NO. 1034881

SUPREME COURT
OF THE STATE OF WASHINGTON

LISA M. AZORIT-WORTHAM,

Petitioner,

v.

THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,
and
ALASKA AIRLINES, INC.,

Respondents.

MEMORANDUM OF AMICI CURIAE WASHINGTON STATE LABOR COUNCIL, TEAMSTERS 117 & ASSOCIATION OF FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER AZORIT-WORTHAM'S PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington State Labor Council, AFL-CIO, Teamsters Local 117 and the Association of Flight Attendants-CWA, AFL-CIO, have an interest in the rights of injured workers to be treated fairly, including the rights of injured workers under the Industrial Insurance Act, Title 51 RCW (hereinafter "the IIA"). This includes an interest in making sure that workers who are required to travel as part of their work and are exposed to infectious diseases as a result, are fully covered by workers' compensation benefits, as well as these workers' families in the event of permanent disability or death.

Amici Curiae respectfully suggests this Court should accept Ms. Azorit-Wortham's Petition for Review and overturn the Court of Appeals' decision in *Lisa M. Azorit-Wortham v. Dep't of Labor & Indus. & Alaska Airlines, Inc.*, ___ Wn.App.3d ___ , ___ P.3d ___ (Slip Opinion No. 58389-5-II)(August 27, 2024).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves workers who are required to travel as part of their work and whether these workers are excluded from workers' compensation coverage under the IIA when they contract an infectious disease while traveling. Ms. Azorit-Wortham was a flight attendant who worked for Alaska Airlines for many years and whose job duties

required her to travel and stay in travel locations away from home for layover periods. CP 286-287, 329. She contracted COVID 19 after a series of flights and overnight stays during the height of the COVID 19 pandemic in 2020, while sheltering in place and minimizing her non-work exposures at home. CP 288-289, 295-300, 316. While the parties to this case litigated this case focused on one specific infectious disease that is prominent in the public consciousness, this case should not be viewed only as a COVID 19 case. The Court of Appeals' holding in this case bars claims from all workers who contract infectious diseases while traveling for work, whether malaria, dengue fever, zika virus, tuberculosis, encephalitis, carbon dioxide poisoning, hepatitis or food poisoning from staying in a hotel as well as bacterial infections like pneumonia, typhus, tetanus or sepsis or infections arising from lice, flea and bed bug bites.

In addition to flight attendants, this includes any employee who travels regularly for work, including legal professionals like judges and lawyers, politicians and political workers, truck drivers, engineers and marketing and sales professionals. Those who fly regularly may be repetitively exposed to chemical hazards like bleed air fumes, pesticides and flame-retardant residuals and physical hazards like heat exhaustion and ionizing radiation from flight at high altitudes and latitudes, which

may cause respiratory infections and cancer, as well as orthopedic occupational diseases from repetitive lifting and loading/unloading luggage, particularly overhead. *E.g.*, Eileen McNeely, et al., *Cancer Prevalence among Flight Attendants Compared to the General Population*, 17 Environmental Health 49 (2018).

While Ms. Azorit-Wortham's claim for workers' compensation benefits was allowed by the Department of Labor & Industries, her Employer appealed to the Board of Industrial Insurance Appeals and persuaded an Industrial Appeals Judge to overturn the allowance of her claim. When Ms. Azorit-Wortham appealed her case to the Superior Court, she submitted a proposed jury instruction based on this Court's holding in *Ball-Foster Glass Cont. Co. v. Giovanelli*, 163 Wn.2d 133, 177 P.3d 692 (2008), stating that a traveling employee is covered by workers' compensation for occupational diseases at all times including during travel and while staying in hotels. CP 512. Alaska Airlines took exception to this jury instruction, and after Ms. Azorit-Wortham prevailed in her jury trial, Alaska Airlines appealed to the Court of Appeals, arguing the traveling employee doctrine applies only to workers injured while traveling, and not to workers who contract infectious diseases while traveling.

On August 27, 2024, the Court of Appeals incorrectly found that the definition of occupational disease is such that the traveling employee doctrine could never apply to infectious diseases contracted while traveling for work, and therefore the jury instruction was an incorrect statement of the law. *Lisa M. Azorit-Wortham v. Dep't of Labor & Indus. & Alaska Airlines, Inc.*, ___ Wn.App.3d ___ , ___ P.3d ___ (Slip Opinion No. 58389-5-II)(August 27, 2024). The Court of Appeals remanded the case for a new trial, and Ms. Azorit-Wortham filed a Petition for Review to this Court on September 23, 2024.

III. STATEMENT OF THE ISSUE

1. Are workers who travel for work excluded from workers' compensation coverage under the IIA if they contract an infectious disease while traveling?

IV. STANDARD OF REVIEW

Where, as here, an assignment of error addresses a matter of law, the standard of review of this Court is *de novo*. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

V. ARGUMENT

A. THE LIBERAL MANDATE OF THE INDUSTRIAL INSURANCE ACT SUPPORTS APPLICATION OF THE TRAVELING EMPLOYEE DOCTRINE TO WORKERS WHO CONTRACT INFECTIOUS DISEASES WHILE TRAVELING FOR WORK (OCCUPATIONAL DISEASE CLAIMS).

When this Court adopted the traveling employee doctrine in *Ball-Foster Glass Cont. Co. v. Giovanelli*, 163 Wn.2d 133, 177 P.3d 692, 696 (2008), it did so with consideration of the liberal mandate of the IIA, which requires liberal construction of the IIA in favor of workers. "In doubtful cases, the Act is to be construed liberally in favor of compensation for the injured worker." *Id.* at 696, citing *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001); see also *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn.App. 644, 833 P.2d 390 (1992). Specifically, the *Giovanelli* Court found that "[f]ailing to recognize Giovanelli as a travelling employee under the facts of this case would be to elevate form over substance, contrary to the remedial purpose of our IIA." *Giovanelli*, 177 P.3d at 700.

"Any ambiguity in the language of the IIA must be resolved in favor of the injured worker." *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 21, 201 P.3d 1011 (2009), citing RCW 51.12.010. The IIA is remedial and is to be interpreted expansively, to provide more coverage to workers and their families, not restrictively, as done by the Court of

Appeals here. As this Court noted in *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 399 P.3d 1156, 1162 (2017), in recognition of the remedial nature of the IIA and its liberal mandate, "...both the Legislature and this Court have expanded occupational disease coverage under the IIA." See also *Id.* at 1163 ("Both the Legislature's amendments to and this Court's decisions interpreting the occupational disease statute evidence a trend toward expanded coverage and a more relaxed burden of proof.").

While this case is an issue of first impression in the sense that the high courts of Washington have not specifically held that the traveling employee doctrine applies to occupational diseases in the 16 years since *Giovanelli* was issued, the Department of Labor and Industries does allow occupational disease claims filed by traveling employees based on the traveling employee doctrine. *E.g., In re Sahil Sachdeva,* Docket No. 19 25229 (April 28, 2021)(occupational disease claim allowed for traveling employee who developed a low back condition as a result of driving long distances).[1] Further, there are historical precedents for allowing the claims of employees who contract infectious diseases while traveling for work. See *Fidelity & Cas. Co. v. Industrial Acc. Comm'n,* 84 Cal.App. 506, 258 P. 698 (1927)(compensation awarded for the death

[1] As noted by the Petitioner, despite the caption in this case, the Washington State Department of Labor & Industries has opposed Alaska Airlines position and did in fact allow occupational disease claims under the traveling employee doctrine.

of an employee sent to Peru during a typhoid epidemic); *Tothrop v. Hamilton Wright Orgs., Inc.*, 45 A.D.2d 784, 356 N.Y.S.2d 730 (1974)(compensation awarded for the death of a photographer sent to Bolivia who contracted infectious viral hepatitis due to unsanitary living conditions); *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933)(compensation awarded for the death of a salesman from Rocky Mountain spotted fever who contracted the disease when his work required frequent travel through territory infested with wood ticks). So, while in one sense this is an issue of first impression, in another sense the impact of the Court of Appeals' holding in *Azorit-Wortham* is to disenfranchise thousands of workers and their families whose occupational and infectious diseases were previously covered by the IIA, contrary to the liberal mandate of the IIA.

In fact, the liberal mandate of the IIA is only referenced in the third paragraph of the *Azorit-Wortham* dissent, and only in the context of acknowledging it was applied in *Giovanelli*. *Azorit-Wortham v. Dep't of Labor & Indus. & Alaska Airlines, Inc.*, Slip Opinion No. 58389-5-II at 14. It was error for the Court of Appeals to remove workers' compensation coverage without considering and applying the mandatory construction provision of the IIA, that the "title shall be liberally construed for the purpose of reducing to a minimum the suffering and

economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. This Court should accept the injured worker's Petition for Review, to correct the Court of Appeals' elevation of "form over substance, contrary to the remedial purpose of our IIA." *Giovanelli*, 177 P.3d at 700.

B. SUPREME COURT PRECEDENT SUPPORTS APPLICATION OF THE TRAVELING EMPLOYEE DOCTRINE TO OCCUPATIONAL DISEASES.

The Court of Appeals also misconstrued *Giovanelli*, 177 P.3d 692 (2008) and how the traveling employee doctrine applies to such occupational diseases or infections "as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." RCW 51.08.140.

The Court of Appeals referenced the language from *Giovanelli* noting a distinction in the language used in Washington between injury and occupational disease, but not, as indicated by the Court of Appeals, to indicate that injury claims should be covered by the traveling employee doctrine while occupational disease claims should not.

Specifically, the *Giovanelli* Court noted that "[u]nder Washington law, there is no requirement that an injury 'arise out of employment,' only that the worker is within 'the course of employment' when injured," while noting in a footnote to this statement that this is

different from Washington's occupational disease statute, which does contain "arising out of employment" language. *Giovanelli*, 177 P.3d at 696, Footnote 2 ("[t]he 'arising out of' element applies, however, to occupational illnesses and diseases."). In context, the *Giovanelli* Court was noting the difference between the language of the Washington injury and occupational disease statutes because the "arising out of" language used in the Washington occupational disease statute matched the language used in the injury statutes of the jurisdictions that had already adopted the traveling employee doctrine.

As noted by the *Giovanelli* Court, "The general coverage provision in the workers' compensation acts of 43 states as well as the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, all share the language...: 'injury "arising out of and in the course of employment"'." *Giovanelli*, 177 P.3d at 696. Also as noted by the *Giovanelli* Court, "Although new to this Court, the traveling employee doctrine is not a novel concept. The traveling employee doctrine, also known as the 'commercial traveler rule,' or the 'continuous coverage rule,' is the prevailing view throughout the United States." *Id.*

In other words, since the majority of states with "arising out of" injury statutes have adopted the doctrine, the fact that Washington's occupational disease statute also uses similar "arising out of" language

means that the use of this language in the Washington occupational disease statute should in fact serve as a basis to acknowledge the doctrine applies to occupational disease claims, the opposite of the Court of Appeals' interpretation of Footnote 2 in *Azorit-Wortham.*

In fact, the point the *Giovanelli* Court was making in emphasizing that our occupational disease statute uses "arising out of" language and our injury statute does not, was that the Washington injury statute is "broader" and "a more comprehensive statute than other states" with even more reason to adopt expansive coverage. *Giovanelli*, 177 P.3d at 696. While the distinction between Washington's broader injury statute and other states' narrower "arising out of" injury statutes is a real distinction, the Court of Appeals failed to understand the point this Court was making, *i.e.*, the fact that Washington's statute is even broader was one more reason to adopt the traveling employee doctrine when the doctrine had already been adopted as "the prevailing view" even in the majority of jurisdictions that use a narrower "arising out of" definition of injury. Since jurisdictions with narrower definitions of injury based on "arising out of" language adopted the traveling employee doctrine, then Washington, which uses broader language to define injury and similar language to define occupational disease, has even more reason to do the same.

The "arising out of" language used in the injury statutes of the majority of states who have adopted the traveling employee doctrine cannot serve as the basis to bar the application of the same doctrine to the Washington occupational disease statute that uses similar "arising out of" language. The Court of Appeals fundamentally misunderstood this Court's precedent and should have acknowledged per *Giovanelli* that statutes that use "arising out of" language, whether injury or occupational disease statutes, can be subject to application of the traveling employee doctrine. This Court should accept the injured worker's Petition for Review, to correct the Court of Appeals' misunderstanding of this Court's reasoning in *Giovanelli*.

C. TRAVEL ITSELF IS A DISTINCTIVE CONDITION OF A TRAVELING EMPLOYEE'S WORK.

The Court of Appeals also misconstrued this Court's holding in *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d. 467, 745 P.2d 1295 (1987), and failed to acknowledge that in defining occupational disease, there is a corollary to the statement in *Dennis* that an occupational disease does not "arise naturally out of employment if it is caused by conditions of everyday life or of all employments in general." The corollary is that to be "distinctive conditions" of the worker's employment that give rise to an occupational disease or infection, "it is not necessary that the conditions be peculiar to, or unique to, the

particular employment." WPI 155.30 Occupational Disease – Definition. The Court included this language in a block quote from the Washington Pattern Jury Instruction on occupational diseases, but ignored its meaning. In *Simpson Timber Co. v. Wentworth*, 96 Wn.App. 731, 981 P.2d 878 (1999)(Division II), Cynthia Wentworth filed an occupational disease claim for a foot condition related to standing longer than seven hours a day for years on cement floors while grading, cutting, and unloading lumber. Her claim was allowed by the Department of Labor and Industries and Simpson Timber appealed, arguing that Ms. Wentworth's claim should be denied because "there is nothing distinctive about hard floors. Since hard floors are omnipresent, they are not distinctive." *Id.* at 881. Division II of the Court of Appeals rejected this argument, citing *Dennis*, 109 Wn.2d at 471, for the proposition that work conditions do not need to be unique to the worker's employment to meet the occupational disease standard and finding that hard floors for prolonged periods can be a distinctive condition of employment. *Id.* at 881. "While it may be commonplace for workers to stand and move about on hard surfaces, it is certainly less common for workers to do so for prolonged periods of time." *Id.* In the same way that travel may be a normal if occasional occurrence in the everyday (non-work) lives of most workers, it is certainly less common for workers to travel and live

away from their homes for prolonged periods of time as part of their work, and *Dennis* and its progeny do not require excluding such traveling workers from the coverage of the IIA when they contract infectious diseases when traveling for work.

Rather, as noted by the dissent in *Azorit-Wortham*, the act of traveling and living temporarily away from home for work is the distinctive condition of the traveling worker's employment from which the disease or infection "arises naturally." *Azorit-Wortham v. Dep't of Labor & Indus. & Alaska Airlines, Inc.*, Slip Opinion No. 58389-5-II at 16. In fact, the rationale identified by this Court in *Giovanelli* for extending coverage via the traveling employee doctrine was "that when travel is an essential part of employment, the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are an incident of the employment even though the employee is not actually working at the time of injury." *Giovanelli*, 177 P.3d at 696.

This rationale applies equally to injury claims and occupational disease claims under the IIA. The act of traveling and living temporarily away from home for work is not a condition of everyday life or of all employments in general—it is the unique province of the traveling employee. The worker would not have been exposed to or contracted

the infectious disease while traveling for work, but for his or her work that required the travel.

Further, while the Court of Appeals discounted RCW 51.16.040, which says that occupational disease claims and injury claims are to be treated the same, the Court of Appeals did so by focusing on the word "compensation" in that statute, rather than the full text of the statute, which requires that "*compensation and benefits* provided for occupational diseases shall be paid *and in the same manner* as *compensation and benefits* for injuries under this title." RCW 51.16.040 (Emphasis added). The statute is not limited to just financial compensation but encompasses all benefits of the IIA. The statute supports similar treatment for occupational disease claims and injury claims for coverage of claims as well as compensation, rather than disparate treatment. In the context of the traveling employee doctrine, there are more reasons to preserve workers' compensation coverage, than to withdraw it.

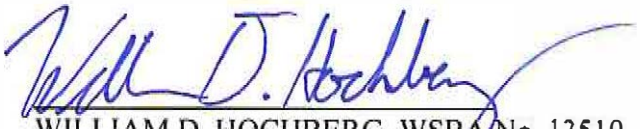
In excluding thousands of traveling workers from the occupational disease protections of the IIA, the Court of Appeals fundamentally misunderstood and misinterpreted this Court's precedents, the Industrial Insurance Act, and Washington State workers' compensation law.

VI. CONCLUSION

Accordingly, the Amici Washington State Labor Council, AFL-CIO, Teamsters Local 117 and the Association of Flight Attendants-CWA, AFL-CIO, respectfully suggest this Court should accept Ms. Azorit-Wortham's Petition for Review and correct the Court of Appeals' erroneous limitation of the traveling employee doctrine that has removed coverage from thousands of traveling workers and their families.

Per RAP 18.17(b) requiring attorney certification of compliance with the appellate rules regarding brief length as a short statement above the signature line, Applicant Amici Curiae certify this Motion contains 5,000 words or less, excluding the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, the signature blocks and any pictorial images. *See also* RAP 18.17(c)(6)(Amicus briefs are limited to 5,000 words if produced with word processing software).

Respectfully submitted this 20 day of November, 2024.



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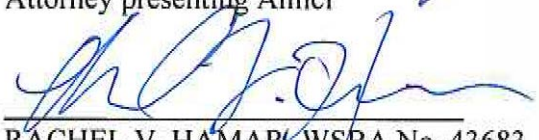

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CERTIFICATE OF SERVICE

Pursuant to RAP 18.5, I hereby certify the Memorandum of Amici Curiae was delivered to the below persons, as indicated, at the addresses listed below, by filing or emailing a true copy of the same to said persons on November 20th, 2024.

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Enclosed please find Motion to file Amici Brief & Amici Memorandum Brief. Thank you!

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