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SUPREME COURT
STATE OF WASHINGTON
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No. 88511-7

**IN THE SUPREME COURT OF
WASHINGTON**

(Court of Appeals No. 42543-2-II)

GARY G. WALSTON and DONNA WALSTON, husband and wife,

Petitioners,

v.

THE BOEING COMPANY,

Respondent.

**REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR REVIEW**

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 ORIGINAL

TABLE OF CONTENTS

I. REPLY ARGUMENT1
II. CONCLUSION5

TABLE OF AUTHORITIES

Washington Cases

Birklid v. Boeing Co., 127 Wn.2d 853, 904 P.2d 278 (1995) passim
Department of Labor and Industries v. Fankhauser, 121 Wn.2d
304, 849 P.2d 1209 (1993)..... 2, 3

Statutes and Regulations

RCW 51.04.010 1
RCW 51.32.010 1

Other Authorities

New York Times, “OSHA Has Dismal Record Preventing Long-
Term Workplace Hazards,”
[http://seattletimes.com/html/nationworld/2020677773_oshashort
cominsxml.html](http://seattletimes.com/html/nationworld/2020677773_oshashort
cominsxml.html) (March 30, 2013)..... 6

I. REPLY ARGUMENT

Boeing raises an issue not addressed or decided by the Court of Appeals, and thus not addressed in the Petition, when it claims that taking account of Boeing's knowledge that it forced Mr. Walston to suffer a certain injurious process – what Boeing calls “cellular injury” – when it coerced him to work unprotected for a month in an asbestos rain is somehow inconsistent with the worker compensation laws and thus would lead to unbridled application of the test announced in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). (Opp. at 10-13.) Neither contention is true.

Briefly addressing the new issue in Boeing's Answer, Mr. Walston does not claim that workers are entitled to compensation for “cellular injuries” that occur from inhaling asbestos fibers. Under Washington law, however, the Court may take account of Boeing's knowledge that it caused a certain injurious process when it forced Mr. Walston to inhale asbestos. Under the Industrial Insurance Act, worker compensation is only paid to workers injured in the course of their work. *See* RCW 51.04.010 (worker compensation is limited to workers “injured in their work”); RCW 51.32.010 (workers compensation covers “[e]ach worker injured in the course of . . .

employment”). Boeing claims that the worker compensation system is Mr. Walston’s “rightful [and sole] remedy” (Brief of Petitioner Boeing, Case No. 42543-2 (Jan. 13, 2012) at 1), which means that Boeing contends Mr. Walston was “injured” during his employment, and not when he was diagnosed with mesothelioma in 2010. That workplace injury was the scarring of his lung tissue when Boeing forced him to inhale asbestos on the job in 1985. That same injury, during his employment, is also a relevant injury for purposes of examining Boeing’s “actual knowledge” under the *Birklid* test.

In *Department of Labor and Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), for example, the Court took account of what Boeing calls “cellular” injury in granting worker compensation benefits to workers exposed to asbestos. The workers in that case breathed asbestos fibers for 30 years during their employment but were not diagnosed with asbestos-related disease until long after they had stopped working. *Id.* at 306-07. The Court held that because they “were exposed to asbestos during employment” and their asbestos diseases diagnosed years later were traceable to that employment, they were injured “in the course of

employment” and thus were entitled to benefits. *Id.* at 309. This case is no different with respect to Mr. Walston’s workplace injury.

The only difference here is that Boeing knew precisely what it was doing to Mr. Walston in 1985. Boeing’s claim that it did not have knowledge in 1985 that it was causing Mr. Walston to suffer a certain injurious process is belied by the circumstantial evidence that such certain injury was common knowledge by 1985 (Petition at 4, n.1), when Boeing had a battalion of skilled industrial hygienists who possessed and relied upon the literature that detailed such certain injury. *See* CP 4618; CP 3450 (27:14-28:12, 29:2-15); CP 1064 (¶ 9), the 1977 *Toxicology* text (CP 5268 and CP 5277), and the 1977 NIOSH report (CP 1979, 5307) (discussing subclinical injury to lung tissue), and CP 5371-72 CP 5321; CP 5323; CP 5363-64 (documenting Boeing employee illnesses or death from asbestos exposure in 1981, 1983 and 1985).

Relatedly, Boeing also raises the specter that if the Court were to acknowledge “cellular” injuries, the scope of the “deliberate intent” exception under *Birklid* would become unbridled. (Opp. at 12-13.) But this argument confuses a certain injurious process with compensable injury. Boeing cites the Surgeon General’s 2011

conclusion that cigarette smoke causes immediate damage to the body (Opp. at 12), but the citation actually reveals Boeing's confusion. There is little question that in the year 2011 forcing office workers to toil in the deep blue haze of tobacco smoke would be an unacceptable employer practice. That is in part due to general knowledge of the injurious processes that such exposures are certain to initiate. But the forced inhalation of tobacco smoke does not constitute a "compensable" injury in itself. A worker forced into a toxic exposure still needs to prove that such forced exposure caused a compensable injury, which would be a daunting challenge in many cases where the disease etiology is multi-factorial.

Here, by contrast, Boeing fails even to challenge Dr. Brodtkin's conclusion that Mr. Walston's coerced 1985 inhalation of asbestos was the most significant asbestos exposure Mr. Walston faced during his long career, and that it was a substantial contributing factor in causing his mesothelioma. CP 2873 (118:23-119:15).

In *Birklid*, Boeing knew that forcing its workers into the toxic exposure to phenol formaldehyde resin commenced a certain injurious process in all workers so exposed. It knew that some

workers had already gotten sick from such injurious processes, and the Court held that it was “predictable” that future toxic exposures would produce illness, although Boeing could not say which workers would get sick. *Birklid*, 127 Wn.2d at 856. While the injurious process itself was not a compensable injury, Boeing’s knowledge that it was forcing its workers to suffer a certain injurious process bore on the *Birklid* Court’s conclusion that the deliberate intent exception had been met for workers who subsequently became ill.¹

II. CONCLUSION

Unless this Court accepts review, Washington employers will be incentivized to deliberately force their workers to suffer an

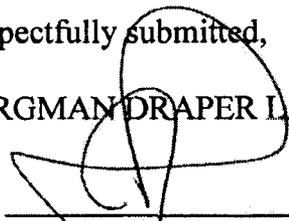
¹ The *Birklid* record is illuminating on this point. When resin production began in 1987, some workers experienced a range of general symptoms, including “dermatitis, rashes, nausea, headaches, tearing, dizziness, and faintness.” *Birklid*, 127 Wn.2d at 857. Some workers suffered immediate, acute reactions, some developed symptoms over time, and the largest number had no symptoms at all. *Id.* at 857 n.2 & 871; CP 3183 (¶ 4); CP 3185-86 (¶ 10); CP 3194-95 (¶ 11); CP 3200-01 (¶¶ 8 & 12); CP 3212 (¶ 18); CP 3226 (¶ 15); *see also* CP 3166-67 (208:22-209:2) (*Birklid* plaintiff’s testimony admitting that only “about half” of her co-workers developed symptoms). While a few developed long-term chronic illnesses from the exposures, *Birklid*, 127 Wn.2d at 871, the great majority had no compensable injuries or no symptoms at all. *Compare* CP 2593 (90:10-91:9) (Boeing’s CR 30(b)(6) witness testimony that Auburn fabrication facility where phenol formaldehyde resin exposure occurred employed 100 to 200 workers) *with* *Birklid*, 127 Wn.2d at 857 n.2 (only about 20 of the workers sought treatment at Boeing’s in-house clinic) & *id.* at 853 (even fewer joined the *Birklid* suit).

immediate, but invisible injurious process, knowing that they will not be accountable in tort for any subsequent illness, and thus may act in their short-term economic interest without fear of legal consequence. Yet far more workers die from chronic ailments triggered by an invisible injurious process than do those who suffer acute and visible injuries. *See* New York Times, "OSHA Has Dismal Record Preventing Long-Term Workplace Hazards," http://seattletimes.com/html/nationworld/2020677773_oshashortcominsxml.html (March 30, 2013). This Court should grant review of the published opinion of the Court of Appeals, reverse the Court of Appeals, and reinstate the Superior Court's denial of summary judgment.

DATED this 16th day of April, 2013.

Respectfully submitted,

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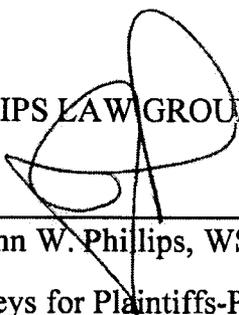
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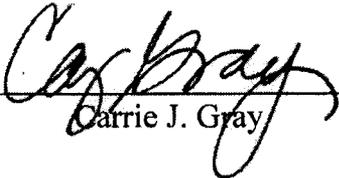
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For filing please find attached Petitioners' Reply Memorandum in Support of Petition for Review. Thank you.

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