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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ROBERT LONG, dec'd and AILEEN LONG, a single person,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This is a workers' compensation case under RCW 51 of Washington's Industrial Insurance Act (WIIA). Ms. Long contends she is entitled to benefits under the WIIA even though her claim also falls under the exclusive remedy provided through the Longshore Harbor Workers Compensation Act (LHWCA). As the Supreme Court recognized in *Gorman v. Garlock*, 155 Wn.2d 198, 118 P.3d 311 (2005), a worker is not entitled to benefits under the WIIA if the worker is also covered under the maritime laws of the United States. The *Gorman* opinion has already decided the question presented in this case, and Ms. Long presents no valid reasons for overruling this authority.

Nor is Ms. Long entitled to benefits under the limited exception to this rule that allows temporary benefits while a claim under the LHWCA is pending. RCW 51.12.102 directs the Department of Labor & Industries (Department) to provide industrial insurance benefits to a worker on a temporary basis if the worker has an asbestos-related illness and had some exposure to asbestos while working for WIIA-covered employers as well as

some exposure while working for maritime employers subject to the LHWCA.<sup>1</sup>

These temporary benefits are provided while a recovery under the LHWCA is pursued, and are terminated once a recovery under the LHWCA is made. The Department may terminate a worker's temporary benefits, even if no recovery is made under the LHWCA, if the worker fails to properly pursue the benefits from the LHWCA insurer. RCW 51.12.102(5).

Here, the Department issued an order that determined that Aileen Long, the widow of Robert Long, was not entitled to benefits. Mr. Long had exposure to asbestos while working for both maritime and non-maritime employers, and was, therefore, subject to the LHWCA. Therefore, at most, his widow could have qualified for temporary benefits under RCW 51.12.102.

However, neither Mr. Long, nor his widow, ever filed an LHWCA claim, and, moreover, Ms. Long forfeited her right to benefits under the LHWCA by accepting a third party settlement without having given notice to the LHWCA insurers. Since RCW 51.12.102 only supports an award of temporary and interim

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<sup>1</sup> RCW 51.12.100 and RCW 51.12.102 are set forth in full in Appendix A to this brief.

benefits while an LHWCA claim is being pursued, and since Ms. Long never filed an LHWCA claim and relinquished her right to receive a recovery under the LHWCA, she cannot properly receive even temporary benefits under the WIIA.

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

1. Under *Gorman* and RCW 51.12.100, did the Department correctly deny Ms. Long's claim for survivor benefits where Mr. Long's asbestos-related medical conditions were proximately caused by the injurious exposure to asbestos while working for employers covered under the LHWCA?
2. Did the Department properly determine that Ms. Long was not entitled benefits under RCW 51.12.100 for her husband's illness that was caused by his exposure to asbestos in the course of both maritime and non-maritime employment, even though his last injurious exposure occurred in the course of non-maritime employment in Washington?
3. Did the Department properly determine that Ms. Long was not entitled to temporary and interim benefits under RCW 51.12.102 because Ms. Long had forfeited her right to benefits under the LHWCA by making an improper third party settlement?

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

Mr. Long died of mesothelioma caused by asbestos exposure in August 2008. BR 41.<sup>2</sup> In February 2009, his widow

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<sup>2</sup> "BR" references the Certified Appeal Board Record.

filed a lawsuit for wrongful death and survivorship against a number of corporate defendants involved in the manufacture and sale of asbestos products in Grays Harbor County. BR 140-44. A month later, Ms. Long filed a claim for workers' compensation benefits under the WIIA. BR 40.

Mr. Long's exposure to asbestos occurred in part while working in maritime employment, and thus, Ms. Long could have filed for LHWCA benefits. BR 81. On April 9, 2009, in response to a Department letter dated April 2, 2009, a representative from Ms. Long's attorney's office wrote to the Department stating that Mr. Long did not file for federal maritime benefits as he was unaware of his right to do so. BR 145. Despite the Department's communication, no claim was filed for LHWCA benefits. BR 44. On February 24, 2010, Ms. Long's attorney informed the Department that Ms. Long had settled the private lawsuits. BR 146.

The Department issued an order on February 25, 2010, that rejected the WIIA claim under RCW 51.12.100 because asbestos exposure had occurred during maritime employment. BR 44. The order also denied temporary benefits under RCW 51.12.102 because temporary benefits are only payable when there is a claim

for benefits under the maritime laws of the United States and Ms. Long did not have a claim and had forfeited her right to those benefits. BR 44.

Ms. Long appealed the Department's rejection of her claim to the Board of Industrial Insurance Appeals (Board). The parties stipulated that Mr. Long suffered injurious exposure to asbestos while employed by some non-maritime employers subject to the WIIA, and some injurious exposure to asbestos while working for maritime employers covered under the LHWCA. BR 81-82.

The industrial appeals judges issued a proposed decision and order that affirmed the Department's order based on *Gorman*. BR 37-41. The three-member Board denied Ms. Long's petition for review and adopted the proposed decision as its own decision. BR 1.

Ms. Long appealed the Board's decision to the Grays Harbor Superior Court. The superior court granted summary judgment to the Department based on *Gorman* and based on the recent Court of Appeals decision *Olsen v. Department of Labor & Industries*, 161 Wn.App. 443, 250 P.3d 158, *review denied* 172 Wn.2d 1012 (2011).

#### IV. STANDARD OF REVIEW

Because this case was disposed of at the Board and superior court levels on motions for summary judgment, this Court reviews the trial court's decision to grant summary judgment to the Department de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Bennerstrom*, 120 Wn. App. at 858.

The issues in this case turn on the proper construction of RCW 51.12.100 and RCW 51.12.102. Statutory construction is a question of law, reviewed de novo. *See Bennerstrom*, 120 Wn. App. at 858. However, Department interpretations of the WIIA are entitled to deference, and the Court "give[s] great weight to the agency's interpretation of the law it administers." *Bennerstrom*, 120 Wn. App. at 858.

The provisions of the WIIA are "liberally construed." RCW 51.12.010. This rule of construction, however, does not provide for an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the legislature. *See Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427,

833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

## V. ARGUMENT

### A. As An LHWCA-Covered Worker, Mr. Long And His Beneficiary Are Excluded From The General Provisions Of The WIIA

1. When RCW 51.12.100 and RCW 51.12.102 are read in conjunction with each other, it is apparent that a worker who has a right or obligation for an injury or disease under the LHWCA cannot be fully covered by the WIIA

Although the WIIA generally provides the exclusive means for redress for injuries sustained on the job, the legislature has exempted from the WIIA, Washington workers covered by certain federal compensation statutes, including the LHWCA. *Olsen*, 161 Wn. App. at 449. Under RCW 51.12.100, a worker is not covered by the WIIA if “a right or obligation exists under the maritime laws.”

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.

RCW 51.12.100(1). Thus, a worker whose industrial injury or occupational disease is subject to the LHWCA may not have the claim covered under the WIIA. *Gorman*, 155 Wn.2d at 208.

Operating as a partial exception to RCW 51.12.100 is RCW 51.12.102, which provides for temporary benefits while a worker is pursuing a federal recovery. *Id.* at 201. RCW 51.12.102(1) provides that the Department shall furnish benefits to a worker who “may” have a claim under the maritime laws for an “asbestos-related disease” if there is evidence that there was at least some harmful exposure while working for non-maritime employers in Washington and provides that the Department “shall render a decision regarding the liable insurer,” and that the Department shall “continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under the title.” RCW 51.12.102(1).

RCW 51.12.102 provides that if a worker appears to have a claim under federal law for an asbestos related illness, and the worker also has some evidence of exposure to asbestos while working for a WIIA-covered employer, then the Department is directed to render a decision as to whether the worker’s claim is covered by the WIIA or by a federal compensation statute such as

the LHWCA. RCW 51.12.102(1). If the Department determines that the liable insurer is subject to the LHWCA (or similar federal statute), then the Department assists the worker in obtaining a recovery under the LHWCA (RCW 41.12.102(4)), and provides temporary WIAA benefits until a recovery is obtained. RCW 51.12.102(1).

However, if the Department determines that the liable insurer is subject to the LHWCA, but the worker fails to cooperate with the Department in pursuing a federal recovery, the Department may terminate the worker's temporary and interim benefits under RCW 51.12.102, even if no LHWCA recovery has been obtained. This is provided for in RCW 51.12.102(5):

(5) The provisions of subsection (1) of this section shall not apply if the worker or beneficiary refuses, for whatever reason, to assist the department in making a proper determination of coverage. If a worker or beneficiary refuses to cooperate with the department, self-insurer, or federal program insurer by failing to provide information that, in the opinion of the department, is relevant in determining the liable insurer, or if a worker refuses to submit to medical examination, or obstructs or fails to cooperate with the examination, or if the worker or beneficiary fails to cooperate with the department in pursuing benefits from the federal program insurer, the department shall reject the application for benefits . . . .

Under RCW 51.12.102(5), benefits are denied when a worker fails to cooperate in pursuing an LHWCA claim.

**2. Under *Gorman*, a worker whose injury or disease is covered by the LHWCA is not fully covered by the WIIA**

Ms. Long argues that she is entitled to benefits under RCW 51.12.102, claiming that RCW 51.12.102 “eliminated RCW 51.12.100’s bar against coverage for Washington workers covered under a maritime statute.” AB 6. The *Gorman* Court rejected this exact argument.

In *Gorman*, the Supreme Court considered whether two workers who worked in maritime employment were permitted by RCW 51.24.020 to sue their employer or were barred because they were covered by the LHWCA. *Gorman*, 155 Wn.2d at 204. The workers had argued that they were covered under RCW 51.12.102. *Id.* at 210. The Court held that by adopting RCW 51.12.102, the legislature did not abrogate RCW 51.12.100. *Id.* at 211. Rather, RCW 51.12.102 creates a partial exception to RCW 51.12.100, which allows for the payment of “temporary, interim” benefits to workers with asbestos-related illnesses. *Gorman*, 155 Wn.2d at 211.

Thus, under *Gorman*, while a worker whose occupational claim is subject to the LHWCA may receive benefits under RCW 51.12.102 while the LHWCA claim is being pursued, the worker's underlying illness is not otherwise covered by the WIIA. *Gorman*, 155 Wn.2d at 211-12. This is because allowing the claim under the WIIA outright would violate RCW 51.12.100, and because the benefits that are available to workers under RCW 51.12.102 are temporary and interim, in that they continue only so long as the remedy under the LHWCA is being pursued. *Id.* *Gorman* held that workers who have asbestos-related illnesses as a result of both maritime and non-maritime employment are subject to the provisions of the LHWCA and are not entitled to benefits under the WIIA, with the exception of the "temporary, interim" benefits available to them under RCW 51.12.102(1). *Id.*

**3. *Gorman* is controlling, and cannot be dismissed as dicta**

Ms. Long contends that *Gorman* should not apply here because it involved workers who had filed tort claims rather than industrial insurance claims. Thus, she argues, *Gorman's* discussion of RCW 51.12.102 is merely dicta because the Court did not have an industrial insurance claim before it. AB 10. While

it is true that the workers in *Gorman* filed tort claims, the Court in that case nevertheless was required to determine whether the WIIA applied to their claims because they filed their tort suits under RCW 51.24.020, a provision that would only apply to them if they were covered by the WIIA. *Gorman*, 155 Wn.2d at 204-205. Indeed, the workers contended that they were covered under the WIIA through RCW 51.12.102. *Id.* at 210. The *Gorman* Court concluded that the case required it to decide whether the plaintiffs “were covered by the WIIA and, if they were, whether the WIIA shields their claims from the preemptive effect of the exclusive liability provision of the LHWCA.” *Id.* at 204-205.

In order for the *Gorman* Court to determine whether the workers were “covered” by the WIIA, it was necessary for it to determine whether RCW 51.12.102 resulted in such coverage. *Gorman*, 155 Wn.2d at 210. The *Gorman* Court considered whether RCW 51.12.102 resulted in such coverage, concluded that it did not, and relied on that conclusion in disposing of the case. *Id.* at 210-13. Thus, the *Gorman* Court’s analysis of RCW 51.12.102 cannot be dismissed as dicta, because that analysis was essential to the Court’s resolution of the case. *See State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954)

(language is necessary for the decision is not dicta); *see also Olsen*, 161 Wn. App. at 450 (concluding that *Gorman* holdings regarding RCW 51.12.102 not dicta).

As determined by *Gorman*, the legislature intended only temporary and interim benefits under RCW 51.12.102 (*Gorman*, 155 Wn.2d at 211), which are provided only when an LHWCA claim is pursued and not when it is forfeited as provided by RCW 51.12.102(5).

**4. *Gorman* may not be overturned based on the notion that the decision failed to properly analyze the legislative history under RCW 51.12.102**

Legislative history of the relevant statutes demonstrates that the legislature intended only temporary and interim benefits in the circumstances present here. Ms. Long appears to contend that the Department's interpretation of RCW 51.12.102, which is based on the *Gorman* Court's determination that RCW 51.12.102 authorizes the payment of only temporary and interim benefits, should not be viewed as binding by this Court because that ruling is contrary to the legislative history of RCW 51.12.102. *See* AB 15.

However, the *Gorman* decision is consistent with the legislative history behind RCW 51.12.102. As *Gorman* explained, the history of the bill relating to that statute shows that the legislature considered, but rejected, repealing RCW 51.12.100 at the same time that it enacted RCW 51.12.102. *Gorman*, 155 Wn.2d at 211-13. As the *Gorman* Court noted, if the legislature had intended for claimants covered by RCW 51.12.102 to be entitled to full WIIA benefits, it could be reasonably expected to have repealed RCW 51.12.100, since RCW 51.12.100 states that a worker with a “right or obligation” under a federal program such as the LHWCA is not entitled to benefits under the WIIA. *Id.*

Ms. Long incorrectly argues that “[n]owhere in the legislative history of this statute, or the Department’s own historical pre-*Gorman* policies, did either body express intent to force workers into Federal compensation whenever possible.” AB 15. In fact, the legislature has manifested its intent for workers to pursue federal claims when available – and not state claims – in both statutory language and legislative history. First, RCW 51.12.100 clearly provides that claims eligible for both LHWCA and WIIA benefits are not covered by the WIIA. Second, the legislative history of the 1988 bill enacting RCW 51.12.102 shows

the legislature's intent that the benefits be temporary in nature. The House's "Floor Synopsis" for the 1988 bill specifically states, in the first sentence of the portion of the report called, "What the Bill Does," that "[t]he Department of Labor and Industries is directed to pay *provisional* benefits to claimants in asbestos-related occupational disease cases when there is a dispute as to liability for the claim." Floor Synopsis, Substitute House Bill 1592 (1988) (emphasis added) (Appendix B.) This demonstrates that the House understood that benefits would only be paid on a provisional basis, and only while there was a dispute as to liability for the claim. Here, there was no "dispute" as to the proper coverage of Mr. Long's occupational illness at the time that the WIIA claim was filed, since Mr. Long's illness was covered by the LHWCA but Ms. Long forfeited the right to take under that statute by failing to file an LHWCA claim and by entering into an improper third party settlement.

Similarly, when the legislature amended the statute in 1993, the "Floor Notes" for the 1993 amendment states in the section of the report titled, "What this bill does" that the bill "provides *interim* industrial insurance benefits until [the federal insurer's] liability is established." Floor Notes, EHB 1353 (1993) (emphasis

added) (Appendix C). Thus, the legislature understood that the benefits that RCW 51.12.102 provides would only be allowed for a limited time, and the legislature did not intend for that statute to make workers with a right or obligation under the LHWCA entitled to WIIA benefits on a permanent basis.

Notwithstanding the legislative history that indicates the legislature's intent that RCW 51.12.102 provide only temporary benefits to workers who are pursuing an LHWCA claim, Ms. Long also argues that "[p]ublic policy requires the Department to pay benefits to [Ms.] Long so [e]mployers cannot shift the costs of occupational diseases onto taxpayers." AB 22. She argues that it should be the workers and employers who pay into the worker's compensation system who should bear the cost of the work-related illness of asbestos. *See* AB 23-24. Ms. Long essentially asks this Court to substitute its judgment as to what is good public policy for the clearly expressed legislative choice to encourage workers to apply for federal maritime benefits rather than WIIA benefits, and to avoid double recoveries. *See Gorman*, 155 Wn.2d at 207-208. The legislature has provided that benefits under RCW 51.12.102 are temporary and interim benefits only. This Court should not

rewrite RCW 51.12.100 and .102 to circumvent this statutory scheme.

**B. The Last Injurious Exposure Rule Does Not Provide For Coverage Under The WIIA When A Worker Has A Right Or Obligation Under The LHWCA**

Ms. Long also argues that the fact that Mr. Long's last injurious exposure occurred while working for a non-maritime employer requires this Court to conclude that her husband's occupational disease claim is covered by the WIIA. AB 9. Like Ms. Long's argument that her claim is covered by the WIIA despite the exclusionary language in RCW 51.12.100, the *Gorman* Court has already rejected this identical argument. 155 Wn.2d at 216-18. Ms. Long provides no argument for this Court to abandon its prior ruling. The Court should apply its *Gorman* holding and reject this argument.

Under the last injurious exposure rule, the last insurer covering the risk during the most recent exposure contributing to the disability is liable for the entire amount of the workers' compensation award. *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 310, 849 P.2d 1209 (1993); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 130, 814 P.2d 629 (1991); WAC 296-14-350(1).

The *Gorman* Court determined that the last injurious exposure rule does not make a worker covered by the WIIA even if the worker's "last" exposure to asbestos occurred while working for a non-maritime employer in Washington, if the worker also had some harmful exposure to asbestos in the course of maritime employment. *Gorman*, 155 Wn.2d at 216-19. *Gorman* explained that the last injurious exposure rule is used to allocate responsibility for a claim that is covered by the WIIA, but that the rule does not determine *whether* a claim is subject to the WIIA: "The rule is addressed to the question of which WIIA insurer is responsible for providing benefits to a WIIA-covered worker. It does not address whether an injured worker is covered by the WIIA." *Gorman*, 155 Wn.2d at 217. The exclusionary language of RCW 51.12.100 controls: "the last injurious exposure rule cannot overcome the exclusionary language of section 100." *Id.*

The holding that RCW 51.12.100 controls over the last injurious exposure rule was not dicta as Ms. Long contends at AB 10. The workers in *Gorman* argued that they were covered by the WIIA under the last injurious exposure rule and the *Gorman* Court could not decide whether the workers were covered by the WIIA without deciding whether the last injurious exposure rule

made them so covered. *See Gorman*, 155 Wn.2d at 216-19. An issue which the Supreme Court had to determine—and did determine—in the course of disposing of a case is part of its holding. *See, e.g., State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992).

Under the principle of stare decisis, *Gorman* should be followed. Under stare decisis, this Court will not overturn a prior holding unless it is shown that it is incorrect or harmful. *Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999). No such showing is made here.

Although Ms. Long does not address the principle of stare decisis nor provide reasons to ignore the principle, she nevertheless argues that the Court should not follow *Gorman*. *See* AB 12-13. In asking the Court to ignore *Gorman* she argues that, in that case the Supreme Court departed from its prior ruling regarding the last injurious exposure rule in *Fankhauser*, that it did not fully consider *Fankhauser* in rendering its decision, and that it ignored the doctrine of stare decisis when it overruled *Fankhauser sub silentio*. AB 13.

Ms. Long has failed to demonstrate that there is any conflict between *Gorman* and *Fankhauser*. The issue the Supreme

Court decided in *Fankhauser* was whether a WIIA claim may be denied based on the fact that a worker's last injurious exposure occurred during self-employment. *Fankhauser*, 121 Wn.2d at 309. The *Fankhauser* Court did not discuss, nor decide, whether a worker who has a right or obligation under the LHWCA is precluded from being covered by the WIIA. In both of the consolidated cases that were at issue in *Fankhauser*, the workers had harmful exposure to asbestos in the course of employment that was covered by the WIIA, and then had a much longer, subsequent, period of self-employment, which also resulted in additional exposure to asbestos. *Fankhauser*, 121 Wn.2d at 306-308.

Under RCW 51.12.020(5), self-employed persons may elect to be covered by the WIIA, but their coverage is not mandatory, and they are only covered by the WIIA if they pay premiums to the Department. *Fankhauser*, 121 Wn.2d at 309-10. The workers in *Fankhauser* did not elect WIIA coverage during their self-employment. *Id.* The *Fankhauser* Court concluded that the claims were covered by the WIIA even though their last injurious exposure occurred while working on a self-employed

basis, even though they did not elect WIIA coverage during that period of exposure. *Id.* at 311-15.

Thus, the issue that *Fankhauser* decided is that an asbestos claim cannot be rejected based on the last injurious exposure rule even if a claimant's "last" injurious exposure to asbestos occurred while the claimant was self-employed and had not elected WIIA coverage pursuant to RCW 51.12.020. *Id.* at 315.

*Fankhauser* did not address whether RCW 51.12.100 would prevent an asbestos-related disease from being covered by the WIIA if the claimant had a "right or obligation" for that disease under the LHWCA, nor did it suggest that the last injurious exposure rule can be used to make a claim subject to the WIIA when the plain language of RCW 51.12.100 precludes such a determination. Indeed, the *Fankhauser* opinion does not contain any discussion of RCW 51.12.100, nor did it discuss RCW 51.12.102, let alone purport to hold that a worker who had a right or obligation under the LHWCA would also be entitled to receive WIIA benefits for the same occupational disease without any limitation. Because the *Fankhauser* Court did not consider whether a worker who is entitled to federal benefits under the LHWCA can also be entitled to anything other than provisional

benefits under the WIIA, and because *Gorman* did not involve workers who were exposed to asbestos during self-employment, there is no conflict between *Fankhauser* and *Gorman*.

Because Mr. Long developed an asbestos related illness due to a combination of maritime employment and non-maritime employment, rather than a combination of self-employment and WIIA-covered employment, this case is governed by *Gorman* rather than *Fankhauser*. When the *Gorman* Court held that RCW 51.12.100 prevents a claimant who has a “right or obligation” under LHWCA from being covered by the WIIA, regardless of where the claimant’s “last” injurious exposure occurred, *Gorman*, 155 Wn.2d at 219, it did not contradict its prior holding in *Fankhauser*.

Ms. Long also claims that the *Gorman* Court was not adequately briefed on the last injurious exposure rule in general nor on the *Fankhauser* case in particular, and appears to contend that this somehow makes the *Gorman* Court’s resolution of the last injurious exposure rule mere dicta. *See* AB 12. However, no legal authority supports Ms. Long’s apparent contention that the thoroughness of the briefing provided to the Supreme Court on a given issue determines whether the Court’s resolution of that issue

was part of its holding or was merely dicta. Rather, an issue which the Supreme Court had to determine, and did determine, in the course of disposing of a case is part of its holding. *See Potter*, 68 Wn. App. at 150.

Also, the *Gorman* Court did not overrule *Fankhauser sub silentio* as Ms. Long contends at AB 13. The last injurious exposure rule remains the law of Washington; however, *Gorman* expressly clarified that it does not apply when a worker is subject to RCW 51.12.100.<sup>3</sup>

To further bolster her argument that the last injurious exposure rule makes her husband's claim subject to the WIIA—and that *Gorman's* holding to the contrary should be disregarded—Ms. Long relies on the Department's statements regarding its understanding of the last injurious exposure rule in the reports it submitted to the legislature in 1987 and 1993. *See* AB 15. Ms. Long essentially argues that the Department should ignore controlling authority issued by the Washington Supreme Court because of statements the Department made prior to the controlling

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<sup>3</sup> Similarly, Ms. Long's argument that the Department's last injurious exposure rule, WAC 296-14-350(1), requires a finding that her claim is covered by the WIIA is misplaced. As the *Gorman* Court held, the last injurious exposure rule can determine which WIIA employer is liable, but not whether a claim is covered under the WIIA in the first place

authority. The Department is unaware of any legal authority supporting such a notion, and Ms. Long cites none.

While it is true that the Department indicated in its 1987 and 1993 reports that it uses the last injurious exposure rule to determine whether a claimant who has had both maritime and non-maritime exposure is entitled to benefits under the LHWCA, the Department was simply reporting its interpretation of the law at those times. See Dep't of Labor & Indus., *Asbestos-Related Disease: A Report to the Commerce and Labor Committee*, Dep't of Labor and Indus., p. 4 (1993) (attached to Brief of Appellant as Appendix A); Dep't of Labor & Indus., *Asbestos Related Disease: Report of House Commerce and Labor Committee*, p. 2 (1987). BR 92. The *Gorman* Court was not required to adopt the view of the law that the Department expressed in those legislative reports, and it did not, in fact, do so. See *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001) (noting that the Court will not defer to Department's interpretation of statute if it disagrees with the Department's interpretation of it).

Ms. Long appears to contend that the Department is somehow obligated to continue to adhere to the position it took in reports that were submitted to the legislature in 1987 and 1993,

even though the Supreme Court reached a different conclusion regarding the proper interpretation of RCW 51.12.100 and .102 in *Gorman*. Ms. Long offers neither any legal authority, nor any public policy basis, that supports the idea that the Department should disregard an opinion of the Supreme Court simply because the Department had previously expressed a different understanding of the law.

Finally, Ms. Long relies on an opinion issued by the Board of Industrial Insurance Appeals before the Washington Supreme Court opinion in *Gorman*. See AB at 18. (citing *In re John Robinson*, BIIA Dckt. 91 0741 (1992)). The Supreme Court's opinions trump those of all lower courts, and its decisions unquestionably trump the decisions of the Board. See *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Furthermore, the Board's denial of Ms. Long's petition for review is a tacit recognition by the Board that *Gorman* is controlling and requires affirmation of the Department's decision in this case.

Ms. Long also argues that the legislature "silently acquiesced" to the Board's analysis in the *Robinson* decision, by not amending the statute in 1992. AB 19. But the guide to statutory construction of "legislative acquiescence," if applicable

in this case, supports the Department rather than Ms. Long. The *Gorman* decision was published in 2006. The legislature has not amended RCW 51.12.100 or RCW 51.12.102 following the publication of the *Gorman* decision.<sup>4</sup> If the legislature believed that the Board's interpretation of RCW 51.12.102 in *Robinson* was correct, and that the Supreme Court's interpretation of RCW 51.12.100 and RCW 51.12.102 in *Gorman* was incorrect, the legislature presumably would have amended the statute following the issuance of that decision in order to legislatively overturn it. Not having done so, it may be reasonably inferred that the legislature has acquiesced to the Supreme Court, not the Board's, interpretation of RCW 51.12.102. See *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488 (1992); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999).

**C. The Department Properly Found Ms. Long Ineligible For "Temporary" and "Interim" Benefits Under RCW 51.12.102, Because Ms. Long Forfeited Her Right To A Recovery**

**1. Benefits are available under RCW 51.12.102 on a temporary basis only**

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<sup>4</sup> Of particular significance, the legislature did not amend either of those statutes in 2011, which was a year in which the Industrial Insurance Act was subject to a significant overhaul. Laws of 2011 c 6.

Ms. Long argues that she is entitled to at least temporary benefits under RCW 51.12.102 because Mr. Long “show[ed] some asbestos exposure while working for a [WIIA]-covered employer.” AB 8. She asserts that RCW 51.12.102 requires payment of benefits “until (1) a Longshore claim is allowed for benefits and (2) the Longshore employer initiates payments.” *Id.* Since no LHWCA recovery has been made, she contends that the “temporary” benefits should have been provided, and they must continue to be provided until an LHWCA recovery has been made.

She suggests that even though it is apparent that she will never actually receive an LHWCA-recovery (as a result of settling a tort claim against an asbestos manufacturer without giving notice to Mr. Long’s LHWCA-covered employers), the Department is still required, under the literal language of RCW 51.12.102, to provide her with “temporary” WIIA benefits until she receives a recovery under the LHWCA. *See* AB 21. In essence, she appears to contend that she is entitled to “temporary” benefits on what is effectively a permanent basis, as a result of the fact that she forfeited the right to make a recovery under the LHWCA by

accepting an improper third party settlement. This Court should reject this hypertechnical argument.

The clear legislative intent behind RCW 51.12.102 was to ensure that workers be provided with WIIA benefits on a temporary basis while a claim for benefits under the LHWCA is pending. *See Gorman*, 155 Wn.2d at 211-12; Floor Synopsis, Substitute House Bill 1592 (1988) (Appendix B); Floor Notes, EHB 1353 (1993) (Appendix C). Here, no LHWCA claim is pending (since one was never filed), and no LHWCA-covered insurer will ever initiate payments to Ms. Long (since she forfeited her ability to receive benefits from the liable insurer). BR 146; *see Gorman*, 155 Wn.2d at 214-15.

As the *Gorman* Court held, the benefits available to workers under RCW 51.12.102(1) are temporary and interim benefits. *Gorman*, 155 Wn.2d at 211. Where a worker or the worker's beneficiary has never filed a claim for benefits under the LHWCA, and, moreover, has forfeited the ability to ever receive benefits under such a claim, it would not further the objectives of RCW 51.12.102 to allow the worker to receive temporary and interim industrial insurance benefits.

If this Court were to order the Department to provide Ms. Long with benefits under RCW 51.12.102(1) until she receives a “recovery” under federal law, the Court would effectively be ordering the Department to provide Ms. Long with industrial insurance benefits in perpetuity. Such a result would be contrary to the statutory language and clearly expressed intent of the legislature in adopting RCW 51.12.102, which is to allow workers with LHWCA-covered claims to receive WIIA benefits only while their LHWCA claims are pending. *See Gorman*, 155 Wn.2d at 211-12.

It is well-settled that a literal application of a statute will be avoided if applying it literally would lead to strained or unrealistic results that could not have been intended by the legislature. *State v. Elgin*, 118 Wn.2d 551, 825 P.2d 314 (1992); *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Here, the legislature’s intent to provide temporary benefits would be thwarted if Ms. Long receives benefits in perpetuity under RCW 51.12.102(1) as a result of having entered into an improper settlement that abrogated her rights under the LHWCA.

Ms. Long argues that the *Gorman* and *Olsen* cases show that the Department erred by failing to provide her with temporary

and interim benefits until she actually receives a recovery under the LHWCA. *See* AB 20-21. To the contrary, neither case shows that the Department is required to pay temporary benefits under the circumstances present in this case.

Unlike the workers in *Gorman* and *Olsen*, Ms. Long has never filed an LHWCA claim, and has, in fact, forfeited the right to receive a recovery under that act by entering into an improper third party settlement. In the *Olsen* case, an LHWCA claim (as well as a WIIA claim) had been filed, and there was no evidence that Ms. Olsen had compromised her LHWCA claim by entering into an improper settlement. *Olsen*, 161 Wn. App at 447. Thus, the *Olsen* court had no occasion to consider, and did not decide, whether a worker or beneficiary who fails to file an LHWCA claim and who has compromised his or her ability to make a recovery under that act would still be eligible for temporary and interim benefits under RCW 51.12.102.

In *Gorman*, similarly, the Court did not decide whether a worker who had failed to file an LHWCA claim and who had compromised his or her ability to make an LHWCA recovery would be entitled to temporary and interim benefits. The workers in *Gorman* argued that they may have, “hypothetically,” lost the

ability to receive an LHWCA recovery, and they argued that this made their underlying disease claims covered by the WIIA instead of the LHWCA. *Gorman*, 155 Wn.2d at 213. The *Gorman* Court rejected this argument, and concluded that even if the workers had forfeited their claim under the LHWCA, the underlying claim would still be subject to the LHWCA, and thus, the WIIA did not cover the claim. *Id.* at 216. The *Gorman* Court did not, however, hold that the Department would have to pay the worker temporary, interim benefits if that “hypothetical” fact were true. The Court simply held that the forfeiture of LHWCA benefits did not make the underlying disease subject to the WIIA. *Id.*

Furthermore, the general thrust of *Gorman* contradicts Ms. Long’s theory that a worker will become entitled to WIIA benefits on an essentially permanent basis, where the worker has compromised his or her ability to receive an LHWCA recovery. The *Gorman* Court concluded that the legislature intended for the benefits under RCW 51.12.102(1) to be “temporary” and “interim.” *Gorman*, 155 Wn.2d at 211, 217, 219. If a worker is entitled to receive benefits under RCW 51.12.102(1) until a recovery under the LHWCA is made even after the worker has forfeited his or her ability to receive an LHWCA recovery, the

benefits under RCW 51.12.102(1) are, as a practical matter, permanent benefits, because an LHWCA recovery will never occur. Therefore, it would be anomalous to hold that the *Gorman* opinion requires this Court to find that Ms. Long is entitled to “temporary” benefits under RCW 51.12.102(1) even after she compromised her ability to ever receive an LHWCA recovery.

The Department properly denied benefits to Ms. Long under RCW 51.12.102 because that statute authorizes workers benefits on a temporary basis only, while a claim for benefits under the LHWCA is pending. *See Gorman*, 155 Wn.2d at 211-12. Here no LHWCA-covered insurer will ever initiate payments to Ms. Long because she forfeited her ability to receive benefits from the liable insurer. BR 146; *see Gorman*, 155 Wn.2d at 214-15. A careful reading of RCW 51.12.100 and .102 shows that the legislature excluded workers from WIIA coverage if the workers had a right or obligation under the LHWCA for a given injury or disease, except to the extent necessary to provide benefits while a worker is pursuing LHWCA or similar federal benefits. *See Gorman*, 155 Wn.2d at 212.

The *Gorman* Court held that the benefits available to workers under RCW 51.12.102(1) are temporary and interim

benefits. *Gorman*, 155 Wn.2d at 211. Where a worker or the worker's beneficiary has never filed a claim for benefits under the LHWCA, and, moreover, has forfeited the ability to ever receive benefits under such a claim, it would not further the objectives of RCW 51.12.102 to allow the worker to receive temporary and interim industrial insurance benefits.

If this Court were to order the Department to provide Ms. Long with benefits under RCW 51.12.102(1) until she receives a "recovery" under federal law, the Court would effectively be ordering the Department to provide Ms. Long with industrial insurance benefits in perpetuity. The benefits would be "temporary" in name only, as a federal recovery would never actually be made. Such a result would be contrary to the statutory language and clearly expressed intent of the legislature in adopting RCW 51.12.102, which is to allow workers with LHWCA-covered claims to receive WIIA benefits only while their LHWCA claims are pending. *See Gorman*, 155 Wn.2d at 211-12.

**2. Under RCW 51.12.102(5), Ms. Long is not entitled to temporary benefits because she forfeited her claim to LHWCA benefits**

Even assuming that there is merit to the hypertechnical argument that Ms. Long should have been provided with

“temporary” benefits under RCW 51.12.102(1), the Department’s denial of “temporary” benefits is supported by RCW 51.12.102(5). RCW 51.12.102(5) provides that the Department may reject a worker’s claim for temporary benefits if the worker fails to cooperate in pursuing a remedy from the appropriate federal insurer.

Here, Ms. Long never filed an LHWCA claim. Moreover, she entered into a third party settlement that resulted in a forfeiture of the right to receive any recovery under the LHWCA. BR 146; *see Gorman*, 155 Wn.2d at 213-15 (concluding that a worker who settles asbestos claim with third party, without securing approval from LHWCA-employer, forfeits LHWCA benefits). It is hard to conceive of how a worker or beneficiary could do more to undermine the Department’s ability to pursue a federal remedy on a worker’s behalf than committing an action which abrogates the worker’s right to receive any recovery under the federal statute. Since Ms. Long forfeited her right to receive a recovery under the LHWCA before she filed the WIIA claim, the Department properly found her ineligible for even temporary benefits under RCW 51.12.102, as she failed to diligently pursue the recovery she could have otherwise received under the LHWCA.

**3. Ms. Long is not entitled to benefits because of alleged delay in the claims administration process**

Ms. Long also argues that the Department provided her with inadequate assistance in pursuing benefits under the LHWCA. AB 21. She appears to contend that the Department's failure to provide her with assistance somehow caused her to be entitled to receive benefits under the WIIA even if Mr. Long's underlying occupational disease claim would have otherwise been subject to the LHWCA. *See* AB 21.

While the Department does not concede that it failed to follow its duties under RCW 51.12.102, even if it is assumed that the Department should have provided greater assistance it would not follow that the failure to provide such assistance means that Mr. Long's occupational disease should be covered by the WIIA.<sup>5</sup> Indeed, Ms. Long cites no authority that supports her apparent contention that administrative delay on the Department's part in assisting a worker in filing an LHWCA claim can somehow cause

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<sup>5</sup> The record is not clear as to what action the Department took, however, the Department wrote to Ms. Long less than a month after the WIIA claim was filed to discuss LHWCA benefits. BR 145. Ms. Long was thus provided notice that benefits may be available under that act, yet, apparently, neither she nor any attorney representing her took any action to obtain benefits under the LHWCA.

the occupational disease claim itself to be covered by the WIIA rather than the LHWCA. *See* AB 21-22.

Even assuming the Department erred by not providing her with temporary benefits while it was rendering a decision regarding the liable insurer, this would not make her husband's underlying occupational illness covered by the WIIA. It would simply show an error in not paying her temporary benefits while that decision was pending.<sup>6</sup>

## VI. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the Superior Court's July 18, 2011 decision to grant summary judgment to the Department.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

ROBERT M. MCKENNA  
Attorney General



SARAH KORTOKRAX  
Assistant Attorney General  
WSBA #38392

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<sup>6</sup> If the Court concludes that Ms. Long should have received temporary benefits, then the Department asks, in the alternative, that Ms. Long only be granted benefits from March 16, 2009, the date Ms. Long filed her claim, through February 15, 2010, the date the Department determined that the liable insurer was the LHWCA and Ms. Long had forfeited her claim under that act.

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

ROBERT LONG, DEC'D and AILEEN  
LONG, a single person,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR AND INDUSTRIES,

Respondent.

DECLARATION OF  
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the 14th day of December, 2011, I mailed the Department's Brief of Respondent and this Declaration of Mailing upon all parties of record in this proceeding by mailing copies thereof, properly addressed with postage pre-paid to each party or their attorney or authorized representative listed below.

Amie Peters  
William Hochberg  
Law Office of William D. Hochberg  
PO Box 1357  
Edmonds, WA 98020-3109

DATED this 14<sup>th</sup> December, 2011.

  
JUDITH SEBASTIONELLI  
Legal Assistant 3

RCW 51.12.100

Maritime occupations — Segregation of payrolls — Common enterprise — Geoduck harvesting.

(1) 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.

(2) If an accurate segregation of payrolls of workers for whom such a right or obligation exists under the maritime laws cannot be made by the employer, the director is hereby authorized and directed to fix from time to time a basis for the approximate segregation of the payrolls of employees to cover the part of their work for which no right or obligation exists under the maritime laws for injuries or death occurring in such work, and the employer, if not a self-insurer, shall pay premiums on that basis for the time such workers are engaged in their work.

(3) Where two or more employers are simultaneously engaged in a common enterprise at one and the same site or place in maritime occupations under circumstances in which no right or obligation exists under the maritime laws for personal injuries or death of such workers, such site or place shall be deemed for the purposes of this title to be the common plant of such employers.

(4) In the event payments are made both under this title and under the maritime laws or federal employees' compensation act, such benefits paid under this title shall be repaid by the worker or beneficiary. For any claims made under the Jones Act, the employer is deemed a third party, and the injured worker's cause of action is subject to RCW 51.24.030 through 51.24.120.

(5) Commercial divers harvesting geoduck clams under an agreement made pursuant to RCW 79.135.210 and the employers of such divers shall be subject to the provisions of this title whether or not such work is performed from a vessel.

[2008 c 70 § 1; 2007 c 324 § 1; 1991 c 88 § 3; 1988 c 271 § 2; 1977 ex.s. c 350 § 21; 1975 1st ex.s. c 224 § 3; 1972 ex.s. c 43 § 11; 1961 c 23 § 51.12.100. Prior: 1931 c 79 § 1; 1925 ex.s. c 111 § 1; RRS § 7693a.]

Notes:

**Effective date -- 2008 c 70:** "This act takes effect January 1, 2009." [2008 c 70 § 2.]

**Effective date -- Applicability -- 1988 c 271 §§ 1-4:** See note following RCW 51.12.102.

**Effective date -- 1975 1st ex.s. c 224:** See note following RCW 51.04.110.

Ferry system employees in extrahazardous employment: RCW 47.64.070.

## RCW 51.12.102

## Maritime workers — Asbestos-related disease.

(1) 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.

(2) The benefits authorized under subsection (1) of this section shall be paid from the medical aid fund, with the self-insurers and the state fund each paying a pro rata share, based on number of worker hours, of the costs necessary to fund the payments. For the purposes of this subsection only, the employees of self-insured employers shall pay an amount equal to one-half of the share charged to the self-insured employer.

(3) If the department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a self-insurer or the state fund, then the self-insurer or state fund shall reimburse the medical aid fund for all benefits paid and costs incurred by the fund.

(4) If the department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a federal program other than the federal social security, old age survivors, and disability insurance act, 42 U.S.C. or an insurer under the maritime laws of the United States:

(a) The department shall pursue the federal program insurer on behalf of the worker or beneficiary to recover from the federal program insurer the benefits due the worker or beneficiary and on its own behalf to recover the benefits previously paid to the worker or beneficiary and costs incurred;

(b) For the purpose of pursuing recovery under this subsection, the department shall be subrogated to all of the rights of the worker or beneficiary receiving compensation under subsection (1) of this section; and

(c) The department shall not pursue the worker or beneficiary for the recovery of benefits paid under subsection (1) of this section unless the worker or beneficiary receives recovery from the federal program insurer, in addition to receiving benefits authorized under this section. The director may exercise his or her discretion to waive, in whole or in part, the recovery of any such benefits where the recovery would be against equity and good conscience.

(d) Actions pursued against federal program insurers determined by the department to be liable for benefits under this section may be prosecuted by special assistant attorneys general. The attorney general shall select special assistant attorneys general from a list compiled by the department and the Washington state bar association. The attorney general, in conjunction with the department and the Washington state bar association, shall adopt rules and regulations outlining the criteria and the procedure by which private attorneys may have their names placed on the list of attorneys available for appointment as special assistant attorneys general to litigate actions under this subsection. Attorneys' fees and costs shall be paid in conformity with applicable federal and state law. Any legal costs remaining as an obligation of the department shall be paid from the medical aid fund.

(5) The provisions of subsection (1) of this section shall not apply if the worker or beneficiary refuses, for whatever reason, to assist the department in making a proper determination of coverage. If a worker or beneficiary refuses to cooperate with the department, self-insurer, or federal program insurer by failing to provide information that, in the opinion of the department, is relevant in determining the liable insurer, or if a worker refuses to submit to medical examination, or obstructs or fails to cooperate with the examination, or if the worker or beneficiary fails to cooperate with the department in pursuing benefits from the federal program insurer, the department shall reject the application for benefits. No information obtained under this section is subject to release by subpoena or other legal process.

(6) The amount of any third party recovery by the worker or beneficiary shall be subject to a lien by the department to the full extent that the medical aid fund has not been otherwise reimbursed by another insurer. Reimbursement shall be made immediately to the medical aid fund upon recovery from the third party suit. If the department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a federal program insurer, the department shall not participate in the costs or attorneys' fees incurred in bringing the third party suit.

[1993 c 168 § 1; 1988 c 271 § 1.]

## Notes:

**Applicability -- 1993 c 168:** "This act applies to all claims without regard to the date of injury or date of filing of the claim." [1993 c 168 § 2.]

**Effective date -- 1993 c 168:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July

1, 1993." [1993 c 168 § 3.]

**Report to legislature -- 1988 c 271 § 1:** "The department of labor and industries shall conduct a study of the program established by RCW 51.12.102. The department's study shall include the use of benefits under the program and the cost of the program. The department shall report the results of the study to the economic development and labor committee of the senate and the commerce and labor committee of the house of representatives, or the appropriate successor committees, at the start of the 1993 regular legislative session." [1988 c 271 § 4.]

**Effective date -- Applicability -- 1988 c 271 §§ 1-4:** "Sections 1 through 4 of this act shall take effect July 1, 1988, and shall apply to all claims filed on or after that date or pending a final determination on that date." [1988 c 271 § 5.]

STATE OF WASHINGTON  
HOUSE OF REPRESENTATIVES

RECEIPT FOR BILL PACKETS

Date: 1/21/88

RECEIVED FROM: H/CDL

Bill Packet For:

\_\_\_\_ HB 1592  
S HB 1592  
\_\_\_\_ HB \_\_\_\_\_  
\_\_\_\_ HB \_\_\_\_\_

Bill Packet For:

\_\_\_\_ SB \_\_\_\_\_  
\_\_\_\_ SB \_\_\_\_\_  
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\_\_\_\_ SB \_\_\_\_\_

By 

FLOOR SYNOPSIS  
SUBSTITUTE HOUSE BILL 1592

A. WHAT THE BILL DOES:

THE DEPARTMENT OF LABOR AND INDUSTRIES IS DIRECTED TO PAY PROVISIONAL BENEFITS TO CLAIMANTS IN ASBESTOS-RELATED OCCUPATIONAL DISEASE CASES WHEN THERE IS A DISPUTE AS TO LIABILITY FOR THE CLAIM. THE DEPARTMENT IS THEN REQUIRED TO DETERMINE WHETHER THE STATE FUND, A SELF INSURER, OR A FEDERAL MARITIME INSURER IS RESPONSIBLE FOR THE CLAIM AND SEEK REPAYMENT OF THE PROVISIONAL BENEFITS IF APPROPRIATE. THE COST OF PROVISIONAL BENEFITS IS SHARED EQUALLY BETWEEN WORKERS AND EMPLOYERS.

OCCUPATIONAL DISEASE CLAIMS ARE TO BE PAID BASED ON THE SCHEDULE IN EFFECT AT THE TIME THE DISEASE REQUIRES TREATMENT OR BECOMES DISABLING, WHICHEVER IS EARLIER. THE PROVISIONAL BENEFITS PART OF THE BILL SUNSETS IN 1993.

EFFECT OF COMMITTEE AMENDMENT: THE REFERENCES TO RECOUPMENT FROM FEDERAL PROGRAM INSURERS AND SELF INSURERS ARE REORGANIZED INTO SEPARATE SECTIONS. THE REQUIREMENT THAT A WORKER RECEIVE FULL RECOVERY FROM A FEDERAL PROGRAM BEFORE THE DEPARTMENT CAN RECOUP PROVISIONAL BENEFITS FROM THE WORKER IS CHANGED TO A REQUIREMENT THAT THE WORKER RECEIVE SOME RECOVERY FROM ANOTHER INSURER.

B. WHY IT IS NEEDED:

ASBESTOS RELATED OCCUPATIONAL DISEASE CLAIMS OFTEN INVOLVE BOTH MARITIME RELATED EMPLOYMENT AND NONMARITIME RELATED EMPLOYMENT. THE

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DETERMINATION OF WHETHER THE STATE PROGRAM OR THE FEDERAL PROGRAM IS RESPONSIBLE FOR THE CLAIM IS OFTEN VERY COMPLICATED AND TIME CONSUMING, EVEN THOUGH THERE IS NO QUESTION BUT WHAT ONE PROGRAM OR THE OTHER IS RESPONSIBLE.

MEANWHILE, THE WORKER IS OFTEN TOTALLY DISABLED WITH NO SOURCE OF INCOME AND IS RUNNING UP LARGE MEDICAL BILLS.

OCCUPATIONAL DISEASE CLAIMS ARE CURRENTLY PAID ACCORDING TO THE SCHEDULE OF BENEFITS IN PLACE AT THE TIME THE DISEASE WAS CONTRACTED. THAT COULD EASILY BE 20 YEARS BEFORE THE CLAIM IS FILED. AS A RESULT OF INFLATION DURING THE INTERVENING YEARS, OCCUPATIONAL DISEASE CLAIMANTS CAN RECEIVE VERY SMALL AWARDS OR TIME LOSS PAYMENTS.

C. FISCAL IMPLICATIONS:

PROVISIONAL BENEFITS FOR THE FIRST BIENNIUM TOTAL \$4,300,000 AND ADMINISTRATIVE COSTS WILL RUN \$133,000. THE CLAIMS SECTION OF THE DEPARTMENT WILL HAVE TO SET UP A SPECIAL UNIT TO HANDLE ADJUDICATION OF ASBESTOS RELATED DISEASE CLAIMS.

D. PERSONS WHO TESTIFIED:

RHONNA GOLDMAN, AWB (FOR); CHUCK BAILEY, WASHINGTON STATE LABOR COUNCIL, AFL-CIO (FOR); BOB DILGER, WASHINGTON STATE BUILDING TRADES COUNCIL (FOR); BRETT BUCKLEY, DEPARTMENT OF LABOR AND INDUSTRIES;

Page 3

MELANIE STEWART, WASHINGTON SELF INSURERS (FOR); BRENT KNOTT,  
WASHINGTON ASSOCIATION OF PULP AND PAPER WORKERS (FOR)

E. COMMENTS:

DC:D7-13

# Report of Standing Committee

HOUSE OF REPRESENTATIVES  
Olympia, Washington

January 21, 1988  
(date)

House Bill  
(Type in House or Senate Bill, Resolution, or Memorial)

No. 1592

Prime Sponsor Representative Sayan

Authorizing workers' compensation for workers with asbestos-related diseases.  
(Type in brief title exactly as it appears on back cover of original bill)

reported by Committee on Commerce & Labor (11)

- MAJORITY recommendation: Do Pass.
- MAJORITY recommendation: The substitute bill be substituted therefor and the substitute bill do pass.
- MAJORITY recommendation: Do pass with the following amendment(s):

Signed by  
Representatives

10

A. Wang  
WANG Chair

Grace Cole  
COLE Vice Chair

Keith Fisher  
FISHER

Evan Jones  
JONES

Richard A. King  
R. KING

John L. O'Brien  
O'BRIEN

Michael C. Patrick  
PATRICK

Paul Sanders  
SANDERS

Douglas S. Sayan  
SAYAN

G. Smith  
SMITH

Samuel W. Walker  
WALKER

REPORT OF STANDING COMMITTEE

April 2, 1993

Engrossed House Bill

NO. 1353

Regulating asbestos disease benefits claims.

(reported by Committee on Labor and Commerce): (13)

Recommendation - Majority

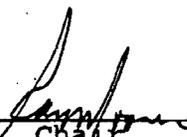
X

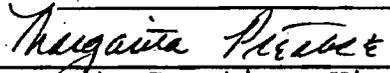
Do pass

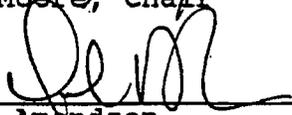
Do pass as amended

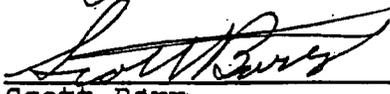
That Substitute Senate Bill No. \_\_\_\_\_ be substituted therefor, and the substitute bill do pass.

Other \_\_\_\_\_

  
Ray Moore, Chair

  
Margarita Prentice, Vice Chair

  
Neil Amundson

  
Scott Barr

Emilio Cantu

  
Karen Fraser

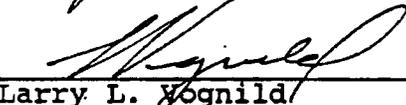
  
Rosemary McAuliffe

  
Irv Newhouse

  
Dwight Pelz

  
Eugene Prince

  
Dean Sutherland

  
Larry L. Yognild

R. Lorraine Wojahn

Passed to Committee on Rules for Second Reading

FLOOR NOTES - EHB 1353

PRIME SPONSOR

REP. GRACE COLE

WHY THIS BILL IS NEEDED

UNLESS RENEWED, "ASBESTOS FUND" ADMINISTERED BY L & I EXPIRES JULY 1.

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WHAT THIS BILL DOES

ASBESTOS INJURIES ARE DIFFERENT FROM OTHER INDUSTRIAL INJURIES. THEY ARE PROGRESSIVE AND OFTEN DO NOT SHOW UP FOR 20 TO 30 YEARS AFTER EXPOSURE. ALSO, ASBESTOS WORKERS OFTEN WORKED AT MANY JOB SITES. THESE FACTORS CAUSE PROBLEMS WHEN WORKERS SEEK INDUSTRIAL INSURANCE BENEFITS. THIS BILL:

1. DETERMINES WHO HAS TO PAY INDUSTRIAL INSURANCE BENEFITS TO ASBESTOS WORKERS WHO HAVE BOTH STATE-COVERED AND FEDERALLY-COVERED CLAIMS. THIS USED TO TAKE MONTHS, SOMETIMES YEARS; THIS PROGRAM HAS CUT THE PROCESS TO ABOUT 3 1/2 MONTHS. PARTY FOUND LIABLE MUST REIMBURSE THE FUND.

2. PROVIDES ~~INTERIM INDUSTRIAL~~ INSURANCE BENEFITS UNTIL THAT LIABILITY IS ESTABLISHED.

3. IF THE FEDS ARE FOUND LIABLE, THE ATTY GENL MAY APPOINT "SPECIAL AG'S" TO PURSUE THE FEDS BOTH FOR STATE REIMBURSEMENT AND ALSO TO SECURE BENEFITS FOR THE INJURED WORKER.

**FISCAL IMPACT**

FISCAL NOTE ENCLOSED. ABOUT \$1 MILLION/BIENNIUM.

**PERSON WHO TESTIFIED**

ALL PRO: L & I; WSTLA; WA STATE LABOR COUNCIL; ASSN OF WA BUSINESS.

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