

Gula, Dorothy, Dec'd

COVERAGE AND EXCLUSIONS

Longshore and Harbor Workers' Compensation Act

Widow who makes a prima facie showing, however slight, that her husband suffered injurious exposure to asbestos in employment covered by Title 51 RCW, is entitled to benefits pursuant to RCW 51.12.102(1), even though the evidence indicates the federal Longshore and Harbor Workers' Compensation Act insurer will ultimately be responsible for the claim.*In re Dorothy Gula, Dec'd, BIA Dec., 88 2196 (1990)*

Scroll down for order.

1 Although we are basically in agreement with the analysis contained in our Industrial Appeals
2 Judge's Proposed Decision and Order, we have granted review in order to more accurately delineate
3 the Department's responsibility regarding these claims. While we are convinced that the Department
4 must pay interim pension benefits on these claims pursuant to RCW 51.12.102(1), the Proposed
5 Decision and Order goes too far and directs the Department to allow the worker's and widower's
6 claims. That is, the Proposed Decision and Order would let the federal insurer off the hook
7 completely. It is that aspect of the Proposed Decision and Order with which we disagree.
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9 Mr. Gula, the widower, has made a bare prima facie showing of entitlement to interim benefits.
10 That is, he has shown that:

- 11 (a) there are objective clinical findings to substantiate that the worker has
12 an asbestos-related claim for occupational disease and (b) the worker's
13 employment history has a prima facie indicia of injurious exposure to
14 asbestos fibers while employed in the state of Washington in employment
15 covered under this title.
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17 RCW 51.12.102(1). At the same time, however, under RCW 51.12.100 as well as 51.12.102, the
18 great preponderance of the evidence indicates that it is the federal program insurer, not the
19 Washington State Fund, which is ultimately responsible for this claim. That is, a right or obligation
20 exists under the maritime laws of the United States for Mrs. Gula's total permanent disability and
21 subsequent death.
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23 The Department therefore correctly followed the mandate of RCW 51.12.102(1) and rendered
24 "a decision as to the liable insurer", i.e., the federal program insurer under the Longshore and Harbor
25 Workers' Compensation Act. The error in the Department order lies not in that determination, but in
26 the Department's failure to "continue to pay benefits until the liable insurer initiates payments"
27 RCW 51.12.102(1). The whole point of RCW 51.12.102 is to avoid delays in the payment of benefits
28 resulting from a state/federal jurisdictional dispute. From the evidence presented to the Department
29 and to us, Mrs. Gula's and her surviving widower's claims should ultimately be accepted under the
30 Longshore and Harbor Workers' Compensation Act. At the same time, however, Mr. Gula is entitled to
31 payment of pension benefits now because there is a prima facie showing, however slight, of injurious
32 exposure to asbestos in employment covered by Title 51 RCW.
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34 The Department's own regulation, WAC 296-14-600(4), requires this result. It provides:

- 35 (2) Whenever the department has determined to pay benefits pursuant to
36 chapter 271, Laws of 1988, the department shall render a decision as to
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1 the liable insurer and shall continue to pay benefits until the liable insurer
2 initiates payments or benefits are otherwise properly terminated.

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4 The department shall render its decision in a final order as provided in
5 RCW 51.52.050.

6 Initiation of payments by a liable insurer shall be deemed to occur on the
7 date such insurer issues a check or warrant or otherwise remits to the
8 worker, beneficiary, or any provider any payment of any benefits owed by
9 such insurer on the claim for asbestos.

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12 (4) If benefits are paid by the department from the medical aid fund on an
13 asbestos-related claim, and it is determined by the department that such
14 benefits are owed to the worker or beneficiary by an insurer under the
15 maritime laws of the United States or by another federal program other
16 than the Federal Social Security, Old Age Survivors and Disability
17 Insurance Act, 42 U.S.C., the department shall pursue such insurer or
18 program to recover such benefits as may have been paid by the
19 department.

20 The determination by the department shall be expressed in final order as
21 provided by RCW 51.52.050.

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23 The Department correctly followed the statute as interpreted by the WAC by issuing "a final order as
24 provided by RCW 51.52.050" determining that the federal program insurer was liable. Where the
25 Department erred was in failing to pay interim pension benefits as also required by the statute and
26 WAC.
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29 The Department has admitted, in the stipulated facts, Exhibit 2, that Dorothy L. Gula was
30 exposed to airborne asbestos fibers while on land on the employer's job-site. While this exposure was
31 much less than the exposure she suffered aboard ships, it is sufficient to establish a "prima facie
32 indicia of injurious exposure to asbestos fibers while employed in the state of Washington in
33 employment covered under this title." RCW 51.12.102(1)(b). As the parties had previously stipulated
34 that there were objective clinical findings to substantiate that the worker has an asbestos-related claim
35 for occupational disease, all the criteria contained in RCW 51.12.102(1) have been met and benefits
36 should be paid under the provisions of this statute. While ultimate responsibility may lie with the
37 federal government under the provisions of the Longshore and Harbor Workers' Compensation Act,
38 the widower, George Gula, has established a right to payment of interim benefits pursuant to the
39 provisions of RCW 51.12.102.
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FINDINGS OF FACT

1. On October 12, 1987, the Department of Labor and Industries received an accident report from the claimant, Dorothy L. Gula, alleging that she had an occupational disease arising out of her employment at E.J. Bartells in 1944 and 1945. On January 14, 1988, the Department issued an order rejecting Mrs. Gula's claim for the reason that her injury (sic) occurred in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act).

On March 15, 1988, the Department received Mrs. Gula's protest and request that the Department reconsider its January 14, 1988 order. On March 25, 1988, the Department issued an order adhering to the provisions of its January 14, 1988 order. On March 28, 1988, the Department received a protest and request for reconsideration to the order dated March 25, 1988. On April 7, 1988, the Department issued an order affirming its January 14, 1988 order and as part of that order also denied George Gula's application for spousal benefits for the reason that Mrs. Gula's death resulted from a disease arising from exposure to substances in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act).

On June 6, 1988, a notice of appeal was filed with the Board of Industrial Insurance Appeals from the Department order dated April 7, 1988. On June 22, 1988, the Board issued an order granting the appeal, assigning Docket No. 88 2196 and ordering that proceedings be held on the issues raised.

2. Between February 1944 and March 1945 Dorothy L. Gula worked in the Kaiser Shipyards at Vancouver, Washington, for two employers, E.J. Bartells and Northwest Insulating.
3. Dorothy L. Gula was employed as a pipe insulator during the course of her employment at the Vancouver Shipyards, which entailed working in the hulls of ships where she would wrap pipes with asbestos insulation. During the course of her employment at the Vancouver Shipyards, Dorothy L. Gula was exposed to airborne asbestos fibers, both while she was engaged in insulating pipes on ships which were afloat on the Columbia River, a navigable waterway, and while she was at work in various parts of the shipyard on land.
4. Dorothy L. Gula died on February 13, 1988 from a condition diagnosed as malignant mesothelioma, and her death was a direct and proximate result of exposure to asbestos fibers during the course of her employment at the Vancouver Shipyards.
5. As the result of a biopsy performed on Dorothy L. Gula's lung tissue, asbestos fibers were detected significantly in excess of background levels, indicating occupational exposure to asbestos.

- 1 6. As a result of the occupational disease of malignant mesothelioma,
2 Dorothy L. Gula was totally disabled and unable to work from April 9, 1987
3 until her death on February 13, 1988.
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5 7. Dorothy L. Gula's occupational disease of malignant mesothelioma first
6 became manifest on March 26, 1987, when she sought medical attention
7 for her pulmonary problem.

8 **CONCLUSIONS OF LAW**

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10 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
11 and the subject matter to this appeal.
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13 2. There are objective clinical findings within the meaning of RCW
14 51.12.102(1)(a) to substantiate that Dorothy Gula has an asbestos-related
15 claim for an occupational disease.
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17 3. Dorothy L. Gula's employment history has a prima facie indicia of injurious
18 exposure to asbestos fibers while employed in the state of Washington in
19 employment covered under Title 51, within the meaning of RCW
20 51.12.102(1)(b).
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22 4. The order of the Department of Labor and Industries dated April 7, 1988
23 affirming the order dated January 14, 1988, rejecting Dorothy L. Gula's
24 claim for the reason that the injury occurred in the course of employment
25 subject to federal jurisdiction (Longshore and Harbor Workers'
26 Compensation Act), and denying George Gula's application for spousal
27 benefits for the reason that Dorothy L. Gula's death resulted from a
28 disease arising from exposure to substances in the course of employment
29 subject to federal jurisdiction (Longshore and Harbor Workers'
30 Compensation Act), is incorrect insofar as it fails to direct payment of
31 interim pension benefits, and is reversed. This matter is remanded to the
32 Department with directions to issue an order determining (1) that benefits
33 are owed to the worker and beneficiary by an insurer under the maritime
34 laws of the United States; (2) that the Department will pursue the federal
35 program insurer on the worker's and beneficiary's behalf, to the extent
36 required by RCW 51.12.102(4) and WAC 296-14-600(4); and directing (3)
37 that interim pension benefits be paid pursuant to RCW 51.12.102(1),
38 based on the schedule of benefits in effect on March 26, 1987.

39 It is so ORDERED.

40 Dated this 15th day of October, 1990.

41 BOARD OF INDUSTRIAL INSURANCE APPEALS

42 /s/

43 SARA T. HARMON

Chairperson

44 /s/

45 FRANK E. FENNERTY, JR.

Member

46 /s/

47 PHILLIP T. BORK

Member