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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Petitioner Diane Lewis disagrees with the Legislature's policy decision to exempt maritime workers, who have an alternative means of recovering from their injuries, with benefits under the Washington Industrial Insurance Act (WIIA). But that policy disagreement is not a basis for review by this Court.

The Legislature determined that maritime workers, who have a right to benefits under the federal Longshore and Harbor Workers' Compensation Act (LHWCA), are not eligible for permanent benefits under the WIIA. RCW 51.12.100. Based in part on the same policy concerns underlying Lewis's petition, the Legislature later allowed certain maritime workers to receive temporary benefits while pursuing their federal claims.

Lewis does not challenge the statute exempting maritime workers from WIIA coverage, RCW 51.12.100. This Court upheld that statute in *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 211, 118 P.3d 311 (2005). Lewis instead challenges the

constitutionality of the temporary benefits statute, RCW 51.12.102. Providing temporary benefits, while denying permanent benefits pursuant to an unchallenged statute, does not present a significant constitutional question. Far from chilling the right to trial by jury, providing temporary benefits *facilitates* the ability to bring a third party claim by providing medical care and wage replacement benefits during the pendency of the LHWCA claim. While the Lewises chose to forego the right to jury trial in favor of settlement, with the collateral consequence of limiting their eligibility for temporary benefits under RCW 51.12.102, the statute providing for temporary benefits did not chill their rights.

Lewis's equal protection claim does not present a significant constitutional question either. The Court of Appeals correctly recognized that maritime workers, who have an additional federal remedy, are not similarly situated to other workers, who lack such a remedy.

Finally, Lewis's claim about impingement of the grand

compromise is no more than an assault on legislative decision-making and provides no basis for review.

None of Lewis's arguments raises a significant constitutional question or other reason for review, so the Court should deny review.

## **II. STATEMENT OF THE ISSUES**

1. Does RCW 51.12.102 chill the right to a jury trial when it is the worker's decision whether to elect to settle a third-party case and thus forgo LHWCA benefits and thus temporary, interim WIIA benefits?

2. Does RCW 51.12.102 violate equal protection when maritime and land-based employees are treated differently in that maritime employees have LHWCA benefits?

3. Is Lewis's claim that the statute implicates the "grand compromise" no more than a challenge to legislative decision-making?

### **III. STATEMENT OF THE CASE**

#### **A. Lewis Stipulated That Her Spouse Was Exposed to Asbestos During Maritime Employment**

Richard Lewis was a career insulator and member of the Heat and Frost Insulators Union Local 7. CP 397. As an apprentice insulator, he performed insulation work at Todd and Lockheed Shipyards that exposed him to asbestos. CP 397. As an apprentice and journeyman insulator from 1980 to 2010, Richard Lewis performed insulation work at land-based industrial facilities throughout Western Washington that also exposed him to asbestos. CP 397.

Richard Lewis was diagnosed with mesothelioma in May 2018 and died of mesothelioma in August 2019. CP 397. The parties stipulated that Richard Lewis's mesothelioma was caused by occupational asbestos exposures. CP 397. And they also stipulated that his exposure to asbestos at Todd and Lockheed Shipyards was a substantial factor in the development of his mesothelioma. CP 397. And so, per the stipulation, Richard Lewis suffered an occupational disease

compensable under the LHWCA while working at Todd and Lockheed shipyards in the early 1980s. CP 398.

Richard Lewis filed a personal injury claim on July 12, 2018, against fourteen defendants arising out of his mesothelioma diagnosis and received an expedited trial setting due to this terminal illness. CP 398.

Richard Lewis settled with the last remaining defendant in his personal injury claim in April 2019 after one week of trial. CP 398. Because Richard Lewis settled his third-party asbestos claim without approval from his employer, neither he nor his spouse Diane Lewis was eligible to receive benefits under the LHWCA. CP 398; Pet. 9-10; *Lewis v. Dep't of Lab. & Indus.*, No. 56774-1-II; slip op. 14 (Wash. Ct. App. Apr. 25, 2023) (unpublished).

Diane Lewis applied for WIIA benefits on April 1, 2020, with the Department of Labor and Industries (L&I), based on the occupational disease. CP 397.



Under RCW 51.12.100, because Richard Lewis's mesothelioma was proximately caused both by maritime employment subject to the LHWCA and by land-based employment in Washington that is not subject to the LHWCA, L&I determined that Diane Lewis was ineligible to receive industrial insurance benefits as Richard Lewis's survivor. CP 398. Under RCW 51.12.102, since Richard Lewis and Diane Lewis are disqualified from receiving benefits under the LHWCA as a result of the settlements Richard Lewis accepted in his third-party claim without employer approval, L&I determined that Diane Lewis is also ineligible to receive temporary benefits. CP 398.

**B. The Board, the Superior Court, and Court of Appeals Affirmed That Lewis Was Not Entitled to Industrial Insurance Benefits**

Diane Lewis appealed L&I's decision to the Board of Industrial Insurance Appeals. CP 50. At the Board, Lewis waived any claim that Lewis should have received temporary, interim benefits under RCW 51.12.102 for the period from

when L&I received her claim to the date that L&I determined that she was not entitled to relief under the WIIA. CP 317-18.

The industrial appeals judge issued a proposed decision that affirmed L&I based on stare decisis under *Gorman's* progeny *Long v. Department of Labor & Industries*, 174 Wn. App. 197, 299 P.3d 657 (2013). CP 53-54. It flows from this case that the temporary, interim benefits that are available under RCW 51.12.102 must be terminated if L&I learns that the worker or beneficiary entered into a third-party settlement that results in the claimant forfeiting their right to receive a recovery under the LHWCA or other federal statutes. *Long*, 174 Wn. App. at 206-07.

The Board granted Lewis's petition for review and issued a decision affirming L&I's decision that adopted the findings and conclusions in the proposed decision. CP 11, 26. The superior court affirmed the Board and rejected her constitutional arguments. CP 460-64.

The Court of Appeals affirmed. *Lewis*, slip op. 2. The Court of Appeals ruled that there was no violation of the right to a jury trial because RCW 51.12.102 doesn't chill the right to a jury trial; rather, it allows workers who are in the "jurisdictional limbo" of waiting for LHWCA benefits to have some temporary, interim relief. *Lewis*, slip op. 16-17 (quoting *Gorman*, 155 Wn.2d at 212).

The Court of Appeals ruled there was no equal protection violation because Lewis did not show a similarly situated class. *Id.* The proposed class combining maritime employees and land-based workers failed because they were not similarly situated, as maritime employees have LHWCA benefits. *Id.*

Finally, the Court of Appeals ruled that the "grand compromise" theory provided no relief because it was no more than trying to make legislative policy. *Id.* at 20.

Lewis seeks review.

#### IV. ARGUMENT

Lewis seeks review under two constitutional theories and one statutory theory. None of these theories warrants review. And they are all grounded in a dissatisfaction with the Legislature's exemption from state coverage of maritime workers who may claim federal workers' compensation benefits. This dissatisfaction doesn't present a basis for review, and Lewis should turn to the Legislature if she dislikes the policy choices it has made.

##### **A. Lewis Doesn't Deny That *Gorman* and Cases Applying It Control in This Case**

RCW 51.12.100 makes workers ineligible for claim allowance under the WIIA for an injury or disease if the worker may be covered by the LHWCA. *Gorman*, 155 Wn.2d at 208-09. RCW 51.12.100(1) states, "Except as otherwise provided in this section, the provisions of this title *shall not apply* to a master or member of a crew of any vessel, or to employers and *workers for whom a right or obligation exists under the*

*maritime laws or federal employees' compensation act for personal injuries or death of such workers.*" (emphasis added).

As the Court recognized in *Gorman*, RCW 51.12.102 creates a narrow exception to RCW 51.12.100's exclusion of coverage, allowing workers with asbestos-related diseases to receive some benefits from L&I while the claim for federal benefits is pending. *Gorman*, 155 Wn.2d 211-13. Once the worker receives a federal recovery, L&I terminates the worker's temporary benefits. *See* RCW 51.12.102. *Gorman* emphasizes that the relief available under RCW 51.12.102 is "temporary, interim" relief to be provided while a federal claim is pending, and it distinguishes this limited right from a worker whose claim may be allowed for general coverage of an injury under the WIIA. 155 Wn.2d at 211-13.

The appellate cases—including both *Gorman* and the cases decided after *Gorman*—reinforce that workers who have injurious exposure while working for LHWCA-covered employment—and who therefore have valid LHWCA

claims—have no coverage under the WIIA, apart from the temporary, interim benefits available under RCW 51.12.102. *Gorman*, 155 Wn.2d at 211-13; *Long*, 174 Wn. App. at 203-04; *Olsen v. Dep't of Lab. & Indus.*, 161 Wn. App. 443, 448-52, 250 P.3d 158 (2011).

The Court of Appeals properly applied these legal principles to the stipulated facts here (*Lewis*, slip op. 6-15), concluding that Lewis's husband and his beneficiaries are not entitled to coverage under the WIIA because he had harmful occupational exposure subject to the LHWCA, and thus he had rights and obligations under the LHWCA. *Id.* at 14-15. As a result, the only relief that could be available under his claim are the temporary, interim benefits available under RCW 51.12.102. L&I's only conceivable error in this regard was its denial of benefits for a two-week period from the date that Lewis filed her WIIA claim to the date that L&I decided her eligibility for benefits. But Lewis waived any claim for benefits for this time. CP 317-18.

Lewis cites RCW 51.12.102 to claim error. Pet. 1, 4, 18, 20-22, 24, 29. Lewis offers no argument that *Gorman* and cases applying it were wrongly decided or harmful, and so the decisions must be followed. *See Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010). And a complaint that temporary, interim benefits shouldn't cease when there is no longer a basis to obtain those benefits—*i.e.*, when the federal claim is no longer pending—is one best directed to the Legislature.

**B. RCW 51.12.102 Doesn't Chill the Right to a Jury—a Worker May Have a Jury Trial Subject to the Consequences Decreed by Congress**

RCW 51.12.102 doesn't chill a right to a jury trial, contrary to Lewis's claims. *Contra* Pet. 21. In fact, it enables a jury trial by giving temporary, interim benefits—provided the LHWCA benefits are still pending—while prosecuting the judicial action. Having money to live off of during a lawsuit only benefits workers, as the Court of Appeals essentially decided. *Lewis*, slip op. 16-17.

Even so, Lewis offers a convoluted theory that RCW 51.12.102 chills exercise of the right to a jury. Pet. 18-24. She asserts that Lewis’s husband “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.” Pet. 1, 4.

But Lewis admits that under the LHWCA, a worker is covered if they worked in a shipyard with asbestos exposure. Pet. 8. And Lewis can’t deny that RCW 51.12.100 precludes industrial insurance benefits if someone is eligible for benefits under maritime law.

RCW 51.12.102 offers temporary, interim benefits up until a worker extinguishes their rights under the LHWCA. *Gorman*, 155 Wn.2d 211-13. This is done to aid workers as they experience hardship waiting for their federal case to be resolved—the “jurisdictional limbo” identified by *Gorman*. 155 Wn.2d at 212; *Lewis*, slip op. 17.



Under maritime and tort law, a worker can seek LHWCA benefits related to the employer and also may sue third parties about the asbestos exposure. These are the remedies for maritime asbestos-related occupational diseases. By recognizing that a remedy for this condition is provided by federal law, the Legislature didn't infringe on the right to a jury—no more than any other exclusion under the Industrial Insurance Act, meaning that other civil remedies apply. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 652, 771 P.2d 711 (1989) (“As long as the 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.”).

Under Washington law, workers have always had the right to sue third-party tortfeasors like suing third-party manufacturers. As to the LHWCA, Washington law doesn't govern the ability to settle those claims. The termination of LHWCA benefits when a worker settles without notice to the employer is a choice to make in the federal action—not a

Washington choice. So any claim of the “chilling” of a jury trial right should be directed to Congress.

The so-called “Hobson’s Choice” (Pet. 18) is how to pursue LHWCA remedies and whether to compromise the asbestos lawsuit in a settlement without employer approval. Pet. 18. Lewis’s spouse had the option to settle his jury trial—but in choosing this route, he elected the remedies he would receive. Lewis cites no authority that having to elect remedies somehow chills the right to a jury trial. Lewis does not and cannot argue that RCW 51.12.102 compelled them to take the settlement instead of pursuing a jury trial.

RCW 51.12.102 acts as a backstop while a worker decides how to pursue their case. This exercise of legislative grace doesn’t implicate the right to a jury trial.

**C. There Is No Equal Protection Violation Because Lewis Doesn’t Show a Similarly Situated Class**

The Court of Appeals properly concluded there was no equal protection violation because Lewis didn’t show similarly situated classes. *See Lewis*, slip op. 19.

The first step in 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). The second step is determining which standard of review applies. *Id.* 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 semi-suspect class, courts apply a rational basis test. *Id.*

Lewis argues that RCW 51.12.102 violates equal protection because maritime and land-based workers are treated differently. Pet. 24, 26. But they are not in the same class. It is not enough that both are “Washington workers who are routinely exposed to asbestos and consequently suffer workplace injury” as Lewis urges. Pet. 26. Rather they must be similarly situated, and they are not, as maritime workers may

access the LHWCA scheme while purely land-based workers cannot, as the Court of Appeals correctly decided. *Lewis*, slip op. 19.

Even if the workers were similarly situated, Lewis cannot overcome the rational basis standard of review. Workers' compensation statutes like RCW 51.12.100 and RCW 51.12.102 are subject only to rational basis scrutiny as they do not affect a fundamental right. *See State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994); *Campos v. Dep't of Lab. & Indus.*, 75 Wn. App. 379, 385-87, 880 P.2d 543 (1994).

RCW 51.12.100 and RCW 51.12.102 are subject to rational basis scrutiny because they regulate a worker's right to economic benefits under a state program and do not involve either a suspect class or a fundamental right. *See Campos*, 75 Wn. App. at 385-87.

Under rational basis review, a law cannot be struck down as unconstitutional if the challenged statute achieves a legitimate state objective and the means the statute uses are not

wholly irrelevant to achieving that objective. *Ward*, 123 Wn.2d at 516.

RCW 51.12.102 is reasonably tailored to achieve legitimate purposes. The purpose of RCW 51.12.102 is to ensure that workers can receive temporary financial relief from L&I while a federal asbestos claim is pending, and the Legislature extends temporary relief in recognition of the difficulty that workers often face in pursuing such claims under the LHWCA. But it is also RCW 51.12.102's purpose to not permanently encumber the state fund—which pays benefits to Washington's workers—with these benefits. And it is not the purpose of the statute to provide relief to a worker when no federal claim is pending, as is the case here. That is why the temporary benefits are terminated if there is no pending federal claim.

There is no equal protection violation because rational basis review shows a legitimate state objective and the means

RCW 51.12.102 uses are not irrelevant to achieving that purpose.

**D. Lewis’s “Grand Compromise” Arguments Merely Second-Guess Legislative Choices**

The Court of Appeals properly decided that Lewis’s remedy lies with the Legislature. *Lewis*, slip op. 20. This includes Lewis’s argument that RCW 51.12.102 disturbs the “grand compromise” that led to adoption of the WIIA in 1911. But the Legislature has the authority to change the WIIA—there is no constitutional provision about a “grand compromise.” And more importantly, RCW 51.12.102 gives workers temporary benefits when they are in a tough situation of waiting for LHWCA relief. These benefits further “sure and certain relief” under RCW 51.04.010.

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**V. CONCLUSION**

This Court should deny review.

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RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of July, 2023.

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