Supreme Court No. 102017-1

No. 56774-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANE J. LEWIS, Individually and as Personal Representative of the Estate of RICHARD W. LEWIS,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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I. Introduction

The Washington Constitution. art. 1, § 21, expressly protects the right of trial by jury. Nevertheless, the Department of Labor and Industries ("Department") unconstitutionally applied the Washington Industrial Insurance Act ("IIA") to chill the jury trial rights of every union insulator suffering from asbestos disease.

Petitioner's decedent, Richard Lewis, was diagnosed with mesothelioma in May 2018 and elected to exercise his constitutional right to seek legal redress during his lifetime against the asbestos companies whose products caused his disease. Because of the Department's policy involving the interpretation of RCW 51.12.102 of the IIA and the Longshore and Harbor Workers Compensation Act ("Longshore Act"), 33 U.S.C. § 901 *et seq*., Mr. Lewis was forced to choose between his constitutionally protected right to a jury trial and the certain relief that workers compensation schemes are meant to guarantee. Thus, the Department's decision denying Mr.

Lewis's widow's benefits violates the Washington Constitution by chilling the exercise of Richard and Diane Lewises' constitutional right to trial by jury.

The Department's policy likewise violates equal protection. Our federal and state constitutions do not permit unequal treatment of similarly situated citizens. The Department's treatment of Washington shipyard workers' constitutionally protected right to a jury trial differs from its treatment of purely land-based workers. No compelling—or even rational—reason exists for this distinction.

Finally, the constitutionality of the IIA is premised on a "grand compromise" in which injured workers forgo their right to sue employers in exchange for "swift and certain" compensation for occupational injuries. Because the Department's interpretation of RCW 51.12.102 subordinated Mr. Lewis's right to eligibility for benefits under IIA to his qualification for benefits under a federal statute with different

standards, the "swift and certain" relief on which the grand compromise is premised is illusory and constitutionally infirm.

Because this case implicates both our federal and state constitutions, the Supreme Court should accept review and overturn the decision denying Mrs. Lewis widow's benefits.

II. Identity of Petitioner and Decision

Petitioner Diane Lewis seeks review of the unpublished decision in *Lewis v. Washington State Department of Labor and Industries*, No. 56774-1-II (attached as Appendix).

III. Issues Presented for Review

1. Should the Supreme Court accept review when the Department's interpretation of RCW 51.12.102 forcing terminally ill workers to elect between receiving benefits workers compensation benefits or prosecuting a third-party claim during their lifetime chills the exercise of their right to trial by jury enshrined in Article 1, Section 21 of the Washington Constitution?

2. Should the Supreme Court accept review when the Department's interpretation of RCW 51.12.102, which denies IIA benefits to qualifying asbestos victims with a single day of maritime employment who accept third party settlements but grants benefits to asbestos victims with no maritime exposure who also accept third-party settlements, violates the equal protection requirements of the Washington and United States Constitutions?

3. Should the Supreme Court accept review when the Department's interpretation that RCW 51.12.102 only provides temporary IIA benefits to qualified workers with maritime exposure while their Longshore Act claim is pending and terminate such benefits if their Longshore claim is denied undermines the "grand compromise" on which the constitutionality of the IIA is premised?

IV. Statement of the Case

A. Richard Lewis's Asbestos Exposure, Occupational Disease, and Civil Lawsuit

Richard Lewis was a career insulator and member of the International Association of Heat and Frost Insulators, Local 7.[1] For approximately one year as an apprentice insulator, Mr. Lewis performed work at Todd and Lockheed Shipyards that exposed him to asbestos.[2] For the next 30 years, Mr. Lewis performed insulation work solely at land-based industrial facilities throughout Western Washington and was exposed to asbestos throughout that period.[3]

In May 2018, as a result of his occupational asbestos exposures, Mr. Lewis developed mesothelioma.[4] It is undisputed that both Mr. Lewis's shipyard and land-based

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[1] CABR 387
[2] CABR 387
[3] CABR 387
[4] CABR 387

exposures were each independently sufficient to cause his mesothelioma.[5]

On July 12, 2018, Richard and Diane Lewis filed a lawsuit in Pierce County Superior Court for personal injuries and loss of consortium arising from Mr. Lewis's mesothelioma diagnosis.[6] Because of Mr. Lewis's terminal diagnosis, the trial court set an expedited trial date of April 8, 2019, pursuant to RCW 4.44.025.[7] In the following months, some defendants were dismissed voluntarily, some prevailed at summary judgment, and some resolved with the Lewises through negotiated monetary settlements. The Lewises settled with the final remaining defendant during the first week of trial.[8] Exactly four months later, Richard Lewis died at the age of 66.[9]

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[5] CABR 387
[6] CABR 388
[7] CABR 388
[8] CABR 331
[9] CABR 387

Following her husband's death, Diane Lewis filed an application for widow's benefits on April 1, 2020.[10] The Department denied benefits, ruling as follows:

> It is determined that the death of Richard Lewis was due to mesothelioma, an asbestos related disease, resulting from past exposures to asbestos fibers in the course of employment.
>
> It has been determined that Mr. Lewis was exposed to asbestos in the shipyards, and therefore is considered a maritime worker, under maritime coverage.
>
> As a claim has not been filed with the Longshore and Harbor Worker's Compensation Act, and you have already recovered a third-party settlement, you do not qualify for coverage under RCW 51.12.102 and are barred by RCW 51.12.100.
>
> The application for death benefits filed by Diane Lewis is denied.[11]

B. Statutory Framework

This appeal and petition concerns the interplay between the IIA and the Longshore Act. The IIA is meant to provide "sure and certain relief for workers, injured in their work, and

[10] CABR 387
[11] CABR 326

their families and dependents . . . regardless of questions of fault and to the exclusion of every other remedy . . .” against the employer. RCW 51.04.010. Disability resulting from occupational disease coverage is compensable pursuant to RCW 51.32.180, which provides that a worker suffering disability from an occupational disease “shall receive the same compensation benefits” as “provided for a worker injured or killed in employment.” RCW 51.32.180. RCW 51.08.140 defines occupational disease as “such disease or infection as arises naturally and proximately out of employment.” *See Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

The Longshore Act, meanwhile, is a federal workers’ compensation scheme that applies to maritime workers and covers workers who performed any work at a shipyard for any amount of time, no matter how brief. Under the Longshore Act, a worker exposed to asbestos at a shipyard is eligible to apply for benefits. *See Gorman v. Garlock, Inc.*, 155 Wn.2d

198, 118 P.3d 311 (2005) (citing *Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 652, 677 P.2d 1134 (1984)).

Longshore Act coverage and eligibility, however, by no means guarantee benefits. Although the IIA and the Longshore Act both provide coverage to asbestos-exposed workers, they impose diametrically opposed consequences on injured claimants who prosecute third-party actions for compensable occupational injuries. The IIA expressly permits and implicitly encourages injured workers to prosecute third-party actions for workplace injuries, subject only to the Department's right of subrogation. *See* RCW 51.24.030; RCW 51.24.060. Conversely, the Longshore Act imposes draconian restrictions on workers' tort recoveries. The Longshore Act's election of remedies provision requires that an injured worker obtain written approval from the responsible employer before settling with a third party. 33 U.S.C. § 933(g)(1). As explained *infra* IV.D, determining the responsible employer in a Longshore Act claim involving asbestos exposure is frequently contested and

takes many years to resolve. Nevertheless, if a worker accepts settlements without obtaining approval from the responsible employer "all rights to compensation and medical benefits under [the Longshore Act] shall be terminated" even if the responsible employer has not been determined at the time the settlement is reached. 33 U.S.C. § 933(g)(2).

C. All Insulators in Washington are Subject to the Longshore Act.

Virtually every union insulator in Western Washington has worked at a shipyard at some time in his/her career. Shipyard work currently represents about 20 percent of the insulation work in this territory but has historically been 50 percent or greater.[12] In fact, since the inception of the apprenticeship program in the 1960s, union insulators in Washington have been *required* by the terms of their apprenticeship to complete both shipyard and land-based work.

[12] CABR 191

Specifically, the program currently requires that 2240 of the 10,000 hours be spent in "Ship and Marine Work."[13]

During the hearing of this matter, the business manager for Local 7 of the insulators' union, Todd Mitchell, testified that the Union has always required that a portion of an apprentice's work be in maritime work.[14] Mr. Mitchell also explained that Washington's Department of Labor and Industries certified the standards of the apprenticeship program and the delivery of that program to apprentices in this State.[15] Mr. Lewis's coworker and fellow union member, Bill Duggins, agreed that it would be "pretty hard" for an insulator to go through their entire career without ever working in a shipyard.[16]

Mr. Duggins is a career member of Local 7 and testified that he has known "many" union insulators who have been diagnosed with asbestos disease, including asbestosis and

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[13] CABR 374
[14] CABR 188
[15] CABR 187
[16] CABR 178

mesothelioma.[17] And "many" of them have died from their asbestos disease.[18] Mr. Mitchell concurred, stating that his union has been "uniquely exposed to the dangers of asbestos."[19]

D. Mesothelioma Victims Face Insurmountable Barriers in Recovering Benefits under the Longshore Act.

Unlike IIA claims in which injured workers are given the benefit of the doubt, Longshore Act claims are heavily-litigated. Longshore Act claims are governed by the last responsible covered employer rule. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1983). "The last covered employer rule means, plainly and simply, that the last employer covered by the [Longshore Act] who causes or contributes to an occupational injury is completely liable for that injury." *Id*. at 1287. Claimants therefore have the burden of establishing where the last injurious shipyard exposure occurred. They must establish a prima facie case for each maritime employer in

[17] CABR 178
[18] CABR 178
[19] CABR 194

reverse chronological order. *Albina Engine & Machine v. Dir., OWCP.*, 627 F.3d 1293, 1301-02 (9th Cir. 2010).

During the administrative hearing, Ms. Lewis presented unrefuted expert testimony from Amie Peters, an attorney well-versed in Longshore litigation. Ms. Peters explained that in Longshore Act claims seeking compensation for asbestos disease, determining the responsible employer is an arduous, heavily-litigated, and often futile endeavor. She explained that for Washington union insulators, such as Richard Lewis—who worked for multiple employers and multiple job sites—there is no easy way to determine where the last maritime-related asbestos exposure occurred. The union, for instance, does not have records of Richard Lewis's (or any other insulators') jobsites, only records of his employers.[20] Nor does the union keep records of where Richard Lewis (or any other insulator) was exposed to asbestos.[21] Consequently, maritime employers

[20] CABR 192-93
[21] CABR 193

typically deny responsibility and point a finger at a previous or subsequent employer as the last responsible employer.[22]

In mesothelioma cases, the challenge of determining the responsible employers is particularly daunting. Given the 30- to 50-year latency period between asbestos exposure and mesothelioma diagnosis, the employment giving rise to a claimant's asbestos exposures occurs decades before symptoms manifest. Claimants often die within months of their mesothelioma diagnoses or are unable to accurately recall the asbestos exposures they sustained decades earlier. Importantly, it is not enough to simply know *where* an insulator worked; there must be evidence about *who* the insulator worked for, and *what* he was doing. As a result, it could take years before the responsible employer is even identified.[23]

After reviewing Mr. Lewis's file, Ms. Peters opined that any Longshore Act claim filed on his behalf would have faced

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[22] CABR 211-12
[23] CABR 211

numerous challenges, including difficulty identifying the last responsible employer.[24] Ms. Peters testified that in her opinion it would likely not have been possible to identify the responsible employer and even if the employer was determined it would have taken years for Mr. Lewis's Longshore Act claim to resolve, and it would certainly not have concluded within his lifetime.[25]

E. Washington Insulators Who File Lawsuits for Asbestos Disease are Denied Both IIA and Longshore Act Benefits.

Under the Department policy, widows' claims involving workers who performed *any* maritime work during their careers are *never* eligible to receive permanent benefits under the IIA. Under certain circumstances, the Department may award temporary IIA benefits pursuant RCW 51.12.102 while the widow's Longshore claim is pending. However, under Department policy, once the Longshore Act claim is resolved,

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[24] CABR 218-19
[25] CABR 218-20

IIA benefits cease regardless of whether the claim was accepted or denied.[26] Thus, asbestos victims whose Longshore Act claims are unsuccessful lose their right to benefits under the IIA even if they sustained decades of asbestos exposure through shoreside employment.

Moreover, under Department policy if an asbestos disease victim who sustained even *one day* of exposure in maritime employment accepts *any* litigation settlements before his/her Longshore Act claims is resolved, the worker becomes immediately ineligible for any workers compensation benefits under RCW 51.12.102. On the other hand, Washington asbestos victims who performed no maritime work are eligible for long-term IIA benefits regardless of whether they have accepted any third-party recoveries.[27]

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[26] *See* CABR 335, 341

[27] The Department's witness agreed that this is the practical effect of the Department's application of RCW 51.12.102. CABR 254-55.

Critically, in determining whether to award benefits pursuant to RCW 51.12.102(1), the Department does not consider whether the claimant will *actually* be able to overcome the many obstacles to recovering Longshore Act benefits.[28] Rather, the Department simply determines whether workers are "eligible" to seek Longshore Act benefits based on the fact of their shipyard work.[29] Indeed, the Department acknowledged that it made no effort to determine whether Mr. Lewis would actually have been able to recover benefits under the Longshore Act in the absence of any third-party settlements.[30] The Department also conceded that it would have been impossible for Mr. Lewis's Longshore claim to be adjudicated to resolution in the 15 months between his diagnosis and death.[31] Finally,

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[28] CABR 258
[29] CABR 258
[30] CABR 259-60
[31] CABR 268-69

the Department acknowledged that if he had not performed any maritime work, the claim would have been approved.[32]

V. This Matter Involves a Significant Question of Law Under Our State and Federal Constitutions (RAP 13(b)(3)).

A. *The Department's Application of RCW 51.12.102 Chills the Constitutional Right to Trial by Jury.*

The Supreme Court should accept review of this issue because the Court of Appeals' opinion fails to appreciate the Constitutionally suspect Hobson's Choice injured asbestos workers and their widows face when deciding whether to pursue uncertain tort remedies or uncertain workers compensation remedies following a workplace injury. The Washington Supreme Court has made clear that the State "can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). Statutes that have a chilling effect on constitutional rights are therefore unconstitutional.

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[32] CABR 266

See United States v. Jackson, 390 U.S. 570, 581-82, 88 S. Ct. 1209 (1968); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). Regulations, too, are unconstitutional when they have the effect of chilling the exercise of constitutional rights. *See Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318 (1972) (noting that numerous decisions of the United States Supreme Court have decided that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of [constitutional] rights").

The Washington Constitution protects a right to trial by jury in civil disputes. Const. art. 1, § 21. Specifically, article 1, section 21 states that "[t]he right of trial by jury shall remain inviolate." "For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989) (striking down a statutory cap on economic damages because the constitution protects the jury's

role to determine damages). This right unquestionably attaches in personal injury actions, including products liability actions. *Id.* at 650-51. "Because of the constitutional nature of the right to jury trial, litigants have a continued interest in it—it simply cannot be removed by legislative action." *Id*. at 652.

Here, Richard and Diane Lewis indisputably had a constitutional right to prosecute a civil lawsuit based on Richard Lewis's terminal diagnosis of mesothelioma caused by his workplace asbestos exposure. Indeed, the Washington Legislature expressly recognized the importance of allowing terminally ill litigants such as Mr. Lewis to participate in trial:

> When setting civil cases for trial, unless otherwise provided by statute, upon motion of a party, the court may give priority to cases in which a party is frail and over seventy years of age, a party is afflicted with a terminal illness, or other good cause is shown for an expedited trial date.

RCW 4.44.025.

Here, the Department's interpretation of RCW 51.12.102 had a chilling effect on the Lewises' rights under article 1,

section 21 of the Washington Constitution. Based on the Department's application of RCW 51.12.102, insulators such as Mr. Lewis must file a Longshore Act claim to receive benefits under the IIA but may not enter into any third-party settlements while their Longshore claim is pending. However, it is undisputed that it would have been impossible to identify the responsible employer during Mr. Lewis's lifetime and highly unlikely that his Longshore Act claim would have been resolved within three-years of his mesothelioma diagnosis. Accordingly, Mr. Lewis was forced to elect between exercising his constitutional right to trial by jury during his lifetime or prosecuting a Longshore claim to an uncertain conclusion that would not be resolved until long after his death.

Not only did the Department's interpretation of RCW 51.12.102 chill Mr. Lewis's freedom to exercise his constitutional right to trial by jury during his lifetime; it chills his widow's ability to pursue civil justice remedies within the three-year statute of limitations for third-party actions. *See*

Deggs v. Asbestos Corp. Ltd., 186 Wn.2d 716, 732, 381 P.3d 32, 40 (2016) (three-year statute of limitations for wrongful death claim begins to run when decedent is diagnosed with asbestos disease). In the event the Longshore claim was denied after the statute of limitations had elapsed, Ms. Lewis would receive no compensation whatsoever. Nevertheless, the Department's interpretation of RCW 51.12.102(1) required the Lewises to either forgo their statutory right to receive workers compensation benefits for Mr. Lewis's workplace injury or surrender their constitutional right to pursue a civil lawsuit against the non-employer entities whose negligence caused Mr. Lewis's terminal disease.

The Department's interpretation is even more detrimental to constitutional principles because there was no guarantee the Lewises would receive *any* permanent benefits by forgoing their right to trial by jury. The Department's representative admitted that if a claimant's Longshore claim is ultimately rejected, payment of ancillary benefits under RCW 51.12.102 is

terminated.[33] As a result, workers entitled to benefits under RCW 51.12.102 must either relinquish their constitutional right to pursue third-party remedies and litigate their Longshore claim to an uncertain conclusion or lose their statutory right to IIA benefits by prosecuting a tort claim. If Ms. Lewis had abstained from pursuing tort remedies during the three or more years that her widow's claim was pending and the Longshore claim was ultimately rejected, the Department would have terminated her IIA benefits, and the statute of limitations would have lapsed on her third-party remedies. In other words, the Department's policy not only chills constitutional rights by penalizing mesothelioma victims for pursuing civil justice remedies; it creates the palpable risk that victims will be deprived of just compensation for their terminal affliction.

The Court of Appeals' minimizes the burden placed on Petitioner and those in her position and shifts responsibility to

[33] CABR 249

the legislature and the federal agency to address this constitutional issue. Yet, the fact remains that the Washington Constitution does not countenance imposing such Hobson's Choices on injured workers.

B. *The Department's Application of RCW 51.12.102 Violates Equal Protection.*

The Supreme Court should also accept review because the Court of Appeals incorrectly concluded that Mr. Lewis is not similarly situated to land-based workers injured by asbestos in Washington. Both the federal Constitution and Washington's own constitution guarantee equal protection to Washington citizens under the law. The United States Constitution Amendment XIV provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Washington's constitution corresponds, stating: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. 1,

§ 12. In other words, "both our state and federal constitutions require[] that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 760, 6 P.3d 142 (2002).

When evaluating an equal protection claim, the Court must first determine whether the individual claiming the violation is similarly situated with other persons. *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). A plaintiff must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Here, the Department's application of RCW 51.12.102 denies an entire class of workers guaranteed state benefits. No worker who has spent time in maritime employment—which is every union insulator—may recover benefits if he/she also accepts litigation settlements. By

contrast, any worker who performs work exclusively at land-based facilities can be eligible for workers compensation benefits even if he/she accepts settlements. The Court of Appeal's mistakenly determined that shipyard workers and land-based workers are not similarly situated because the former are covered by the Longshore Act. (Slip Op. at 19) However, these workers are the same in every way that matters. They are Washington workers who are routinely exposed to asbestos and consequently suffer workplace injury. Nevertheless, only some of these workers may receive state workers compensation benefits. It is this unequal treatment that is the basis of Petitioner's complaint and the reason the Supreme Court should accept review.

C. *Denying Benefits to Asbestos Victims Exposed in Both Maritime and Land-Based Employment Contravenes the Constitutional Justification on Which the IIA is Premised.*

Finally, the Court should accept review because the Court of Appeal's opinion undermines the historical rationale for finding the IIA is constitutional. "Washington's IIA was the

product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). The IIA is meant to provide "sure and certain relief for workers, injured in their work, and their families and dependents . . . regardless of questions of fault and to the exclusion of every other remedy . . ." against the employer. RCW 51.04.010. In exchange for forgoing their right to sue the employer, injured workers were guaranteed "safe" and "sure" compensation. *Id*. at 591. Washington courts have determined that the IIA's limitation of an injured worker's civil trial rights is constitutional. *See State v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645 (1913) (noting that the Industrial Insurance Act "has abolished rights of actions and defenses, and in certain cases denied the right of trial by jury"), *aff'd*, 243 U.S. 219, 37 S. Ct. 260 (1917). However, the IIA was not meant to eliminate the trial rights of injured workers entirely. Instead, it

replaced them with a mandatory industrial insurance scheme. It even established a cause of action for employers who intentionally injure employees. *Birklid*, 127 Wn.2d at 859.

The Department's interpretation of RCW 51.12.102 in this case contravenes IIA's beneficial purpose by eliminating asbestos victims' "sure and certain" recovery of benefits whenever they obtain recoveries from non-employer defendant in civil litigation. When asbestos victims are denied benefits based solely on a short period of maritime employment and are still precluded from suing their employers, the "grand compromise" behind the IIA is illusory.

The Department's policy does not serve the Legislature's objectives. In limiting recovery under the IIA, the Legislature intended to prevent double recovery by workers covered under the Longshore Act. *Gorman*, 155 Wn.2d at 208; *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 938, 15 P.3d 188 (2000). The policy objective is to "protect the state's industrial insurance fund when a worker is adequately covered under the

[Longshore Act]." *Gorman*, 55 Wn.2d at 209-08 (quoting *E.P. Paup Co. v. Director; Office of Workers Comp. Programs*, 999 F.2d 1341, 1348 n.8 (9th Cir. 1993)). However, as explained *supra* V.B, providing widows benefits to Ms. Lewis creates no risk of double recovery because the IIA grants a right to subrogation. Moreover, the Department acknowledged that it does not consider whether a claimant will *actually* receive compensation under the Longshore Act when deciding whether to award benefits under the IIA.[34] Indeed, the Department denied the claim *because* it determined that recovery under the Longshore Act was impossible.

The Court of Appeals erred in shifting responsibility for overseeing this issue to the Legislature. The Department's application of RCW 51.12.100 and RCW 51.12.102 depriving workers of compensation from either responsible employers or other responsible parties already contravenes the intention of

[34] CABR 258

the IIA. To honor the compromise between workers and Washington industry, Ms. Lewis's claim must be allowed, and the Supreme Court should accept review of this issue.

VI. Conclusion

Because this case concerns the constitutional shortcomings of the Department's policy, the Supreme Court should accept review and overturn the decision denying widow's benefits to Mrs. Lewis.

I certify that this brief contains 4,330 words in compliance with RAP 18.17(c).

Signed in Seattle, Washington on the 23rd day of May 2023.

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Appendix A

Filed
Washington State
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Division Two

April 25, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DIANE J. LEWIS, individually and as Personal Representative of the Estate of RICHARD W. LEWIS JR., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	No. 56774-1-II UNPUBLISHED OPINION

VELJACIC, J. — Diane J. Lewis's husband, Richard W. Lewis, Jr. died from malignant mesothelioma caused by asbestos exposure while working for maritime and nonmaritime employers. Lewis appeals the superior court's order affirming the Board of Industrial Insurance Appeals's (Board) decision denying Lewis's application for permanent surviving spouse benefits under the Washington Industrial Insurance Act (WIIA), title 51 RCW.

Lewis argues that the superior court erred in concluding that she did not qualify for permanent surviving spouse benefits under RCW 51.12.102. Lewis also argues that the superior court erred in concluding that the Department of Labor and Industries's interpretation of RCW 51.12.102 did not have an unconstitutional chilling effect on her right to a jury trial and did not violate her right to equal protection of the law. Lewis further argues that the Department's interpretation of RCW 51.12.102 contravenes the beneficial purpose of the WIIA and thus, she is entitled to permanent surviving spouse benefits.

We hold that Lewis did not qualify for permanent surviving spouse benefits under RCW 51.12.102. We also hold that RCW 51.12.102 did not have an unconstitutional chilling effect on her right to a jury trial and did not violate her right to equal protection of the law. We decline Lewis's invitation to second-guess the legislature's enacted public policy of limiting workers' compensation benefits to maritime workers and their beneficiaries under RCW 51.12.102. Accordingly, we affirm.

FACTS[1]

I. FACTUAL BACKGROUND

Lewis's husband was an insulator and member of the International Association of Heat and Frost Insulators. During his union apprenticeship in the late 1970s, he spent a year working for maritime employers at Todd and Lockheed Shipyards, where he had injurious exposures to asbestos-containing insulation. His maritime employers were obligated to provide their workers with coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901–950.

For the remaining 30 years of his career as an insulator, from approximately 1980 to 2010, Lewis's husband worked at land-based industrial facilities throughout Western Washington. He had additional injurious exposures to asbestos-containing products while working for employers who were obliged to provide their workers with coverage under the WIIA.

As a result of his occupational exposures to asbestos-containing insulation, Lewis's husband developed mesothelioma—an incurable and fatal form of asbestos-related lung cancer. He was formally diagnosed with mesothelioma in May 2018.

[1] The facts presented in this section are derived from the stipulated findings of fact in the superior court's order affirming the June 16, 2021 Board order, which are verities on appeal. *Hopkins v. Dept' of Labor & Indus.*, 11 Wn. App. 2d 349, 353, 453 P.3d 755 (2019).

On July 12, 2018, Lewis and her husband filed a complaint in Pierce County Superior Court against certain asbestos manufacturers and other third parties. In the complaint, they claimed damages for personal injuries and loss of marital consortium caused by his occupational exposures to asbestos.

On June 26, 2019, after reaching settlements with some of the third-party defendants, the Lewises dismissed their lawsuit. The third-party settlements were finalized without the prior written approval of the responsible maritime employers. Prior written approval of the responsible maritime employer is required under LHWCA, as explained below.

On August 15, Lewis's husband died. The cause of his death was mesothelioma.

II. PROCEDURAL HISTORY

On April 1, 2020, Lewis filed an application for surviving spouse benefits with the Department. Her application included documentation of objective clinical findings which substantiated that her husband had an asbestos-related occupational disease as well as documentation establishing a prima facie case showing that her husband had injurious exposures to asbestos fibers while working at jobs covered under the WIIA.

Neither Lewis nor her husband filed a claim for LHWCA benefits related to his asbestos-related disease.

On April 14, the Department issued an order denying Lewis's application for surviving spouse benefits because she did not qualify for coverage under RCW 51.12.102. The Department's order provided that,

> Richard Lewis died on 08/15/2019 and Diane Lewis, the surviving spouse, has filed an application for benefits.
>
> It is determined that the death of Richard Lewis was due to mesothelioma, an asbestos related disease, resulting from past exposures to asbestos fibers in the course of employment.

> It has been determined that Mr. Lewis was exposed to asbestos in the shipyards, and therefore is considered a maritime worker, under maritime coverage.
>
> As a claim has not been filed with the [LHWCA], and you have already recovered a third party settlement, you do not qualify for coverage under RCW 51.12.102 and are barred by RCW 51.12 100.
>
> The application for death benefits filed by Diane Lewis is denied.

Clerk's Papers (CP) at 144.

On April 30, Lewis appealed the Department's order denying her application for surviving spouse benefits to the Board. At the administrative hearing, Lewis asked the Board to award a surviving spouse's pension without regard to her husband's status as a maritime worker. Significantly, the industrial appeals judge (IAJ) noted that "the only potential claim for relief to which [] Lewis might be entitled is an award of temporary benefits for the period from April 1, 2020, the date that she filed her claim, through April 14, 2020, the date that the Department denied her claim." CP at 54. However, the IAJ noted that Lewis specifically waived her claim to any potential temporary benefits.

On April 8, 2021, the IAJ issued a proposed decision and order affirming the Department's order.

On April 30, Lewis filed a petition for review of the proposed decision and order to the Board. On June 16, the Board denied Lewis's petition for review and the proposed decision and order became the Board's decision and order.

On July 20, Lewis appealed the Board's order to Pierce County Superior Court. On February 24, 2022, the superior court entered an order affirming the Board's order. The court also entered findings of fact, which are discussed above, and the following conclusions of law:

> 2.2.1 At all material times, Mr. Lewis was a maritime worker eligible for Longshore and Harbor Workers' Compensation Act benefits for the condition diagnosed as mesothelioma.

> 2.2.2 At all material times, Mrs. Lewis was the beneficiary of a maritime worker and was eligible for [LHWCA] benefits due to her husband's death from the condition diagnosed as mesothelioma.
>
> 2.2.3 By June 26, 2019, Mr. and Mrs. Lewis had forfeited their right to receive [LHWCA] benefits due to the condition diagnosed as mesothelioma, per 33 U.S.C. § 933(g)(l), because they had settled their third party claims for damages caused by the condition diagnosed as mesothelioma without the prior written approval of Mr. Lewis's responsible maritime employer(s).
>
> 2.2.4 On April 14, 2020; Mrs. Lewis did not qualify for [surviving spouse] benefits as provided under RCW 51.12.102.
>
> 2.2.5 The Department order dated April 14, 2020 is correct and is affirmed.
>
> 2.3 The Board's June 16, 2021 Decision and Order, which affirmed the Department's April 14, 2020 decision, is correct and is affirmed.
>
> 2.4 RCW 51.12.100 and RCW 51.12.102, as interpreted by the Board and the Department, did not have an unconstitutional chilling effect on the right of Mr. Lewis or Mrs. Lewis to a jury trial.
>
> 2.5 RCW 51.12.100 and RCW 51.12.102, as interpreted by the Board and the Department, did not violate the right of Mr. Lewis or Mrs. Lewis to equal protection of the law.

CP 462-63. Lewis appeals.

ANALYSIS

Lewis argues that the superior court erred in affirming the Board's order because the Department's denial of her application for permanent surviving spouse benefits contravenes two of her constitutional rights, the plain language of RCW 51.12.102, and the beneficial purpose of the WIIA. We disagree.

I. STANDARD OF REVIEW

"When '[r]eviewing a decision under the [WIIA], the superior court considers the issues de novo, relying on the certified board record.'" *Spohn v. Dep't of Labor & Indus.*, 20 Wn. App. 2d 373, 378, 499 P.3d 989 (2021) (internal quotation marks omitted) (quoting *White v. Qwest*

Corp., 15 Wn. App. 2d 365, 371, 478 P.3d 96 (2020)); RCW 51.52.115. "On appeal, we review the superior court's order, not the Board's order." *Spohn*, 20 Wn. App. 2d at 378. "The superior court's order 'is subject to the ordinary rules governing civil appeals.'" *Id*. at 378 (quoting *White*, 15 Wn. App. 2d at 371); RCW 51.52.140.

This case involves statutory interpretation, which is also a question of law that we review de novo. *Bradley v. City of Olympia*, 19 Wn. App. 2d 968, 977, 498 P.3d 562 (2021). The primary goal in interpreting a statute is to determine and give effect to the legislature's intent. *Id*. We discern legislative intent through the language of the statutory provision, the context of the statute, and related statutes. *Id*.

RCW 51.12.010 states that the WIIA "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." "'The [WIIA] is remedial in nature, and thus we must construe it liberally . . . in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.'" *Bradley*, 19 Wn. App. 2d at 978 (internal quotation marks omitted) (quoting *Spivey v. City of Bellevue*, 187 Wn.2d 716, 726, 389 P.3d 504 (2017)).

II. LEWIS DOES NOT QUALIFY FOR PERMANENT SURVIVING SPOUSE BENEFITS

Lewis argues that the superior court erred in concluding that she did not qualify for permanent surviving spouse benefits because such an interpretation contravenes the plain language of RCW 51.12.102 and the beneficial purpose of the WIIA. We disagree.

A. The LHWCA and WIIA

The LHWCA is a federal workers' compensation program. *Gorman v. Garlock, Inc*., 155 Wn.2d 198, 205, 118 P.3d 311 (2005). It provides relief to workers employed in certain shore-

and harbor-centered maritime occupations who suffer injury or death on the job and shields maritime employers from tort claims by injured workers. *Id*. at 205; *see* 33 U.S.C. §§ 902, 903, 905(a). The LHWCA is applicable only if both workers and employers meet certain qualifications. *Gorman*, 155 Wn.2d at 205; *see* 33 U.S.C. §§ 902(3), 902(4), 903(a).

The LHWCA requires an injured worker entitled to compensation under that act to obtain the written approval of his or her otherwise-responsible employer before settling with a third party. *Gorman*, 155 Wn.2d at 213; 33 U.S.C. § 933(g)(1). "If the worker accepts settlement without having obtained approval from his or her employer, 'all rights to compensation and medical benefits under [the LHWCA] shall be terminated.'" *Gorman*, 155 Wn.2d at 213-14 (quoting 33 U.S.C. § 933(g)(2)). Here, Lewis does not dispute that her husband was a maritime worker covered by the LHWCA until they accepted a third-party settlement agreement without the responsible maritime employer's prior written approval.

The WIIA, the state workers' compensation program, "supplants common law suits by workers against their employers for injuries sustained on the job and generally provides the exclusive means by which an injured worker may obtain relief for such injuries from his or her employer." *Gorman*, 155 Wn.2d at 207. Under RCW 51.12.100, the WIIA exempts from its coverage Washington workers covered by certain federal workers' compensation statutes, including the LHWCA. *Id*. at 208.

However, in 1988, the legislature enacted RCW 51.12.102, which provides for the payment of temporary WIIA benefits under certain circumstances to maritime workers "'who may have a right or claim for benefits under the [LHWCA].'" *Gorman*, 155 Wn.2d at 209 (quoting RCW 51.12.102(1)). In its current form, the statute provides that,

> The department shall furnish the benefits provided under this title to any worker or beneficiary who may have a right or claim for benefits under the maritime laws of

> the United States resulting from an asbestos-related disease if (a) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and (b) the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title. The department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title.

RCW 51.12.102(1).

B. The Supreme Court's Decision in *Gorman*

Our Supreme Court considered the interplay between the LHWCA and the WIIA in *Gorman*. 155 Wn.2d 198. In that case, the appellants, who were exposed to asbestos while working for maritime employers, sought to sue their maritime employers pursuant to RCW 51.24.020, which provides an exception to the WIIA's exclusive remedy provision for injuries resulting from the employer's deliberate intention. *Id*. at 202-04. The appellants argued that RCW 51.12.102 abrogated the exclusionary language of RCW 51.12.100 and thus allowed maritime employees like them to bring a suit under RCW 51.24.020. *Id*. at 210.

The court disagreed and held that maritime workers covered by the LHWCA are not covered by the WIIA's general provisions, and thus, may not maintain a suit under RCW 51.24.020. *Id*. at 213. However, the court acknowledged that under RCW 51.12.102, workers can receive some state benefits even if they may have a right or claim to benefits under federal maritime laws, but the court held this provision for temporary, interim benefits did not otherwise abrogate the exclusionary language of RCW 51.12.100. *Id*. at 210-13.

Accordingly, *Gorman* makes clear that if a worker has a claim under federal maritime law, such as the LHWCA, they may nonetheless be covered under RCW 51.12.102(1), but benefits under that section are temporary until it is conclusively determined whether the state or federal

workers' compensation program is responsible for providing benefits to such a worker. *Id*. at 210-13. Otherwise, the federal remedy is exclusive.

Additionally, it is important to note the significance of the procedural posture in *Gorman*: in both cases in that consolidated appeal, the superior court dismissed each worker's complaint under CR 12(b)(6). *Id*. at 202-04. Thus, the court also had to consider hypothetical facts proffered by the appellants. *Id*. at 214-15.

First, the appellants posited, hypothetically, that "each may have entered into a settlement agreement with a third party without having first obtained the approval of [their maritime employers]." *Id*. at 214. As discussed above, such a third-party settlement terminates "'all rights to compensation and medical benefits under [the LHWCA].'" *Id.* at 213-14 (quoting 33 U.S.C. § 933(g)(2)). Because their rights under the LHWCA may have been terminated, the appellants contended that they may not be "'workers for whom a right . . . exists under the [LHWCA],'" and the superior court erred by dismissing their claims. *Id*. at 214 (quoting RCW 51.12.100(1)).

The Supreme Court disagreed. *Id*. at 215-16. The court held that, even if the appellants entered into third-party settlements without prior approval from their employer, the exclusionary language of RCW 51.12.100 still applied because, at the time they were exposed to the asbestos that allegedly caused their injury, both appellants were covered by the LHWCA. *Id*. at 215.

Second, the appellants also posited, hypothetically, they may have been exposed to asbestos while employed by a land-based, WIIA-covered employer after their employment with their LHWCA-covered employer. *Id*. at 216-17. Thus, the appellants argued that they may be covered by the WIIA under the "last injurious exposure rule," notwithstanding the exclusionary language of RCW 51.12.100. *Id*. at 216. The Supreme Court disagreed and held that

> where a Washington worker is exposed to asbestos while employed as a maritime worker in a maritime setting by a LHWCA-covered employer and, later, is exposed

> to asbestos while working for a land-based, WIIA-covered employer, the LHWCA-covered employer is liable under the LHWCA for all compensation provided to the worker under that act. Such a worker is within the class of "workers for whom a right . . . exists under the maritime laws," RCW 51.12.100(1) and is, therefore, barred from the WIIA, *except to the limited extent provided by section 102*. He or she is, therefore, excluded from the general provisions of the WIIA.

Id. at 218 (alteration in original) (emphasis added).

Following *Gorman,* two decisions from the court of appeals applied the Supreme Court's holdings. Each will be discussed in turn.

C. *Olsen v. Department of Labor and Industries*[2]

In *Olsen*, Olsen's husband was repeatedly exposed to asbestos fibers while working for the Navy, other maritime employers, and nonmaritime employers. 161 Wn. App. 443, 447, 250 P.3d 158 (2011). His last injurious exposure occurred while working for a WIIA-covered employer. *Id*. After her husband passed away from asbestos-related diseases, Olsen filed a claim under the LHWCA and WIIA for surviving spouse benefits. *Id*. The Department issued an order granting Olsen temporary reimbursable death benefits only. *Id.*

On appeal, Olsen argued that the Department erred in limiting her surviving spouse benefits. *Id*. at 448-51. Division Three disagreed and held that "[b]ased on the [Supreme] [C]ourt's holding in *Gorman*, if a worker has a claim under federal maritime law, he may nonetheless be covered under RCW 51.12.102(1), but benefits under that section are temporary." *Id*. at 450. In so holding, the court rejected Olsen's contention that "*Gorman* is not controlling [] because the plaintiffs there sought to sue their employers rather than obtain worker's compensation benefits." *Id*. The court explained that

> none of the *Gorman* holdings discussed above can be considered dicta, considering the court said it was required to decide whether the plaintiffs were covered by the [WIIA], and whether that act shielded their claims from the preempting effect of

[2] 161 Wn. App. 443, 250 P.3d 158 (2011).

> the federal act. . . . In order to determine whether the plaintiffs were covered by the [WIIA], the court had to decide whether RCW 51.12.102 resulted in coverage.

Id. (internal citation omitted).

The court also held that, even though Olsen's husband suffered his last injurious exposure to asbestos while working for a WIIA-covered employer, the "last injurious exposure rule" could not overcome the exclusionary language in RCW 51.12.100. *Id*. at 451. Accordingly, the Department properly awarded Olsen temporary benefits until federal benefits were approved. *Id*. at 451-52.

D. *Long v. Department of Labor and Industries*[3]

In *Long*, Long's husband died from malignant mesothelioma caused by exposure to asbestos. 174 Wn. App. 197, 201, 299 P.3d 657 (2013). He was exposed to asbestos while working for maritime employers covered by the LHWCA and while working for non-maritime employers covered by the WIIA. *Id*. Both exposures were a proximate cause of his mesothelioma. *Id*. Shortly after her husband's death, Long sued numerous third-party companies for wrongful death and survivorship. *Id*. She also filed a claim with the Department under the WIIA for surviving spouse benefits. *Id*.

The Department denied Long's claim because some of her husband's asbestos exposures occurred during his employment with an LHWCA-covered employer. *Id*. The Department also denied Long temporary benefits under RCW 51.12.102(1) because she accepted a third-party settlement without prior agreement of the liable maritime employer, which barred her entitlement to temporary benefits because she had no claim for benefits under maritime laws that would allow the Department to pay provisional benefits. *Id*.

[3] 174 Wn. App. 197, 299 P.3d 657 (2013).

On appeal, we held that,

> Because Long's husband worked for an LHWCA-covered employer, he is not covered by the WIIA. As a result, the WIIA's last-injurious-exposure rule, as codified in WAC 296–14–350, does not apply here because Long's husband could claim benefits under maritime law. *Long remains excluded from the WIIA even though she is now barred from her entitlement to LHWCA benefits because she accepted third-party settlements without the prior agreement of the liable maritime employer*. . . . Accordingly, we hold that the superior court did not err by granting the Department's motion for summary judgment affirming the Board's decision denying Long benefits.

Id. at 206-07 (emphasis added) (footnote omitted) (internal citation omitted). However, we also held that "the Department erroneously declined to award [Long] temporary, interim workers' compensation benefits that it was required to provide under RCW 51.12.102(1), but [] conclude[d] that the Department was not required to pursue an LHWCA claim on her behalf under RCW 51.12.102(4)." *Id*. at 207. In so holding, we noted that Long was entitled to temporary benefits from the date she filed her application for benefits until the date the Department "correctly determined that it was not the liable insurer and denied Long's claim." *Id*.

With an understanding of the applicable statutory framework and case law in mind, we now turn to Lewis's arguments in this appeal.

E. Lewis Does Not Qualify for Permanent Surviving Spouse Benefits under RCW 51.12.102

Lewis argues that the Department's interpretation of RCW 51.12.102—that only temporary, interim benefits are available to LHWCA-covered workers and their beneficiaries—contravenes the plain language of that statute and the beneficial purpose of the WIIA. We disagree.

Here, contrary to Lewis's assertion, the Department did not interpret RCW 51.12.102 to provide maritime workers who may have a claim or right under the LHWCA with only temporary, interim benefits. Rather, as explained above, that is the Supreme Court's interpretation of RCW 51.12.102 in *Gorman*. Because we are bound to follow Supreme Court precedent, we reject

Lewis's contention that she is entitled to permanent surviving spouse benefits under the WIIA. *Peterson v. Dep't of Labor & Indus.*, 17 Wn. App. 2d 208, 237, 485 P.3d 338 (2021). Accordingly, this argument fails.

Lewis argues that *Gorman*'s discussion of RCW 51.12.102 is dicta and does not control because the court did not have before it the issue of a claim for state workers compensation benefits. We disagree because, as discussed above, the court in *Olsen* rejected a similar argument and we see no reason to depart from that holding. This argument fails.

Next, Lewis appears to argue that she qualifies for permanent surviving spouse benefits under RCW 51.12.102 because the Department was required to pay such benefits until the liable insurer had initiated payments. Because no liable insurer had initiated payment of benefits to her, Lewis contends that the Department had no justification for denying her surviving spouse benefits under RCW 51.12.102. We disagree.

Here, *Gorman* controls the outcome of this issue and we adopt the reasoning set out by *Long* and *Olson* because those cases are persuasive. *Gorman* and *Olsen* made clear that benefits under RCW 51.12.102 are temporary only. And *Long* made clear that such benefits last from the date the application for benefits is filed until the date the Department correctly determines that it is not the liable insurer and denies the claim. However, as explained above, Lewis waived any claim for temporary benefits. Because Lewis was only entitled to temporary benefits until the date the Department denied her claim, which she specifically waived, the superior court did not err in concluding that Lewis did not qualify for permanent surviving spouse benefits under RCW 51.12.102.

Lewis contends that *Gorman*, *Long*, and *Olsen* do not control our decision because they did not raise the constitutional challenges she raises here. While *Long* and *Olson* are not binding

on us, we adopt their reasoning, as explained above. Thus, we disagree. Additionally, as explained below, her constitutional challenges are without merit.

Even if *Gorman, Long,* and *Olsen* did not apply here, the result would be the same. The plain language of the RCW 51.12.102 supports the interpretation that Lewis was entitled only to temporary benefits until the Department correctly determined it was not the liable insurer and denied her claim based on the third-party settlement agreement.

Lewis relies heavily on the following emphasized language in last sentence of RCW 51.12.102(1): "The department shall render a decision as to the liable insurer and *shall continue to pay benefits until the liable insurer initiates payments*." (Emphasis added.) However, Lewis ignores the remaining portion of the last sentence, which states "or benefits are otherwise properly terminated under this title." RCW 51.12.102(1). Lewis also ignores the provision that states "The department shall furnish the benefits provided under this title to any worker or beneficiary *who may have a right or claim for benefits* under the maritime laws of the United States resulting from an asbestos-related disease." RCW 51.12.102(1) (emphasis added). As discussed above, "If the worker accepts settlement without having obtained approval from his or her employer, 'all rights to compensation and medical benefits under [the LHWCA] shall be terminated,'" which occurred here. *Gorman*, 155 Wn.2d at 213-14 (quoting 33 U.S.C. § 933(g)(2)).

Reading the above provisions together, the plain language of RCW 51.12.102(1) permits the Department to terminate temporary benefits when it determines that (1) it is not the liable insurer and (2) a LHWCA-covered worker or beneficiary no longer as right or claim under the LHWCA due to a third-party settlement agreement. Because Lewis fails to give effect to the entirety of RCW 51.12.102, her argument fails.

Here, the Department correctly determined that it was not the liable insurer and correctly denied her claim because of the third-party settlement agreement, which extinguished any right or claim she might have under the LHWCA. While Lewis was entitled to temporary benefits from April 1 to April 14, 2020—the date the Department denied her application and learned she no longer had a viable LHWCA claim—she explicitly waived her claim to those funds.

We hold that the superior court did not err in concluding that Lewis did not qualify for permanent surviving spouse benefits under RCW 51.12.102.

III. UNCONSTITUTIONAL CHILLING EFFECT ON THE RIGHT TO A JURY TRIAL

Lewis argues that the Department's interpretation of RCW 52.12.102 unconstitutionally chills her right to a jury trial because it needlessly discourages potentially LHWCA-covered workers—or their surviving spouses—from exercising their right to sue non-employer entities that caused their occupational asbestos-related disease. We disagree.

A. Legal Principles

To protect the integrity of constitutional rights, Washington courts have explained the State can take no action that will unnecessarily chill or penalize the assertion of a constitutional right. *State v. Martin*, 151 Wn. App. 98, 104, 210 P.3d 345 (2009). "A statute is presumed constitutional. The burden is on the party challenging the statute to prove beyond a reasonable doubt that the statute is unconstitutional." *Afoa v. Dep't of Labor & Indus.*, 3 Wn. App. 2d 794, 804, 418 P.3d 190 (2018).

RCW 51.12.102(1) provides that,

> The department shall furnish the benefits provided under this title to any worker or beneficiary who may have a right or claim for benefits under the maritime laws of the United States resulting from an asbestos-related disease if (a) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and (b) the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of

> Washington in employment covered under this title. The department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title.

As discussed above, *Gorman* makes clear that if a worker has a claim under federal maritime law, such as the LHWCA, they may nonetheless be covered under RCW 51.12.102(1), but benefits under that section are temporary until it is conclusively determined whether the state or federal workers' compensation program is responsible for providing benefits to such a worker. 155 Wn.2d at 210-13.

Article 1, section 21 of the Washington Constitution provides,

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

In *Sofie v. Fibreboard Corp*, the Supreme Court opined that "[a]s long as [a] cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does. Otherwise, article 1, section 21 means nothing." 112 Wn.2d 636, 652, 771 P.2d 711 (1989).

B. RCW 51.12.102 Does Not Unconstitutionally Chill the Exercise of the Jury Trial Right

Here, as an initial matter, the Department did not interpret RCW 51.12.102(1) to only provide temporary, interim benefits to potentially LHWCA-covered workers. Rather, the Supreme Court in *Gorman* did, as explained above.

Contrary to Lewis's contention, nothing about RCW 51.12.102 unnecessary chills a potentially LHWCA-covered worker's right under article 1, section 21 of the Washington Constitution. As the Supreme Court in *Gorman* recognized, absent RCW 51.12.102, a worker "who could be covered by either the WIIA or the LHWCA might for a time be trapped in

jurisdictional limbo, with neither compensation program providing relief until it is conclusively established which program is responsible for providing benefits." 155 Wn.2d at 212. So rather than unnecessarily discourage a potentially LHWCA-covered worker from exercising their right to institute a third-party lawsuit against non-employer entities causing their asbestos-related disease, RCW 51.12.102(1) assists such workers or their beneficiaries stuck in this jurisdictional limbo by providing temporary, interim benefits until federal benefits or a third-party settlement is received.

Because nothing about RCW 51.12.102(1) unnecessarily chills a potentially LHWCA-covered worker or beneficiary's right to pursue third-party lawsuits against non-employer entities, we conclude that Lewis's argument is without merit.

Lewis appears to argue that RCW 51.12.102 needlessly burdens the jury trial right because it forced her and her husband to elect between exercising his constitutional right to trial by jury during his lifetime or prosecute a LHWCA claim to an uncertain conclusion that would not be resolved until long after his death. We disagree.

Here, nothing in RCW 51.12.102 sets up the alleged "Hobson's Choice" that Lewis complains about. Br. of Appellant at 32. As explained above, Lewis does not qualify for permanent surviving spouse benefits because RCW 51.12.102 only provides temporary, interim benefits to maritime workers until the Department renders a decision as to the liable insurer and properly terminates such benefits. However, a worker who suffered asbestos-related disease arising from maritime employment can receive compensation for their injuries from the federal workers' compensation program or a third-party lawsuit, as in this case. Lewis complains that either option would take too long and neither guarantees permanent benefits. But, if anything, this alleged "Hobson's choice" that Lewis complains about is presented by the LHWCA, not RCW

51.12.102. After all, it is the LHWCA that requires approval of the responsible employer before settlement of a lawsuit brought outside of the LHWCA and, assuming such approval, it is the LHWCA that provides a maritime worker's exclusive remedy for workplace injuries. Accordingly, this argument fails.

Lewis also argues that the Department's position is detrimental to constitutional principles because there was no guarantee that she would receive any permanent benefits by forgoing her right to a jury trial. In essence, Lewis asks us to second-guess the legislature's enacted public policy in RCW 51.12.102. We decline to do so because "[p]ublic policy arguments 'are more properly addressed to the Legislature, not to the courts.'" *McCaulley v. Dep't of Labor & Indus.*, 5 Wn. App. 2d 304, 316, 424 P.3d 221 (2018) (quoting *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 258, 11 P.3d 883 (2000)).

Accordingly, we hold that the superior court did not err in concluding that RCW 51.12.102 did not have an unconstitutional chilling effect on Lewis's right to a jury trial.

IV. EQUAL PROTECTION

Lewis argues that the Department's application RCW 51.12.102—that only temporary benefits are available to LHWCA covered workers—violates her right to equal protection of the law because it denies an entire class of workers and their beneficiaries benefits under the WIIA. We disagree.

Under the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Article I, section 12 of the Washington Constitution states: "[n]o law shall be passed granting to any citizen [or] class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens."

The first step to an equal protection analysis requires the party challenging the legislation to identify that they are a member of a cognizable class, and that they received disparate treatment because of their membership in that class. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006); *see also White*, 15 Wn. App. 2d at 373 (stating that the state and federal equal protection clauses "require that 'persons similarly situated with respect to the legitimate purpose of the law' receive like treatment.") (quoting *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). But, "[w]here persons of different classes are treated differently, there is no equal protection violation." *Garcia v. Dep't of Soc. & Health Servs*., 10 Wn. App. 2d 885, 920, 451 P.3d 1107 (2019).

The second step is determining which standard of review applies. *Osman*, 157 Wn.2d at 484. The standard of review depends on the type of classification or right implicated. *Id*. If the state action does not threaten a fundamental or important right, or if the individual is not a member of a suspect or quasi-suspect class, courts apply a rational basis test. *Id*.

Here, Lewis's equal protection challenge rests on the differential treatment of LHWCA-covered workers and purely land-based workers, who are covered by the WIIA. But LHWCA-covered workers and purely land-based workers are not similarly situated persons because LHWCA-covered workers have access to the federal workers' compensation scheme while purely land-based workers do not. *See Gorman*, 155 Wn.2d at 215 ("The plain language of [RCW 51.12.100] reflects the legislature's intent to exclude from the coverage of the WIIA the entire class of workers covered by the LHWCA."). Because Lewis cannot establish marine and land-based workers are similarly situated, her claim fails.

Accordingly, we hold that the superior court did not err in concluding that RCW 51.12.102 did not violate Lewis's right to equal protection of the law.

V. PUBLIC POLICY OF THE WIIA

Lewis argues that she is entitled to permanent surviving spouse benefits because the Department's application of RCW 51.12.100 and RCW 51.12.102 contravenes the purpose of the WIIA to provide sure and certain recovery of workers' compensation benefits. We decline to address her argument.

Here, Lewis again asks us to second-guess the legislature's enacted public policy of excluding LHWCA covered workers from the WIIA, except for those temporary benefits available under RCW 51.12.102. We decline to do so because, as explained above, "[p]ublic policy arguments 'are more properly addressed to the Legislature, not to the courts.'" *McCaulley*, 5 Wn. App. 2d at 316 (quoting *Blomster*, 103 Wn. App. at 258).

CONCLUSION

We affirm the superior court's order denying Lewis's request for permanent surviving spouse benefits under the WIIA.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Glasgow, CJ.

Price, J.

CERTIFICATE OF SERVICE

I certify that on May 23, 2023, I caused to be served a true and correct copy of the foregoing document upon the below-listed attorneys of record by the following method:

☒ Via Appellate Portal, to the following:

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Dated at Seattle, Washington this 23rd day of May 2023.

BERGMAN OSLUND UDO LITTLE

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Stephanie Simmons

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