem of "unearthing" wrongful death causes of action to be minimal
23 compared to the hardships imposed on the victims unblamably left without
24 a remedy.
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26 White, at 355-356. While this reasoning is not binding with respect to our interpretation of RCW
27 51.28.055, it is in accord with our reading of this statute.
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29 In sum, under RCW 51.28.055 as amended in 1984, a beneficiary's claim for benefits pursuant
30 to RCW 51.28.055 is not extinguished by the mere passage of two years from the date of the worker's
31 death, if the worker was never provided with the requisite written statutory notification mandated by
32 RCW 51.28.055. The safeguard provided by such notification is critical. If the worker receives
33 statutory notification, he or she has the opportunity to convey that information to beneficiaries prior to
34 death. Additionally, since that notification must be filed with the Department, there is a better chance
35 that the surviving beneficiaries will receive the information they need in order to make an informed
36 decision as to whether to file a claim. But without any notification, a beneficiary's right to seek benefits
37 under the Industrial Insurance Act premised on an occupational disease claim would, in many cases,
38 be just an empty right.
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44 When a worker has received the requisite written notice during his or her lifetime, the
45 beneficiaries have an additional two years after the worker's death in which to file a claim. When a
46 worker has not been provided with such statutory notification, the claim is never extinguished. A
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1 premium is therefore placed on prompt and complete disclosure and notification to the worker who has
2 allegedly contracted an occupational disease during the course of employment. We believe this is
3 precisely what the Legislature intended by the 1984 amendments.
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6 The Department order under appeal must therefore be reversed and the claim remanded to the
7 Department with direction to adjudicate the merits of the claim based upon a timely application for
8 widow's benefits.
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10 After consideration of the Proposed Decision and Order and the Petition for Review filed
11 thereto, and a careful review of the entire record before us, we hereby enter the following:
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13 **FINDINGS OF FACT**

- 14
15 1. On August 5, 1987, the Department of Labor and Industries received a
16 claim for pension by spouse or children from Pearl Aalmo, alleging that
17 she was the widow of Christopher Aalmo who died on August 16, 1984 of
18 carcinomatosis, carcinoma of left lung, arteriosclerosis (sic) heart disease,
19 asbestosis left lung, chronic obstructive pulmonary disease. The claim for
20 a pension alleged that one or more of these medical conditions was
21 proximately caused by occupationally related exposure to asbestos during
22 the course of Mr. Aalmo's employment with various Washington State
23 employers.

24 On October 22, 1987, the Department issued an order which rejected
25 Pearl Aalmo's claim for benefits on the ground that it was not timely filed.

26 On December 18, 1987, the beneficiary-petitioner filed a Notice of Appeal
27 with the Board of Industrial Insurance Appeals from the October 22, 1987
28 Department order. On January 13, 1988, the Board granted the appeal,
29 assigned it Docket No. 87 4382 and directed that further proceedings be
30 held.
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- 32 2. Christopher Aalmo died on August 16, 1984 of diseases diagnosed as
33 carcinomatosis, carcinoma of left lung, arteriosclerosis (sic) heart disease,
34 asbestosis left lung, and chronic obstructive pulmonary disease.
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36 3. On or before August 16, 1984, the date of his death, Christopher Aalmo
37 was not informed orally or in writing by a physician that his conditions were
38 causally related to occupational exposure to asbestos or that a claim for
39 benefits may be filed.
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41 4. Pearl Aalmo was married to Christopher Aalmo at the date of death and is
42 his widow.
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44 5. Pearl Aalmo was never informed orally or in writing by a physician that
45 Christopher Aalmo's lung conditions or his death were causally related to
46 occupational exposure to asbestos or that a claim for benefits may be
47 filed.

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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter to this appeal.
2. Pearl Aalmo's application for benefits filed with the Department of Labor and Industries on August 5, 1987, was timely filed, inasmuch as the time for filing such an occupational disease claim under RCW 51.28.055 had not begun to run, and the claim was therefore not extinguished.
3. The order of the Department of Labor and Industries dated October 22, 1987, rejecting Pearl Aalmo's claim for widow's benefits on the ground that the claim was not timely filed, is incorrect and should be reversed and the claim remanded to the Department with directions to consider the application for benefits as timely filed and to determine the merits of the claim.

It is so ORDERED.

Dated this 10th day of March, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

DISSENTING OPINION

I disagree with the Board majority's decision.

It is quite clear to me that, based on the 1984 statutory amendments, there are two mutually exclusive statutes of limitations for timely filing of claims under Title 51: RCW 51.28.050 for claims based on injuries; and RCW 51.28.055 for claims based on alleged occupational diseases.

If the claim -- whether by worker or beneficiary--is based on injury, RCW 51.28.050 solely governs. The claim must be filed within one year from the date of injury, for the worker's claim; or it must be filed within one year from the date of the worker's death, for the beneficiary's claim.

On the other hand, if the claim--whether by worker or beneficiary--is based on alleged occupational disease (as here), RCW 51.28.055 solely governs. The claim must be filed within two years from the date of the requisite written notice to the worker, for the worker's claim; or it must be filed within two years from the date of death of the worker, for the beneficiary's claim.

1 This beneficiary's claim, based on the worker's alleged occupational disease, was not filed
2 within two years from the date of the worker's death. Indeed, it was not filed until a few days short of
3 three years from the worker's death. Therefore, pursuant to what I view as the plain meaning of RCW
4 51.28.055 as amended in 1984 -- particularly the new language added as the last sentence of that
5 statute -- the beneficiary's claim was not timely filed. From the legislative history of the 1984
6 amendments, this view clearly accords with legislative intent. Mrs. Aalmo's claim is not valid, and her
7 right to claim benefits is extinguished.
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11 I would affirm the Department's order of October 22, 1987, rejecting the claim.

12 Dated this 10th day of March, 1989.
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17 /s/
18 PHILLIP T. BORK Member
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