

No. 885117

IN THE SUPREME COURT OF WASHINGTON

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

Petitioners,

v.

THE BOEING COMPANY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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STATE OF WASHINGTON

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COURT OF APPEALS' DECISION

The decision of the Court of Appeals was issued on January 29, 2013, and is reported at 294 P.3d 759.

ISSUE PRESENTED FOR REVIEW

Whether Walston presented sufficient evidence to create a material issue of fact whether Boeing “had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge,” *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995), so as to permit a tort action against it for illness resulting from a workplace asbestos exposure notwithstanding the immunity provided by the Industrial Insurance Act.

STATEMENT

From 1956 to 1992, Gary Walston worked as a hammer operator in Boeing’s Hammer Shop in Seattle. 294 P.3d at 760. The hammer machines were used to manufacture aircraft parts by dropping lead punches onto metal laid over pre-formed dies. While the parts made in the Hammer Shop did not contain asbestos (CP 341), the shop did use some asbestos in the fabrication process before 1978. Employees in the Hammer Shop who worked with hot materials wore protective apparel, some of which contained asbestos until suitable asbestos-free substitutes were found in the late 1970s and early 1980s. (CP 98-104.)

Some of the insulation on steam pipes in the Hammer Shop also contained asbestos. In January 1985, Boeing repaired the pipe insulation, and the workers conducting the repairs wore protective clothing that Walston refers to as “moon suits.” Walston did not wear protective clothing, and he claims that dust from the repair fell on him and other workers in the Hammer Shop. 294 P.3d at 761.

In 2010, Walston was diagnosed with mesothelioma. Soon thereafter, he sued Boeing, alleging that he had developed mesothelioma as a result of his exposure to asbestos while working for Boeing. Boeing moved for summary judgment, arguing that it was entitled to immunity under the Industrial Insurance Act, which eliminates tort liability for workplace injuries except in the narrow category of cases in which an “injury results to a worker from the deliberate intention of his or her employer to produce such injury.” RCW 51.24.020. The superior court denied summary judgment. (CP 5709-10.)

The Court of Appeals granted discretionary review. Walston moved to transfer the case to this Court, but this Court denied the motion.

The Court of Appeals reversed. The court began by explaining that, in *Birklid v. Boeing Co.*, this Court construed the statutory phrase “deliberate intention . . . to produce such injury” to mean that “the employer had actual knowledge that an injury was certain to occur and

willfully disregarded that knowledge.” 127 Wn.2d 853, 862-63, 865, 904 P.2d 278 (1995); *see* 294 P.3d at 764. The court concluded that “there is no material factual dispute relating to Walston’s injury and Boeing’s alleged actual knowledge that injury was certain to occur.” *Id.* at 766. The court acknowledged “Boeing’s awareness that some workers developed asbestos-related diseases,” but it determined that that knowledge did not “raise[] a material issue of fact about whether Boeing knew that exposing employees to asbestos during the pipe repair in 1985 was certain to injure them.” *Id.* at 767. To the contrary, the court observed, “not everyone exposed to asbestos develops an asbestos related disease.” *Id.* (citing *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004)). And “[e]ven Walston’s experts conceded that there is no known threshold of exposure to asbestos that results in certain asbestos related disease.” *Id.*

Walston offered “expert testimony that a cellular injury occurs when a person is exposed to asbestos and that the relevant injury is the cellular injury, not the disease contracted following a long latency period.” 294 P.3d at 767. But emphasizing the “narrow exception the legislature provided and the strict standard announced by our Supreme Court in *Birklid*,” the Court of Appeals rejected the suggestion that “Boeing had actual knowledge of certain injury in the absence of clinical symptoms and

based only on asbestos-caused cellular inflammation and irregular cell division increasing the risk of an asbestos related disease.” *Id.*

Finally, the Court of Appeals addressed “various internal Boeing documents discussing the risk of asbestos exposure and its potential to cause injury.” 294 P.3d at 767. The court acknowledged that the evidence established “that Boeing knew that exposure to asbestos was dangerous to its employees because it increased the risk that an asbestos-related disease could materialize.” *Id.* But it held that “the relevant inquiry is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury.” *Id.* (quoting *Shellenbarger*, 125 Wn. App. at 49). “Risk of injury,” the court explained, “is not certain injury mandated under the *Birklid* test.” *Id.* And “a reasonable fact finder could not conclude that the employer knew with certainty that any employee would be injured by asbestos exposure in the workplace.” *Id.*

ARGUMENT

Walston asserts (Pet. 6) that the Court of Appeals “granted tort immunity” to employers who “deliberately coerce their employees into a toxic exposure, such as being forced to handle plutonium or to walk into an irradiated power plant, on the arbitrary ground that the injury to the worker is not immediate and visible.” That is incorrect. Contrary to

Walston's suggestion, the court below did not announce a new rule but simply applied this Court's holding in *Birklid v. Boeing Co.* that the Industrial Insurance Act bars an action against an employer for a workplace injury unless "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." 127 Wn.2d 853, 865, 904 P.2d 278 (1995). The decision of the Court of Appeals is correct and does not conflict with any decision of this Court or any other Division of the Court of Appeals. To the contrary, it follows the only other Washington decision applying *Birklid* to asbestos exposure—Division One's decision in *Shellenbarger v. Longview Fibre Co.*, which this Court declined to review. 125 Wn. App. 41, 103 P.3d 807 (2004), review denied, 154 Wn.2d 1021, 120 P.3d 73 (2005). Further review is not warranted.

A. The Court of Appeals correctly applied *Birklid*

In the Industrial Insurance Act, the Legislature abolished the jurisdiction of courts to hear claims against an employer arising from workplace injuries. RCW 51.04.010. As this Court has observed, the Act was "the product of a grand compromise" that gave employers "immunity from civil suits by workers" in return for giving injured workers "a swift, no-fault compensation system for injuries on the job." *Birklid*, 127 Wn.2d at 859.

The statute contains a narrow exception, however, that allows an employee to sue an employer for work-related injuries that “result[] . . . from the deliberate intention of his or her employer to produce such injury.” RCW 51.24.020. In *Birklid*, this Court held that the “phrase ‘deliberate intention’ . . . means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.” *Birklid*, 127 Wn.2d at 865. “[T]he *Birklid* test can be met in only very limited circumstances where continued injury is not only substantially certain, but *certain* to occur.” *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 32, 109 P.3d 805 (2005). “Mere negligence” therefore “does not rise to the level of deliberate intention,” nor do “[g]ross negligence and a failure to follow safety procedures.” *Folsom v. Burger King*, 135 Wn.2d 658, 664-65, 958 P.2d 301 (1998). In other words, “[d]isregard of a *risk* of injury is not sufficient,” but “*certainty* of actual harm must be known and ignored.” *Vallandigham*, 154 Wn.2d at 28.

The Court of Appeals correctly applied those principles to this case. While “Boeing was aware that asbestos was a hazardous material,” that establishes only that Boeing knew that asbestos poses a *risk* of injury. 294 P.3d at 761. There is no evidence that Boeing had actual knowledge that asbestos is *certain* to cause injury, and in fact it is not. To the

contrary, “Walston’s experts conceded that there is no known threshold of exposure to asbestos that results in certain asbestos related disease.” *Id.* at 767. The Court of Appeals therefore correctly concluded that Walston failed to satisfy the deliberate-intent exception as interpreted by this Court in *Birkliid*.

According to Walston (Pet. 11), the facts of this case are “remarkably similar” to those in *Birkliid*, in which this Court determined that the plaintiffs had presented sufficient evidence to allow a finding that the deliberate-injury exception was satisfied. But Walston’s description of the facts is inaccurate in several respects. As an initial matter, the suggestion (Pet. 2) that Walston was “coerced” into “work[ing] for a month under asbestos abatement contractors who . . . showered him with asbestos dust” during the 1985 pipe-repair incident is exaggerated. The work was finished in a few days, not a month, and the Hammer Shop supervisor responded to workers’ concerns by directing them to move away from the area where the work was taking place. (CP 438, 449-50.) And while Walston asserts (Pet. 11) that “over sixty Boeing employees have died from . . . exposure” to asbestos, he does not say that they were exposed to asbestos at Boeing, as opposed to somewhere else. Indeed, many of those employees are clients of Walston’s counsel who had some period of employment at Boeing but have filed lawsuits claiming exposure

to asbestos somewhere else. More to the point, all but one of the deaths occurred *after* the January 1985 Hammer Shop repair. In any event, even if Walston's description of the facts were correct, it would not establish that Boeing had actual knowledge that Walston was certain to be injured. And even if the Court of Appeals had misapplied the law to the particular facts of this case, the misapplication of a properly stated rule of law is not a basis for this Court's review.

B. The decision below is consistent with other Court of Appeals decisions

Walston argues (Pet. 8-9) that the decision below is inconsistent with *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001), and *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996), which allowed employees to pursue tort actions for injuries sustained as a result of their exposure to chemicals. As the Court of Appeals explained, however, *Hope* and *Baker* are different from this case because both involved the willful disregard of certain injuries to the plaintiffs. In both cases, the plaintiffs themselves complained to their employers that they were suffering injuries from the chemicals to which they were exposed, and the employer witnessed the injuries at or shortly after the time of exposure but continued to expose the plaintiffs to the chemicals. *See Hope*, 108 Wn. App. at 189-90 (noting that Hope experienced "rashes and

blisters” and that she told her supervisor “that the chemicals were causing her rash”); *Baker*, 80 Wn. App. at 778 (noting that Baker experienced “breathing difficulties, skin rashes, nausea and headaches” and that he complained to his employer at least three times). Similarly, in *Birkliid*, the employer’s knowledge of certain injury was inferable from the immediate, visible injuries suffered by employees who were exposed to a toxic chemical. 127 Wn.2d at 856. As the Court of Appeals observed, no similar evidence of certain injury was present in this case. 294 P.2d at 766.

Walston attacks (Pet. 12) the proposition that “immediate and visible injury is a prerequisite to bringing a tort claim.” But that is not what the Court of Appeals held. Although the court observed that Walston was not “immediately or visibly injured by the exposure to asbestos,” it did not suggest that immediate, visible injury is required. 294 P.3d at 766. Instead, it correctly noted that, in the factual context of *Birkliid*, *Hope*, and *Baker*, “[t]he immediate visible effects of chemical exposure . . . provided the requisite material issue of fact relating to the employer’s actual knowledge of certain injury.” *Id.* Here, by contrast, “there is no material factual dispute relating to Walston’s injury and Boeing’s alleged actual knowledge that injury was certain to occur”—whether through evidence of immediate, visible injury or through any other evidence. *Id.*

What matters under *Birkliid* is the employer's knowledge of the certainty of injury to the plaintiff. *See* 127 Wn.2d at 865. If other employees also suffered injury, and if the injuries were immediately and visibly manifested, those facts could be evidence of the employer's actual knowledge of certain injury to the plaintiff. Likewise, if no injuries were apparent at the time, that fact might tend to disprove the employer's actual knowledge that the plaintiff was certain to suffer injury. In either case, however, the immediacy or visibility of the injury would not itself be legally determinative. The Court of Appeals did not suggest otherwise.

As the Court of Appeals recognized, 294 P.3d at 765-66, the case most closely analogous to this one is Division One's decision in *Shellenbarger*. In that case, which involved claims of injury from workplace exposure to asbestos, the court explained that "asbestos exposure does not result in injury to every person," and that the requirement of certainty "leaves no room for chance." *Id.* at 47, 49. The court concluded that the plaintiff's claims failed because a jury "could not conclude that [the employer] knew injury was certain to occur." *Id.* at 48-49. The same is true here.

C. The *Birkliid* test should not be expanded to encompass “cellular injury”

Walston suggests (Pet. 1) that any exposure to asbestos “is certain to cause an invisible injurious process.” Because, he says, that cellular-level process is certain to occur upon exposure, any exposure to asbestos constitutes the deliberate infliction of certain injury. But the Industrial Insurance Act defines “injury” for purpose of the deliberate-injury exception as “any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.” RCW 51.24.030(3). In other words, the relevant injury must be a compensable condition. While the manifestation of a disease is compensable, the asymptomatic cellular-level effects of asbestos are not. *See Dep’t of Lab. & Indus. v. Landon*, 117 Wn.2d 122, 128, 814 P.2d 626 (1991) (holding that the date of injury for calculating benefits is “the date the disease manifests itself,” not the date when the “last injurious exposure to the harmful material” occurred).

Walston has not identified a single case that treats exposure to or inhalation of asbestos fibers as a compensable injury under the Industrial Insurance Act, or under tort law generally. The courts avoid such an expansive notion of injury, and for good reason. As Walston’s experts conceded, inhalation of many common substances such as smog can cause

asymptomatic, cellular-level effects in the lungs. (CP 612, 638.) Treating such exposure as an “injury” would dramatically expand the narrow deliberate-injury exception into a broad rule of liability for all cases of exposure to asbestos and many other substances, and it would materially undermine the Industrial Insurance Act. For example, under Walston’s interpretation, any employer—including the state government—would be subject to tort suits based on lung cancer for having permitted smoking in the workplace, since it has been well known for decades that “any exposure to tobacco smoke, even occasional smoking or exposure to secondhand smoke, causes *immediate* damage to your body,” damage that “can lead to serious illness or death.” Regina M. Benjamin, Surgeon General, *Exposure to Tobacco Smoke Causes Immediate Damage: A Report of the Surgeon General*, 126 Pub. Health Rep. 158 (Mar.-Apr. 2011) <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3056024>>.

Moreover, even if there were authority for Walston’s novel cellular-level injury argument, Walston presented no evidence that Boeing had actual knowledge that inhalation of asbestos fibers was certain to cause such “injury” to its employees. The evidence Walston cites establishes only that asbestos exposure creates a risk of lung disease, not that Boeing knew of a certainty of cellular or other actual injury.

Ultimately, Walston's arguments amount to an invitation to this Court to replace the *Birklid* rule with a test under which an employer's knowledge of "substantial certainty" of injury is sufficient for liability. But this Court considered such a test in *Birklid* and expressly rejected it. 127 Wn.2d at 865. The Court emphasized "the narrow interpretation Washington courts have historically given to RCW 51.24.020," as well as "the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010." *Id.* A decade later, this Court reaffirmed its rejection of the substantial-certainty test. *See Vallandigham*, 154 Wn.2d at 32 ("the first prong of the *Birklid* test can be met in only very limited circumstances where continued injury is not only substantially certain, but *certain* to occur").

The considerations identified in *Birklid* have even greater force now that 17 years have passed since that decision. As this Court has observed, the "Legislature is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Val. v. King Cnty. Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). There is no basis for reconsidering *Birklid*.

CONCLUSION

The petition for review should be denied.

DATED: April 1, 2013

Respectfully submitted,

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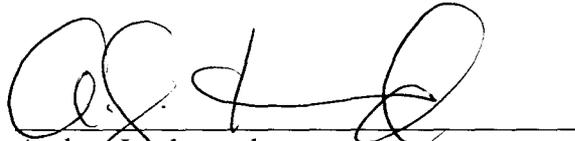
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I declare under penalty of perjury under the laws of the State of
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DATED: April 1, 2013, at Seattle, Washington.



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