

## **Corkum, Richard**

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### **COVERAGE AND EXCLUSIONS**

#### **Effect of allowed Federal Employees Compensation Act claim**

Where a claimant developed asbestos-related disease due to exposure at a variety of employers due to exposure at different employers between 1952 and the mid-1980s, the Department's rejection of a claim due to the allowance of a Federal Employees Compensation Act [FECA] claim was in error since the Department was responsible for interim treatment benefits under the asbestos fund while it identified the liable insurer. Noting the result may be different under the provisions of RCW 51.12.102(1) if coverage is provided under the Longshore and Harbor Workers' Compensation Act, the Department should pursue the federal program on the claimant's behalf, if appropriate. *...In re Richard Corkum, BIIA Dec., 90 0280 (1991)*

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**DECISION**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to the Proposed Decision and Order issued on September 25, 1990 in which the order of the Department dated January 9, 1990 was reversed and the matter remanded to the Department with direction to further investigate the claim and issue a further determinative order.

This case was presented for decision based on stipulated facts and legal memoranda. The parties stipulated:

1. Richard C. Corkum has objective findings of asbestos-related disease as a result of asbestos exposure occurring at various times between 1952 and the mid-1980s, and with various employers subject to a variety of workers' compensation laws, both state and federal.
2. Richard C. Corkum has filed a claim for benefits under the Federal Employees Compensation Act of the United States for conditions resulting from asbestos exposure occurring in employment subject to the jurisdiction of this law. His claim was allowed for annual surveillance examinations on September 11, 1987. He has also filed a claim under the Federal Longshore and Harborworkers' Compensation Act, which has not been allowed as of May 9, 1990.
3. Richard C. Corkum has worked for the following employers as a pipefitter, plumber, or sprinkler fitter, in situations where asbestos fiber was present:
  - 1952: Puget Sound Naval Shipyard, Bremerton, WA
  - 1952: Grinnell Co. of the Pacific, Tacoma, WA
  - 1952-1953,  
1955 and  
1959-1962: Todd Shipyard, Tacoma, WA
  - 1952-1971: Lockheed Shipbuilding, Tacoma, WA
  - 1965 (part-time): Duwamish Shipyards, Tacoma, WA
  - 1971-1974: Tacoma Boatbuilding, Tacoma, WA
  - 1979-1986: Todd Shipyard, Tacoma, WA
4. Richard C. Corkum's injurious exposure to asbestos began in 1952 when he was subject to the jurisdiction of the Federal Employees Compensation Act, while working for Puget Sound Naval Shipyard, and continued from 1952 to the mid-1980s, when he was subject to the jurisdiction of the Federal Longshore and Harborworkers' Compensation Act. From 1959 to 1963 he was exposed to asbestos while covered under the State Department of Labor and Industries jurisdiction. The last job site on which

1 he was exposed was at Todd Shipyard, Tacoma, Washington from  
2 1979-1986.

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4 5. On June 16, 1987, Richard C. Corkum filed a claim for benefits under Title  
5 51 RCW.

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7 6. On January 9, 1990, Richard C. Corkum's claim for benefits was rejected  
8 by the Department of Labor and Industries on the ground that he was not  
9 subject to coverage under the Industrial Insurance Laws of the State of  
10 Washington at the time of his last injurious exposure to asbestos, thereby  
11 excluding Mr. Corkum from coverage under the Department of Labor and  
12 Industries Asbestos Fund. Grounds set forth by the Department for the  
13 rejection were that he was last employed by Todd Shipyards and subject  
14 to the Longshore and Harborworkers' Compensation Act and that his claim  
15 had been allowed for annual surveillance examinations under the Federal  
16 Employees Compensation Act.

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18 7. Department records indicated Richard C. Corkum was exposed to  
19 asbestos in employment covered by Title 51 RCW in 1952 and from 1959  
20 to 1963 while working for various employers.

21 Stipulation of Facts.

22 Although we agree with our industrial appeals judge that the Department order rejecting this  
23 claim should be reversed, we have granted review to clarify the legal basis for our decision, to direct  
24 the Department to pay interim benefits under the asbestos fund, to direct the Department to determine  
25 the liable insurer, and to direct the Department to pursue the federal program on behalf of the worker,  
26 if appropriate.  
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29 Mr. Corkum has made a prima facie showing of entitlement to interim benefits under the  
30 provisions of RCW 51.12.102(1). He has established:

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32 (a) there are objective clinical findings to substantiate that the worker has an  
33 asbestos-related occupational disease and  
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35 (b) the worker's employment history has a prima facie indicia of injurious  
36 exposure to asbestos fibers while employed in the state of Washington in  
37 employment covered under this title. . . .  
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39 RCW 51.12.102(1). The Department argues, however, that it can reject Mr. Corkum's claim on the  
40 basis that his Federal Employees Compensation Act (FECA) claim has been allowed for annual  
41 surveillance examinations. According to the Department, the provisions of RCW 51.12.102(1) direct it  
42 to pay benefits only until the liable insurer initiates payments. Since the liable insurer, FECA, has  
43 initiated benefits, the Department argues it properly rejected the claim. With this we disagree.  
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1 The basis of Mr. Corkum's FECA claim is his exposure to asbestos fiber while employed at  
2 Puget Sound Naval Shipyard in 1952. RCW 51.12.060 specifically states that employees of the  
3 United States are not covered by Title 51 RCW. However, the mere fact that Mr. Corkum's FECA  
4 claim has been allowed is not sufficient basis for the Department to reject his claim. For he suffered  
5 subsequent injurious exposure while covered both by our state law and the Longshore and Harbor  
6 Workers' Compensation Act (LHWCA). If Mr. Corkum had only suffered exposure to injurious  
7 asbestos fiber during his employment covered by FECA, the Department's rejection of his claim would  
8 have been appropriate under the provisions of RCW 51.12.060. But since Mr. Corkum's maritime  
9 claim and state claim are based on exposure subsequent to his federal employment claim, he is  
10 entitled to at least interim state benefits under RCW 51.12.102.

11 RCW 51.12.102(1) specifically refers to any worker "who may have a right or claim for benefits  
12 under the maritime laws of the United States resulting from an asbestos-related disease. . . ."  
13 (Emphasis added) Mr. Corkum's maritime claim (LHWCA) had not been allowed as of the date of the  
14 Department order under appeal. Only his federal employment claim (FECA) had been allowed. The  
15 provisions of RCW 51.12.102(1) do not apply to federal employment claims. See, In re Edward H.  
16 Reichelt, Dckt. No. 87 4384 (January 20, 1989).

17 The Department also argues that the last injurious exposure rule permits the rejection of Mr.  
18 Corkum's claim. This is based on the fact that during the last years of employment in which he was  
19 injuriously exposed to asbestos fibers, Mr. Corkum was engaged in employment subject to LHWCA  
20 (Todd Shipyards from 1979 to 1986). Stipulation of Facts, Items 1., 3. and 4. See also, Department  
21 Order dated January 9, 1990. The Department cites RCW 51.32.180 (as amended 1988) and WAC  
22 296-14-350 (1988). RCW 51.32.180 mandates the same benefits for workers and beneficiaries,  
23 regardless of whether the worker has sustained an industrial injury or an occupational disease. The  
24 1988 amendments to RCW 51.32.180 and WAC 296-14-350(2) and (3) also establish the applicable  
25 schedule of benefits in occupational disease claims filed on or after July 1, 1988. In addition, WAC  
26 296-14-350(1) provides: "The liable insurer in occupational disease cases is the insurer on risk at the  
27 time of the last injurious exposure to the injurious substance or hazard of disease which gave rise to  
28 the claim for compensation."

29 It appears that Mr. Corkum's last injurious exposure to asbestos fiber may well have occurred  
30 during employment covered by the LHWCA. Resolution of this appeal does not, however, turn on the  
31 likelihood of eventual LHWCA coverage for subsequent exposure. In order for Mr. Corkum to receive  
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1 interim benefits from the Department he need only show that he may have a maritime claim, that he  
2 has objective clinical findings to support an occupational disease claim for asbestos exposure, and  
3 that he has an employment history of injurious exposure while in employment covered under Title 51  
4 RCW. RCW 51.12.102(1). This he has done. The Department then has the responsibility by statute  
5 to determine the liable insurer and "continue to pay benefits until the liable insurer initiates payments  
6 or benefits. . . ." Ibid. The last injurious exposure rule cannot be construed to deny interim benefits to  
7 workers based on employment not covered by this state's workers' compensation law.

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11 A review of the legislative history of RCW 51.12.102 (Laws of 1988, ch. 271, ] 1 p. 1226,  
12 Substitute House Bill 1592) reveals that the driving force behind the legislation was a concern that  
13 workers who contracted asbestos-related occupational diseases frequently have work histories which  
14 include exposure to asbestos in several different employments which may be covered by more than  
15 one workers' compensation program. While jurisdictional battles were waged among the various  
16 compensation programs, workers were often totally disabled and without sources of income or medical  
17 coverage. The goal of the legislation was to provide state industrial insurance benefits to workers  
18 whose employment history established exposure to asbestos fibers while employed in covered  
19 employment in this state. Benefits would be paid even if the Department determined that benefits  
20 were owed by an insurer under the maritime laws. The Department would then pursue the federal  
21 program on behalf of the worker or be entitled to a lien against any third party recovery. See, Senate  
22 Bill Report, Committee on Economic Development and Labor (February 26, 1988); Floor synopsis,  
23 Substitute House Bill 1592; and, K. Haynes, Office of Program Research, House of Representatives,  
24 memorandum to House Commerce and Labor Committee (September 2, 1987).

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28 Application of the last injurious exposure rule as argued by the Department would not only deny  
29 benefits to Mr. Corkum but also to significant numbers of workers the statute was clearly intended to  
30 cover. Further, as pointed out in the extensive discussion in the Proposed Decision and Order from  
31 Professor Larson's treatise on Workmen's Compensation, the last injurious exposure rule has  
32 generally been interpreted to apply to the last employer over which the particular compensation  
33 program has jurisdiction. 4 A. Larson, The Law of Workmen's Compensation, ] 95.25(d), at 17-187  
34 (1990).

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38 In Todd Shipyard Corp. v. Black, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 104 S.Ct. 1910  
39 (1984), the court discussed the last covered employer rule as it applies to LHWCA. Mr. Black had  
40 injurious exposure to asbestos fiber while employed in Washington state at Todd Shipyard,  
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1 employment covered by LHWCA. Subsequently, he worked in Washington for Boeing for 26 years  
2 where he again had injurious exposure to asbestos fiber. This employment was not covered by  
3 LHWCA. Todd Shipyard attempted to absolve its liability to Mr. Black using the last covered employer  
4 rule on the theory that Mr. Black was last exposed to asbestos at Boeing. The court held:  
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8 The last covered employer rule means, plainly and simply, that the last  
9 employer covered by the LHWCA who causes or contributes to an  
10 occupational injury is completely liable for that injury. This is true even if  
11 the employee incurred the injury, in part, while subsequently working for  
12 an employer not covered by the Act.

13 717 F.2d at 1287.

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15 In support of its decision, the court discussed the intent of Congress with regard to the last  
16 covered employer rule.<sup>1</sup> Black, at 1284- 1286. This purpose is very similar to the intent behind our  
17 own RCW51.12.102, i.e., to avoid delay in benefits caused by disputes among insurers. See also  
18 RCW 51.04.010. The court in Black also pointed out that their interpretation of the rule had been  
19 endorsed in state cases where the last employer was located in a state different from that in which the  
20 claim had been brought. Black, at 1285. See generally, 4 A. Larson, The Law of Workmen's  
21 Compensation. § 95 (1990). The Washington statute is designed to deal with Washington problems.  
22 The last injurious exposure rule only applies within a given jurisdiction. The Department has no  
23 jurisdiction over employers covered by FECA or LHWCA. Therefore the Department cannot  
24 determine the liability of such an employer over whom the Department has no jurisdiction. Until the  
25 claim under LHWCA is competently adjudicated, RCW 51.12.102 applies.  
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29 Mr. Corkum has made a prima facie showing under the provisions of RCW 51.12.102(1). After  
30 review of the record, the Proposed Decision and Order, and the Department's Petition for Review, this  
31 Board is persuaded that the Department order of January 9, 1990 is incorrect and should be reversed  
32 and the claim remanded to the Department with directions to issue an order providing Mr. Corkum with  
33 benefits pursuant to RCW 51.12.102 and taking such further action as is required by law.  
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### 39 **FINDINGS OF FACT**

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41 1. On June 16, 1987 the Department of Labor and Industries received an  
42 application for benefits on behalf of Richard Corkum, alleging asbestos  
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44 <sup>1</sup>E.g.: "Congress intended the last employer be completely liable because of "the difficulties  
45 and delays which would inhere in the administration of the Act" if attempts were made to  
46 apportion liability among several responsible employers [citation omitted]." 717 F.2d at 1285.  
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1 exposure during the course of his employment with various employers.  
2 On April 1, 1988 the Department issued an order rejecting the claim for the  
3 reason that the injury occurred while Mr. Corkum was in the course of his  
4 employment subject to federal jurisdiction. Longshore and Harbor  
5 Workers' Compensation Act.  
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7 On January 9, 1990, within sixty days of the communication of the  
8 Department's order of April 1, 1988 to Mr. Corkum, the Department issued  
9 an order rejecting his claim for the reason that the last injurious exposure  
10 which gave rise to the occupational disease for which the claim was filed  
11 did not occur during employment subject to coverage under the industrial  
12 insurance laws of the State of Washington, and the claim was not  
13 considered allowable under the asbestos fund as the federal claim had  
14 been allowed.

15 On January 16, 1990 a notice of appeal was filed with the Board of  
16 Industrial Insurance Appeals from the Department order of January 9,  
17 1990. On February 1, 1990, the Board issued an order granting the  
18 appeal, assigning it Docket No. 90 0280, and directing that proceedings be  
19 held on the issues raised.

- 20 2. From 1952 until 1986 Richard Corkum was exposed to asbestos fiber  
21 during the course of his employment with various employers as a  
22 pipefitter, plumber, and sprinkler fitter.
- 23 3. Mr. Corkum's injurious exposure to asbestos fibers during the course of  
24 his employment began in 1952 while he was subject to the jurisdiction of  
25 the Federal Employees Compensation Act. At various times between  
26 1952 and 1963 Mr. Corkum was injuriously exposed to asbestos fibers  
27 while in the course of his employment with employers subject to the  
28 provisions of the Washington State Industrial Insurance Act. From 1963  
29 through 1985 and part of 1986 Richard Corkum was subject to injurious  
30 exposure to asbestos fibers during the course of his employment with  
31 employers subject to the jurisdiction of the Federal Longshore and Harbor  
32 Workers' Compensation Act.
- 33 4. Richard Corkum has objective clinical findings of asbestos-related disease  
34 as a result of injurious exposure to asbestos fibers while in the course of  
35 his employment with various employers, including employment subject to  
36 the provisions of the Washington Industrial Insurance Act.
- 37 5. Richard Corkum filed a claim for Federal Employees Compensation Act  
38 benefits, for occupational exposure in 1952, which was allowed for annual  
39 surveillance exams. He also filed a claim for Federal Longshore and  
40 Harbor Workers' Compensation Act benefits. As of May 9, 1990, that  
41 claim was still pending.  
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#### 44 **CONCLUSIONS OF LAW**

- 45 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
46 and subject matter of this appeal.  
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2. Claimant Richard Corkum has objective clinical findings within the meaning of RCW 51.12.102(1)(a) to substantiate that he has an asbestos-related claim for occupational disease, and his employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the State of Washington in employment covered under Title 51 RCW, within the meaning of RCW 51.12.102(1)(b).
  3. Within the meaning of RCW 51.12.102, claimant Richard Corkum may have a right or claim for benefits under the maritime laws of the United States resulting from an asbestos-related disease.
  4. Claimant Richard Corkum's prior allowed claim under the Federal Employees Compensation Act does not preclude interim coverage, for subsequent occupational exposure, under RCW 51.12.102.
  5. The last injurious exposure rule applies only within a given jurisdiction.
  6. The order of the Department of Labor and Industries dated January 9, 1990 which rejected the claim for the reason that the last injurious exposure which gave rise to the disease for which the claim was filed did not occur during employment subject to coverage under the industrial insurance laws of the State of Washington, and that the claim was not considered allowable under the asbestos fund as the federal claim had been allowed, is incorrect and is reversed. This matter is remanded to the Department with directions to issue an order determining that Mr. Corkum is entitled to interim benefits pending the Department's determination as to the liable insurer, and that the Department will pursue the federal program insurer to extent required by RCW 51.12.102(4) and WAC 296-14-600(4).

It is so ORDERED.

Dated this twenty-eighth day of March, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/  
SARA T. HARMON Chairperson

/s/  
FRANK E. FENNERTY, JR. Member

/s/  
PHILLIP T. BORK Member