

## **Survivor Benefits Under Industrial Insurance Act—Who Pays?**

Darren A. Feider

*Williams Kastner Labor & Employment Advisor, Summer 2011*

Employers are covered under the Washington Industrial Insurance Act, which provides benefits for on-the-job injury or disease and payments to spouses as survivor benefits. In certain situations, a worker who has worked for two separate employers may be eligible to recover multiple benefits, and the question of which entity is responsible for the survivor benefits is the issue – *i.e.*, who pays? This was recently addressed in *Olson v. Dept. of Labor & Industries*, 161 Wn. App. 443 (2011), in which a surviving spouse sought declaratory judgment that the Department of Labor and Industries (“L&I”) was responsible in conjunction with the federal government for death benefits payable upon her husband’s death (which was caused by prolonged exposure to asbestos).

In *Olson*, the worker was a pipefitter who had worked for the State of Washington from 1955 until 1990. Previously he had worked for the U.S. Navy and other maritime employers. He had lifelong exposure to asbestos in the marine industry, causing asbestos fibers in his lungs and his subsequent death. His wife received temporary reimbursable death benefits from L&I. The State challenged the benefits, claiming it was not the responsible employer. On appeal, the surviving spouse asserted that L&I was the liable insurer for the asbestos-related illness, not the federal government. She made this argument because State benefits were better than federal benefits. L&I argued that, because the worker’s injury had arisen in part when he worked for the Navy, and for other maritime employers, federal law was the exclusive remedy for the surviving spouse, to prevent double recovery, and the State would pay temporary benefits under the federal government initiated payment.

The *Olson* court found that, because the surviving spouse had a claim under federal maritime law, the federal remedy was exclusive and she was not entitled to permanent State benefits. The surviving spouse responded that the exclusivity argument was inapplicable because her husband's last employer was covered under State law pursuant to the last injurious exposure rule, which allocates liability between successive employers in occupational disease cases. The *Olson* court acknowledged that the last injurious exposure rule assigns responsibility to the last insurer of the risk, but that rule did not trump federal maritime law, which was the exclusive remedy for an injured employee. To prevent double recovery, the last injurious exposure rule is not applicable where the worker has a claim for benefits under maritime law.

The take-aways from the *Olson* case are that when a worker files a worker's compensation claim seeking benefits, or in the *Olson* case, death benefits, employers should analyze whether other sources could be applicable. For the *Olson* case, the deceased worker had worked for the Navy and with other maritime employers, which has its own exclusive remedy. The prior employment trumped the last employer, leaving federal law as the exclusive benefit for the surviving spouse. Thus, the employer was no longer responsible for the worker's compensation benefits because of the prior employment relationship.