

NO. 86358-0 43187-4-II

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

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ROBERT LONG, DEC'D, & AILEEN LONG,

*Appellant,*

v.

WASHINGTON STATE DEPARTMENT OF  
LABOR AND INDUSTRIES,

*Respondent.*

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APPELLANT'S REPLY BRIEF

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### **I. Statement of Facts in Reply**

The Department's Response Brief states: "[d]espite the Department's communication, no claim was filed for LHWCA benefits." Resp. Br. at 4. This statement by the Department is materially misleading because it implies the April 2, 2009 Department Letter to which the statement refers advised Mrs. Long to file for LHWCA benefits. The Department's implication creates a material misstatement of fact suggesting Mrs. Long was somehow put on notice by this letter to file for LHWCA benefits. However, the April 2, 2009 letter neither tells Mrs. Long to file for LHWCA benefits, nor does it advise Mrs. Long that if she has a right to benefits under the LHWCA, she would not be eligible to receive Washington State benefits.

The Department's misstatement must be remedied. However, the April 2, 2009 letter is not contained within the record, and without this letter, the Court will not have sufficient evidence to correct the Department's baseless argument Mrs. Long erroneously failed to pursue her rights. Resp. Br. at 34. Accordingly, Mrs. Long requests leave from this court under RAP 9.10 and 9.11 to supplement the record with this letter in order to correct the Department's material misstatement of fact. Mrs. Long made a good faith effort to ensure the record below contained

all the necessary evidence to correctly decide this case. Indeed, the parties up to this point had agreed that there was “no genuine issue as to any material fact” and that the case could be decided on summary judgment. Until this point, that was true because the Department had not previously contested the fact the Longs were unaware of any right or duty to file for LHWCA benefits until it was too late. The April 9, 2009 letter, *see* CABR<sup>1</sup> 145, from Mrs. Long’s other attorney, an attorney who does not specialize or practice federal or state workers’ compensation, stands as uncontested evidence of (1) the Longs’ lack of knowledge that a LHWCA right existed, and (2) their lack of knowledge about any duty to apply for such federal benefits.

## **II. Argument in Reply**

### **A. The Department’s Interpretation of RCW 51.12.102 Supports Mrs. Long because the Department’s Failure to Abide by the Statute Resulted in Mrs. Long Forfeiting Her Rights to LHWCA Benefits**

The Department states its obligation under RCW 51.12.102 as follows: “If the Department determines that the liable insurer is subject to the LHWCA . . . , then the Department assists the worker in obtaining recovery under the LHWCA . . . , and provides temporary benefits until a recover is obtained.” Resp. Br. at 9. Noticeably, the Department’s

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<sup>1</sup> Certified Appeal Board Record (“CABR”)

statement of its duties impliedly concedes that it had a statutory duty in this case to assist Mrs. Long in obtaining LHWCA benefits and to pay Washington IIA benefits to her until a federal insurer began payments. Further, it is uncontested the Department failed to perform either of those functions in this case, yet the Department's Response Brief fails to offer any explanation as to why it neglected its statutory duties for over a year. App. Br. 20-22.

Instead, the Department sidesteps its malfeasance by arguing Mrs. Long violated her statutory duty under RCW 51.12.102(5) by refusing to assist the Department in making a proper determination of coverage. Resp. Br. at 33-36. However, RCW 51.12.102(5) only applies when an injured worker fails to timely comply with a request from the Department. RCW 51.12.102(5) ("If a worker or beneficiary refuses to cooperate with the department . . . by failing to provide information that, in the opinion of the department, is relevant in determining the liable insurer . . . the department shall reject the application for benefits."). In the present case, the Department has failed to point to any evidence in the record showing (1) the Department made a request of Mrs. Long to pursue LHWCA benefits, and (2) that Mrs. Long did not timely abide by such request. Instead, the Department rests on the same problematic "facts" refuted above in the Statement of Facts in Reply. Resp. Br. at 9-10, 33-34. In

reality, all the record shows is the Department was aware of a potential right to LHWCA benefits, but chose not to assist the claimant in pursuing federal benefits and instead chose to wait over a year to adjudicate the claim—waiting until Mrs. Long unknowingly forfeited her federal and state rights. *See* App. Br. at 20-22. As the uncontested evidence before the Court proves the Department failed to abide by its statutory duties, and because the Department has no evidence to support its baseless assertion of misconduct by Mrs. Long, the Claimant respectfully requests the Department not be allowed to benefit from its malfeasance.

**B. Mrs. Long Seeks Widow’s Benefits under RCW 51.32.050, not “Temporary” or “Interim” Benefits in Perpetuity under RCW 51.12.102**

The Department argues Mrs. Long is being “hypertechnical” for seeking “‘temporary’ benefits on what is effectively a permanent basis.” Resp. Br. at 27. The Department further complains granting these “benefits in perpetuity” would go against the language and intent of RCW 51.12.102. Resp. Br. at 29. However, what the Department fails to acknowledge as a part of its argument is that there is a common word for benefits on a permanent basis. *It is called a pension*, and the remedial structure and intent behind the IIA as a whole requires acceptance of Mrs. Long’s claim.

“Temporary” benefits on a permanent basis is what the Industrial Insurance Act provides to the permanently disabled per RCW 51.32.060 and to those widowed by industrial injuries per RCW 51.32.050(2)(a). Providing a pension to the widowed and permanently disabled is nothing new and is far from the evil the Department makes it to be by claiming RCW 51.12.102 limits Mrs. Long to “temporary” and “interim” benefits.<sup>2</sup> Curiously, the words “temporary” and “interim” never once appear in RCW 51.12.102; yet, the Department uses the two terms a total of 78 times in its Response Brief.

The entire thrust of the Department’s argument is that RCW 51.12.102 prohibits benefits because Mrs. Long’s husband had some exposure to asbestos early in his career at a LHWCA-covered employer. *See Resp. Br. at 27-33.* In making this argument, the Department ignores the fact that most of Mr. Long’s asbestos exposure (including the last exposure in time) occurred during IIA-covered employment. *See CABR 81-82.* The Department further ignores decades of case law upholding the application of the Last Injurious Exposure Rule. *See, e.g. Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 814 P.2d 629 (1991) (upholding the Department’s use of the Rule). As Mr. Long’s last injurious exposure occurred at IIA-covered employment, and this asbestos exposure

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<sup>2</sup> Benefits which the Department has thus far refused to pay, despite acknowledging Mrs. Long’s entitlement under the plain text of RCW 51.12.102.

prematurely caused his death, his widow is entitled to benefits under the regular provisions of the IIA. RCW 51.32.050. RCW 51.12.102 is irrelevant to this case because Mrs. Long has no rights under the LHWCA. Further, Mrs. Long has no rights under any other compensation system, and thus no risk of double recovery exists if she is granted widow's benefits; accordingly, *Fankhauser* and the plain text of RCW 51.32.050 dictate she receive benefits just like any other beneficiary without a right to compensation from another source.

**C. The Legislative history Relied on by the Department and *Gorman* Supports Neither, while Failing to Acknowledge RCW 51.12.102's Complete Legislative history**

The Department claims the legislative history shows the Legislature "considered, but rejected, repealing RCW 51.12.100 at the same time that it enacted RCW 51.12.102." Resp. Br. at 14. However, the Department does not rely on the legislative history itself for authority, but instead relies on the *Gorman* decision. *Id.* (citing *Gorman*, 155 Wn.2d at 211-213). Looking to the actual text of the *Gorman* opinion, it becomes clear the Department has misunderstood the legislative history of RCW 51.12.102. Page 211 of the *Gorman* opinion says nothing about the Legislative history. Not until the bottom of page 212 does the *Gorman* Court discuss legislative history, and even then, it only says: "If the legislature had intended to abrogate completely the exclusionary language

of section 100, it could have done so.” *Gorman*, 155 Wn.2d at 212. Nowhere does this part of the *Gorman* opinion (or any part) support the Department’s claim the legislature (1) rejected a proposal to repeal RCW 51.12.100, or (2) even considered such a repeal. As the legislative history contains absolutely no reference to a proposal or rejected proposal to repeal RCW 51.12.100, the history continues to support Mrs. Long’s argument. *See* App. Br. at 14-19.

The Department argues the Legislative history from the 1988 enactment and 1993 re-enactment supports an intent to force claimants into federal compensation whenever possible. *See* Resp. Br. at 14-16. This argument is flawed because it reads too much into the cited history, while ignoring the Legislature’s understanding RCW 51.12.102 would not abrogate the policies embodied in the Department’s 1988 and 1993 reports to the Legislature. *See* App. Br. at 15-17, 22-24. All that the Department’s cited history means is the Legislature intended to provide benefits to claimants while jurisdictional disputes were being resolved. *Id.* The Department errs in its reasoning by misconstruing this history to create a false dichotomy that once jurisdiction is resolved the claimant either loses all benefits or has their federal claim allowed. Thus, the Department ignores a third possibility, which has always existed under the

IIA: if no federal claim is allowed, then a claimant has no rights under the LHWCA and is thus eligible for regular benefits under 51.32 RCW.

For the history to support the Department's interpretation would rewrite RCW 51.12.102 to say: "if a claimant with indicia of exposure under a LHWCA-covered employer is later found ineligible for LHWCA benefits, the claimant is also ineligible for IIA benefits." However, such language does not exist, and implying such would violate the entire remedial structure and intent of the Industrial Insurance Act. It has always been the intent of the Legislature for the IIA to provide "sure and certain relief" to injured workers. RCW 51.04.010. To that end, RCW 51.12.010 requires the IIA be liberally construed in favor of the worker, *see Harry v. Buse Timber & Sales, Inc.*, 166 Wash.2d 1, 12-13, 201 P.3d 1011 (2009), and RCW 51.12.102 requires payment of benefits while jurisdictional liability is being resolved. The result is a statutory regime structured to ensure that no injured worker is left without a remedy. For that reason, the Department's argument RCW 51.12.102 evinces an intent to deny benefits to workers (like the late Robert Long) who have no rights under any other law contradicts the remedial purpose of the IIA.

The Department also argues paying benefits to Mrs. Long would violate the intent of RCW 51.12.102 to prevent double recoveries. Resp. Br. at 16. However, the Department fails to identify what double recovery

would accrue to Mrs. Long by allowing her IIA claim. Indeed, no double recovery would occur because, as the Department concedes, she has no right to benefits under federal law. Without access to IIA benefits, Mrs. Long is without benefits to support herself due to her husband's early death from occupational disease.

**D. *Fankhauser* and the Last Injurious Exposure Rule Determine Both Coverage and Allocation of Responsibility**

The Department argues the Last Injurious Exposure Rule merely apportions liability among IIA-covered employers, but does not also serve to extend IIA coverage to injured workers with a history of both IIA-covered and non-covered exposure. *See* Resp. Br. at 17-23. As a subset of that argument, the Department claims *Fankhauser* narrowly held only that coverage could not be denied on the basis the last exposure in time occurred at employment not covered by the IIA. *Id.* at 20. However, the Department concedes the 1988 and 1993 reports demonstrate its use of the Last Injurious Exposure Rule to extend coverage in cases of multijurisdictional exposure. *See* Resp. Br. at 24. By the Department's own admission, the Last Injurious Exposure Rule does in fact also determine coverage.

Although the *Gorman* Court stated otherwise, *Gorman* 155 Wn.2d at 217, that statement is not persuasive. As already discussed, the *Gorman*

Court had not been fully briefed on either *Fankhauser* or the Last Injurious Exposure Rule. Indeed, if *Fankhauser* is as limited as the Department contends and not relevant to RCW 51.12.102, see Resp. Br. at 21, then why did the *Gorman* Court feel the need to discuss *Fankhauser* virtually *sua sponte*? In reality, the Department had for nearly 20 years used the Last Injurious Exposure Rule, including *Fankhauser*, to extend coverage to injured workers like Mr. Long; a fact well known by and acquiesced to by the Legislature, even in cases of multijurisdictional exposure. App. Br. at 11-20; Resp. Br. at 24. Only after *Gorman* did the Department abandon its decades-old application of the Last Injurious Exposure Rule.

**E. The Legislature Acquiesced to Long-Standing Department Policy and Board Precedent, but did not Acquiesce to *Gorman***

The Department erroneously characterizes Mrs. Long's argument as *mandating* the Court to follow the Department's 1988 and 1993 reports, and BIIA precedent. Resp. Br. at 24-26. Mrs. Long makes no such argument. The argument is that the Supreme Court *defers* to long-standing Department policy and legislative acquiescence to these reports and Board precedent (specifically *In re Robinson*), in recognition of RCW 51.12.102's purpose of ensuring injured workers have benefits in instances of multijurisdictional exposure. App. Br. at 17-19. Although not bound

by these sources of authority, the Court finds them highly persuasive. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wash. App. 853, 858, 86 P.3d 826 (2004) (The court “give[s] great weight to the agency’s interpretation of the law it administers.”); *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984) (The Legislature can be said to have acquiesced to Department interpretation when the Legislature subsequently amends the statute without overruling the Department’s interpretation).

Here, the Legislature was fully aware of the Department’s application of the Last Injurious Exposure Rule in a way favorable to Mrs. Long in 1988, when RCW 51.12.102 was first enacted. App. Br. at 18-19. It was again made aware of this interpretation five years later when it reenacted RCW 51.12.102. *Id.* Although all evidence strongly points toward acquiescence, the *Gorman* Court adopted an opposite interpretation. However, as the Appellant has already discussed at length, the *Gorman* Court was never fully briefed on the legislative history, nor the Department’s interpretation and the Legislature’s acquiescence.

As the Department has no authority for going against its pre-*Gorman* interpretation or for refuting the Legislature’s acquiescence to it, the Department instead argues the Legislature has since acquiesced to *Gorman*. Resp. Br. at 25-26 and Fn 4. This argument is frivolous. The

fact unrelated provisions of the Industrial Insurance Act have been amended since the Court decided *Gorman*, does not mean the Legislature acquiesced to the Court's opinion. First, RCW 51.12.102 has not been amended since 1993; thus, the Legislature has not had the opportunity to vacate *Gorman*. Second, there is no evidence the Legislature is even aware of *Gorman*; where on the other hand, the Legislature's own archived bill files from 1988 and 1993 prove its awareness of the Department's interpretation of RCW 51.12.102 and the Last Injurious Exposure Rule, which supports Mrs. Long's interpretation. In the face of demonstrative evidence the Legislature was *actually* aware of the Department's pre-*Gorman* interpretation, compared to no proof the Legislature is even aware of *Gorman*, the evidence strongly weighs in favor of Mrs. Long.

Furthermore, the authority cited by the Department in favor of Legislative acquiescence to *Gorman* is inapposite. *See* Resp. Br at 26, Fn. 4. In *Snoqualmie Valley*, the Legislature acquiesced to Court precedent by later amending the same statute without overturning the Court's prior interpretation. *Friends of Snoqualmie Valley v. King County Boundary Rev'w Bd.*, 118 Wn.2d 488, 495, 825 P.2d 300 (1992). Unlike *Snoqualmie Valley*, the Legislature has yet to amend RCW 51.12.102. Accordingly,

the Legislature's acquiescence to the 1988 and 1993 reports has not changed in the time since the Court's decision in *Gorman*.

**F. *Gorman* does not control this case because the corresponding portions of the Court's opinion are non-controlling, non-persuasive obiter dicta**

The Department tries to rebut the fact the cited portions of *Gorman*<sup>3</sup> are nothing more than obiter dicta by resorting to a circular argument: "The *Gorman* Court concluded that the case required it to decide whether the plaintiffs 'were covered by the WIIA.'" Resp. Br. at 12. This is the same as saying "The *Gorman* Court had to rule on RCW 51.12.102 and the last injurious exposure rule because it said it had to rule on those issues." However, the *Gorman* Court did not have to rule on those issues because (1) those issues were not properly before the Court and (2) the Court was not briefed on those issues. See App. Br. at 10-14.

Although the Department relies on circular reasoning, the *Gorman* Court did not when it attempted to justify the need to rule on RCW 51.12.102 and the Last Injurious Exposure Rule. The *Gorman* Court thought it had to rule on those issues because the case hinged on a CR 12(b)(6) motion (failure to state a claim upon which relief can be granted). *Gorman v. Garlock*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005). As explained in *Gorman*, when a case hinges on a 12(b)(6) motion, a court

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<sup>3</sup> The corresponding parts of *Gorman* are Washington Reporter pages 210-219, Pacific Reporter pages 318-322.

can dismiss the claim “only if it appears beyond doubt that the plaintiff can prove no set of [real or hypothetical facts], consistent with the complaint, which would entitle the plaintiff to relief.” *Gorman*, 155 Wn.2d at 214 (quoting *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)). In considering hypothetical facts, “the gravamen of a court’s inquiry is whether the plaintiff’s claim is legally sufficient. . . . If a plaintiff’s claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.” *Id.* at 215.

Mrs. Long agrees with the *Gorman* Court’s recitation of the standards for 12(b)(6) motions and the Court’s obligation to consider hypothetical facts. *Gorman* and *Bravo* dictate, however, that the focus of the inquiry into hypothetical facts is whether the claim is conceivably **legally sufficient**. As previously explained, the underlying complaint in *Gorman* was a lawsuit for intentional tort brought against a LHWCA-covered employer—not a workers’ compensation claim. *See* App. Br. at 10-14; *Gorman*, 155 Wn.2d at 203-204.

To bring a tort suit under Washington’s Industrial Insurance Act, the claim must be brought against the claimant’s employer. RCW 51.24.020. As used in the IIA, “employer” means a business “engaged in this state in any work covered by the provisions of **this title**.” RCW

51.08.070 (emphasis added). Because Todd and Lockheed were exclusively maritime employers subject to the exclusive provisions of the LHWCA and excluded from the Legislative jurisdiction of the IIA, they were not employers within the meaning of RCW 51.24.020. *See Gorman*, 125 Wn.2d at 206. Indeed, Gorman and Helton conceded this fact and did not attempt to refute it. *Id.* Because Gorman and Helton could not in fact satisfy the requisite element of bringing suit against an IIA-covered employer and because hypothetical facts would have required bringing suit against different parties (i.e. IIA-covered employers), the *Gorman* Court did not need to consider the hypothetical facts presented by Gorman and Helton. Even if hypothetical facts regarding the Last Injurious Exposure Rule and RCW 51.12.102 supported Gorman and Helton, the Court would still have affirmed the 12(b)(6) motion because the defendants were not proper parties under RCW 51.24.020—a facial error that the petitioners never contested. With such a glaring and uncontested facial infirmity in the complaint, the Court’s discussion of RCW 51.12.102 and the Last Injurious Exposure Rule was not essential for the resolution of the *Gorman* case.

As the Court need not have considered hypothetical facts, that portion of the opinion is squarely obiter dictum. When this Court is confronted with obiter dictum, it takes it under advisement, but does not

apply *stare decisis*: “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and **need not be followed**” *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003) (emphasis added). Accordingly, *stare decisis*<sup>4</sup> does not apply to obiter dictum like *Gorman*, but may still be persuasive. See e.g., *State ex rel. Lofgren v. Kramer*, 69 Wn.2d 219, 222, 417 P.2d 837 (1966) (relying not on the obiter dicta itself, but instead on its underlying reasoning for persuasive authority).

Although the dicta at issue in *Lofgren* were found to be persuasive, this was because the dicta were not actually obiter dicta, but rather judicial dicta. Judicial dictum is “[a]n opinion by a court on a question that is **directly involved, briefed, and argued by counsel**, and even passed on by the court, but that is not essential to the decision.” Black’s Law Dictionary (9th ed. 2009) (emphasis added).<sup>5</sup> In *Lofgren*, the dicta from the out of state cases had been prompted by sound briefing and argument, which in turn led to dicta that were well supported by authority. That is

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<sup>4</sup> The Department claims Mrs. Long does not “provide reasons to ignore the principle [of *stare decisis*].” Resp. Br. at 19. However, in its very next sentence, the Department lists a number of Mrs. Long’s reasons why *Gorman* is obiter dictum, not subject to *stare decisis*. *Id.* (citing App. Br. at 13).

<sup>5</sup> Perhaps the best example of Judicial Dictum is *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000) (hereinafter *ATU*). *ATU* had at least four different identifiable holdings. *ATU*, 142 Wn.2d at 191-192. However, these multiple holdings were not dismissed as gratuitous obiter dictum because each underlying issue in the four separate holdings was squarely at issue in the case and each was fully briefed and argued. *Wash. St. Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, FN2, 174 P.3d 1142 (2007).

where the *Gorman* dicta and the dicta found persuasive by *Lofgren* diverge: the *Gorman* dicta were not well supported, the issues were not directly involved or fully and adequately briefed, and the issues were not argued by counsel. *See* App. Br. at 10-14.

In cases such as *Gorman*, where the Court creates obiter dictum on an issue not squarely before it, the Court has in later cases acknowledged the error and decided the issue anew once it has been squarely presented. *State v. Boren*, 42 Wn.2d 155, 158-159, 253 P.2d 939 (1953) (“We must confess that we are in a large measure responsible for the confusion in that we have not always made plain and definite the distinction between these statutes.”); *Matter of Estate of Thompson*, 103 Wn.2d 292, 295, 692 P.2d 807 (1984) (“There is obiter language in earlier decisions which counsel . . . argues as suggesting that our holding herein should be otherwise than it is. The case at bench, however, is the first time this precise issue has been presented to this court.”). In line with *Boren* and *Thompson*, Mrs. Long requests the Court dismiss the obiter dictum in *Gorman* and decide the issue of RCW 51.12.102 and the Last Injurious Exposure Rule now, as the issue has been squarely raised and properly briefed.

### III. Conclusion

This case would have proceeded like *In re Robinson* and every other similar case over the past 20 years, but for the dicta in *Gorman*. The Department would have paid Mrs. Long the benefits due her under RCW 51.32.050, in accordance with *Fankhauser* and the Department's pre-*Gorman* policy, to which the Legislature acquiesced. Now that the issue overshadowed by obiter dictum in *Gorman* is squarely before the Court, fully briefed and ready to be argued, Mrs. Long requests the Court reconsider *Gorman* and grant relief in accordance with legislative history and long-standing Department policy.

DATED this 13 day of January, 2012.

THE LAW OFFICE OF WILLIAM D. HOCHBERG



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**CERTIFICATE OF MAILING**

*Robert Long, Dec'd, & Aileen Long v. Dep't of Labor & Indus.*  
Supreme Court No. 86358-0

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I certify that a copy of the document(s) attached hereto was mailed,  
to the parties referenced above this 13<sup>th</sup> day of January, 2012.

BY: *Kathleen J. Henman* *WSBA #3683*

Appellant's Reply Brief