

NO. 44035-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MICHAEL S. MICHELBRINK, JR., a single man,

Respondent,

v.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

**APPELLANT'S SUPPLEMENTAL BRIEF ON REMAND FROM
THE SUPREME COURT**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT3

 A. *Walston* Requires This Court To Broadly Construe The
 IIA’s Exclusive Remedy Provisions, And Narrowly
 Interpret And Apply The Exception Found In RCW
 51.24.020.....3

 B. Michelbrink Failed To Show WSP Knew, With
 Certainty, The Taser Training Would Produce His Injury5

 C. Michelbrink Failed To Prove WSP Disregarded
 Knowledge of Certain Injury9

III. CONCLUSION10

TABLE OF AUTHORITIES

Cases

<i>Birklid v. Boeing</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	passim
<i>Brame v. Western State Hosp.</i> , 136 Wn. App. 740, 150 P.3d 637 (2007).....	7
<i>Brand v. Dep't of Labor & Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111(1999).....	3
<i>Crow v. The Boeing Co.</i> , 129 Wn. App. 318, 118 P.3d 894 (2005), <i>review denied</i> , 156 Wn.2d 1028 (2006).....	9
<i>Favor v. Dep't of Labor & Indus.</i> , 53 Wn.2d 698, 336 P.2d 382 (1959).....	8
<i>Flanigan v. Dep't of Labor & Indus.</i> , 123 Wn.2d 418, 869 P.2d 14 (1994).....	4
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	5
<i>Hale v. Wellpinit Sch. Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009).....	5
<i>Harris v. State, Dep't of Corr.</i> , 368 Mont. 276, 294 P.3d 382 (Mont., 2013).....	6
<i>Hubbard v. Dep't of Labor & Indus.</i> , 140 Wn.2d 35, 992 P.2d 1002 (2000).....	4
<i>Meyer v. Burger King Corp.</i> , 144 Wn.2d 160, 26 P.3d 925 (2001).....	4
<i>Michelbrink v. State</i> , 180 Wn. App. 656, 323 P.3d 620 (2014).....	1, 3, 7

<i>Rushing v. ALCOA, Inc.</i> , 125 Wn. App. 837, 105 P.3d 996 (2005).....	4
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	2, 7
<i>Walston v. Boeing Co.</i> , 181 Wn.2d 391, 334 P.3d 519 (2014).....	passim
<i>Weyerhaeuser v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	8
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	5

Statutes

RCW 51	passim
--------------	--------

Other Authorities

<i>In re: Kenneth Heimbecker</i> , BIIA Dec., 41, 998 (1975).....	8
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I. INTRODUCTION

Respondent Michael Michelbrink filed the present tort lawsuit after sustaining a back injury during a Taser training exercise with his employer, Appellant Washington State Patrol (WSP). WSP moved for summary judgment because it did not have actual knowledge that Michelbrink was certain to be injured in the training, nor did it willfully disregard such knowledge. As a result, the exclusive remedy provisions in Washington's Industrial Insurance Act (IIA), Title 51 RCW, limit Michelbrink to the industrial insurance benefits he received. RCW 51.04.010; *Birklid v. Boeing*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). After the trial court denied WSP's motion, this Court granted discretionary review, and, based largely on its conclusion that RCW 51.24.020 must be "liberally construed" in favor of Michelbrink, affirmed the trial court. *Michelbrink v. State*, 180 Wn. App. 656, 663, 667 n.15, and 670, 323 P.3d 620 (2014).

On December 4, 2014, the Washington Supreme Court granted WSP's Petition for Review, reversed this Court's decision, and remanded this case for reconsideration in light of its decision in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014). In *Walston* the worker asked the Supreme Court to expand the definition of "injury" in RCW 51.24.020 to encompass the cellular-level injury to his lungs that

resulted when his employer, Boeing, intentionally exposed him to dangerous levels of asbestos. *Walston*, 181 Wn.2d at 394. The Supreme Court rejected the worker’s broad definition of “injury” as inconsistent with the narrow standard developed in *Birkliid* and *Vallandigham*,¹ and held “even if Boeing had actual knowledge that exposure to asbestos would cause asymptomatic cellular-level injury, the *Birkliid* deliberate intention standard would not be met.” *Id.* at 398. Under that standard “certainty of actual harm must be known and ignored.” *Id.* at 397.

Like the worker in *Walston*, Michelbrink cannot show WSP willfully disregarded actual knowledge that his injury was certain to occur. At best, the evidence demonstrates there was a 1% chance that troopers who were “tased” during WSP’s Taser training exercise were *at risk* of experiencing an injury. CP at 39 ¶ 3, 46, 54. However, “[d]isregard of a *risk* of injury is not sufficient to meet the *Birkliid* test; certainty of actual harm must be known and ignored.” *Walston*, 181 Wn.2d at 397 (italics in original). As a matter of law, Michelbrink is limited to the “sure and certain” benefits he has already received under the IIA. *Id.* at 397-98; *see also* CP at 35. This Court should now reverse the trial court, grant WSP’s motion for summary judgment, and dismiss Michelbrink’s lawsuit.

¹ *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

II. ARGUMENT

A. *Walston* Requires This Court To Broadly Construe The IIA's Exclusive Remedy Provisions, And Narrowly Interpret And Apply The Exception Found In RCW 51.24.020

In its earlier decision this Court concluded it must “liberally construe” RCW 51.24.020 in favor of Michelbrink. *Michelbrink*, 180 Wn. App. at 663, 667 n.15, and 670. That holding is inconsistent with the purpose of the IIA and Supreme Court precedent, which requires Washington courts to narrowly construe and apply RCW 51.24.020. *See Walston*, 181 Wn.2d at 397-98 (rejecting attempt to expand the definition of “injury” in RCW 51.24.020); *Birklid*, 127 Wn.2d at 865 (rejecting the “substantial certainty” and “conscious weighing” tests as “inconsistent with the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010”).

The IIA provides injured workers a swift, no-fault compensation system. In exchange, injured workers give up the right to pursue tort remedies against their employers. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111(1999). This “grand compromise” between business and labor is established by the IIA’s exclusive remedy provisions. RCW 51.04.010 (exercising its police and sovereign power, the IIA provides “sure and certain relief . . . regardless of questions of

fault” and, in exchange, abolishes “all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes”).² These exclusive remedy provisions, which are “sweeping, comprehensive, and of the broadest, most encompassing nature,” *Rushing v. ALCOA, Inc.*, 125 Wn. App. 837, 841, 105 P.3d 996, 998 (2005), are overcome only if the worker’s injury results from the “deliberate intention” of the employer. RCW 51.24.020.

Liberalizing the provisions that pertain to monetary, medical and vocational benefits serves the purpose and intent of the IIA “to ensure against loss of wage-earning capacity and to provide ‘sure and certain relief’ to injured workers regardless of questions of fault.” *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 41, 992 P.2d 1002 (2000); RCW 51.12.010. Yet, narrowly construing and applying RCW 51.24.020’s exception also preserves the essence of the IIA’s “quid pro quo compromise” where “the employer provides sure and certain relief in the form of strict liability in exchange for limitations on that liability and immunity from suit.” *Flanigan v. Dep’t of Labor & Indus.*, 123 Wn.2d 418, 433, 869 P.2d 14 (1994); *Meyer v. Burger King Corp.*, 144 Wn.2d 160, 164, 26 P.3d 925, 927 (2001); *Birklid*, 127 Wn.2d at 865. Thus, to sustain a claim under RCW 51.24.020, the Supreme Court

² See also RCW 51.32.010 (the payment of industrial insurance benefits “shall be in lieu of any and all rights of action whatsoever against any person whomsoever”).

requires “a specific intent to injure,” *Folsom v. Burger King*, 135 Wn.2d 658, 664-65, 958 P.2d 301 (1998), which is met only when the worker proves the employer had, (1) actual knowledge the injury was certain to occur, and (2) willfully disregarded that knowledge. *Birklid*, 127 Wn.2d at 865.

It is a fundamental rule of statutory construction that once a statute has been construed by the Supreme Court, that construction “operates as if it were originally written into it.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Thus, under *Birklid* and its progeny, RCW 51.24.020 must be narrowly interpreted and applied, and is not subject to a liberal construction in favor of Michelbrink. *Walston*, 181 Wn.2d at 396.

B. Michelbrink Failed To Show WSP Knew, With Certainty, The Taser Training Would Produce His Injury

As the Supreme Court affirmed in *Walston*, allegations of risk of injury are insufficient to establish “deliberate intention” under RCW 51.24.020; the proponent must prove “actual knowledge that injury was certain to occur.” *Walston*, 181 Wn.2d at 397-98. Michelbrink did not establish this required element, and this Court should dismiss Michelbrink’s lawsuit. *Id.* at 396; *see also White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (the non-moving party must come forward with

specific, admissible evidence to support all necessary elements of the non-moving party's claims).

Initially, WSP troopers, as front-line, first responders, regularly confront dangerous, frequently life threatening events. They must "actively train in real-world environments to prepare for these dangers, and to ensure that they can safely perform their duties." CP at 40, 42-43 (other physically confrontational forms of training include ground-fighting and OC spray exposure); *see also Harris v. State, Dep't of Corr.*, 368 Mont. 276, 294 P.3d 382 (Mont., 2013) (interpreting provisions that mirror Washington's IIA, the Montana Supreme Court held that exposure to a Taser during training is not a deliberate injury but rather an intent to "educate and train"). This training prepares troopers for the demanding physical tasks and difficult judgment decisions their job requires, such as whether and how much force to use. CP at 43-44.

WSP did not deliberately intend to injure Michelbrink. Michelbrink was injured in a training exercise designed to prepare him for the rigorous demands of their job. CP at 40, 42-44. Nevertheless, this Court previously held that knowing the "*most typical* effects of [a Taser] exposure included temporary pain, minor skin irritation, temporary blisters, and redness or minor bleeding if the Taser probe punctured the skin," was sufficient to create a question of fact as to whether WSP

deliberately intended Michelbrink's injury. *See Michelbrink*, 180 Wn. App. at 665-6 (citing CP at 54). That conclusion is inconsistent with *Walston*.

Physical reactions to a Taser exposure that occur "most" but not every time, and which are "typical" but are not necessarily experienced by every person tased, do not establish "certainty of injury." *Walston*, 181 Wn.2d at 397 (evidence that someone, not necessarily the plaintiff, is certain to be injured is not enough to satisfy the *Birklid* test). Also, the passage relied upon by this Court was based on a study reported by the Taser manufacturer. CP at 54. Michelbrink produced no evidence that the reactions identified in the manufacturer's report reflect the "most typical effects" experienced by troopers who participated in WSP's Taser training.

Moreover, it is undisputed that, of the 791 troopers and cadets who were exposed to a Taser during the WSP training, only eight trainees—or one percent—reported any type of injury. A one percent injury rate does not establish "certainty of injury." *Walston*, 181 Wn.2d at 396-97; *Vallandigham*, 154 Wn.2d at 33 (96 assaults by one student were not sufficient to predict with certainty any particular future assault); *Brame v. Western State Hosp.*, 136 Wn. App. 740, 749, 150 P.3d 637 (2007) (foreseeability is not sufficient to establish certainty of injury).

Further, as the Supreme Court affirmed in *Walston*, not every physical reaction to a work activity constitutes a compensable “injury” under the IIA. *Walston*, 181 Wn.2d at 398 (immediate, cellular-level injury to the worker’s lungs caused by work related asbestos exposure was not a compensable injury under the IIA). The holding in *Walston* affirms long-standing Washington law. Not every bump, bruise, or temporary pain that results from a work related activity constitutes a compensable injury under the IIA, much less a deliberate intent to injure under RCW 51.24.020. *Walston*, 181 Wn.2d at 398; *Favor v. Dep’t of Labor & Indus.*, 53 Wn.2d 698, 703, 336 P.2d 382 (1959) (injuries must “have something tangible about them, a relationship of time and space that is susceptible of investigation”); *In re: Kenneth Heimbecker*, BIIA Dec., 41, 998 (1975) (“every slip, fall, bump, and the like, does not result in bodily harm—in other words, not every accident results in some physical condition. Thus, every industrial accident does not constitute an industrial ‘injury.’ ”).³

Here, the temporary pain, minor skin irritation, redness and other similar reactions from the Taser exposure, standing alone, are not compensable injuries under the IIA, and do not satisfy the two-part *Birkliid* test. *Id.* Moreover, given that 99% of the trainees did not report *any*

³ This decision of the Board of Industrial Insurance Appeals is “entitled to great deference.” *Weyerhaeuser v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

injury, WSP could not have possessed actual knowledge that Michelbrink or any other trainee was certain to be injured by the Taser exposure. *Crow v. The Boeing Co.*, 129 Wn. App. 318, 329-30, 118 P.3d 894 (2005), *review denied*, 156 Wn.2d 1028 (2006) (the fact that the employer's action led to past injuries does not prove actual knowledge of certain injury). At best, the record before this Court suggests that the Taser training put participating troopers at *risk* of suffering an injury.⁴ However, as a matter of law, risk of injury, even a probability that an injury will occur, is not enough to show actual knowledge of certain injury or to defeat summary judgment. *Walston*, 181 Wn.2d at 397-98.

Michelbrink failed to prove that WSP had actual knowledge he was certain to be injured in the Taser training exercise. As required by *Walston*, this Court should grant WSP's motion for summary judgment, and dismiss Michelbrink's suit. *Id.* at 397-98.

C. Michelbrink Failed To Prove WSP Disregarded Knowledge of Certain Injury

Michelbrink also cannot establish the second *Birkliid* element, willful disregard of a known, certain injury. *Birkliid*, 127 Wn.2d at 865. Again, 99% of the troopers who participated in the Taser training did not

⁴ Although Michelbrink sustained a stress fracture during the training, which is an industrial injury, there is no evidence WSP knew he was certain to sustain such an injury. Indeed, the risk of a participant experiencing such an injury was "comparable or less than the risk(s) from vigorous physical exertion, such as weight training, wrestling, or other intense athletic endeavors." CP at 61.

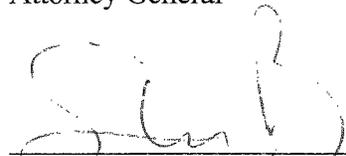
report *any* injury. Michelbrink does not explain, and the record does not establish, how WSP could possibly have willfully disregarded knowledge of certain injury, when the vast majority of trainees reported no injury at all. Furthermore, the unchallenged evidence demonstrates that WSP took affirmative steps to protect trainees from injury, such as having two spotters to hold each trainee who was tased. CP at 52-53 ¶ 11. Michelbrink cannot establish the second *Birklid* element, and, for this reason as well, the Court should grant WSP's motion and dismiss Michelbrink's lawsuit. *Birklid*, 127 Wn.2d 865.

III. CONCLUSION

For the reasons stated herein, the trial court's ruling should be reversed and this lawsuit should be dismissed.

RESPECTFULLY SUBMITTED this 19th day of May, 2015.

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I certify under penalty of perjury in accordance with the laws of the State of Washington that the Appellants' Supplemental Brief was electronically filed with the Court of Appeals. And that one copy was served via hand delivery on Respondent's Attorney at:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of May, 2015, at Tumwater, Washington.


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WASHINGTON STATE ATTORNEY GENERAL

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