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No.

**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.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONERS

Plaintiffs Gary G. Walston and Donna Walston (“Walston”) are the petitioners.

II. COURT OF APPEALS’ DECISION

On January 29, 2013, the Court of Appeals, Division II (hereafter “Court of Appeals”), issued its published decision reversing the trial court and dismissing Walston’s suit against Boeing. *Walston v. Boeing Co.*, __ P.3d __, 2013 WL 326309 (Wash.App. Div. 2).

III. ISSUE PRESENTED FOR REVIEW

Should the Court review the Court of Appeals’ holding that in cases of toxic exposure, an employee cannot meet the “deliberate intent” exception set forth in RCW 51.24.020 unless workers become immediately and “visibly sick” when the employer coerces them into a toxic insult, and hold instead, consistent with the rule enunciated in *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995), that in cases of coerced toxic exposure, the “deliberate intent” exception is met when the employer knows such coerced exposure is certain to cause an invisible injurious process in all exposed employees that could kill some of them?

IV. STATEMENT OF THE CASE

Gary Walston spent 38 years working for Boeing, from 1963 to 1995. CP 1635 (18:23-19:6). Throughout his Boeing career, Walston was forced to inhale asbestos fibers, but this case is *not* about his career of asbestos exposure. Rather, this case is about a singular, egregious event in 1985, long after Boeing had learned that asbestos was a toxic exposure that killed some of its employees. Here are the undisputed facts, which the Court of Appeals accepted for purposes of its decision. *See* 2013 WL 326309 at *1-2.

In 1985, Walston's supervisor coerced him — despite his protest — to work for a month under asbestos abatement contractors who wore “moon suits” and showered him with asbestos dust while he worked below them. When Walston and his co-workers protested and asked for protective equipment, their Boeing supervisor told them to “go back to work.” CP 1655-56 (98:4-19, 101:4-9, 104:6-21); *see also* CP 2042 (illustration showing 1985 asbestos abatement above workers in the Hammer Shop) (copy attached as Appendix A hereto).

Walston's expert, Dr. Brodtkin, concluded that Walston's month-long 1985 ordeal was a substantial contributing factor to his contracting mesothelioma in 2010 and was “likely by far . . . the

highest level of exposure experienced by Walston” during his long Boeing career. CP 2873 (118:23-119:15).

1985 was 13 years *after* OSHA promulgated emergency regulations to protect workers from asbestos exposure. By then, Boeing knew that asbestos dust was “*dangerously toxic*” and that workers required protection from inhalation. CP 5238 (Industrial Hazards Control Bulletin No. 5). Boeing also knew that *any* amount of asbestos dust could harm its workers. CP 3231 (“*[o]nly a ban can assure protection against the carcinogenic effects of asbestos.*”) (emphasis added). And Boeing knew that the specific work performed in 1985 required respiratory protection not only for the workers in “moon suits,” but also for workers standing below them. CP 5308; CP 5238; CP 5314.

By 1985, Boeing knew that its workers who breathed asbestos fibers on the job had suffered life-threatening diseases. Indeed, by 1985, one of Walston’s Hammer Shop co-workers had died from exposure to asbestos, and overall approximately sixty Boeing workers have died from asbestos-related diseases. *See* CP 5371-72 CP 5321; CP 5323; CP 5425-5676.

And Boeing knew in 1985, because it was common scientific

knowledge by then¹, that workers were injured immediately from inhaling asbestos fibers, which scar lung tissue when they lodge in the lung and immediately begin to impair lung function and cause an injurious process. CP 5247. Dr. Brody testified that an individual exposed to asbestos fibers at levels greater than background sustains an immediate injury, even though it is not observable. CP 1024-26 (¶¶ 7 & 10). Boeing did not challenge Dr. Brodtkin's testimony because

¹ See, e.g. *Kilpatrick v. Dept. of Labor & Industries*, 125 Wn.2d 222, 883 P.2d 1370 (1995) (“ [a]sbestos inhalation starts an injurious process . . . The fibers insidiously injure the lungs throughout the period of exposure.” *Id.* at 234 (Madsen, J., dissenting) (citing Irving J. Selikoff & Douglas H.K. Lee, *Asbestos and Disease* (1978), at 145-47) (emphasis added); *Villella v. Public Employees Mutual Ins. Co.*, 106 Wn.2d 806, 813, 725 P.2d 957 (1986) (“initial inhalation of asbestos fibers causes tissue damage and thus, a covered injury has occurred at the inception of exposure.”); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635, 865 P.2d 527 (1993) (holding that where mesothelioma victim was exposed to asbestos in shipyards in 1950s and 1960s, but asbestos disease was not diagnosed until 1987, the “injury producing events” occurred before Tort Reform Act of 1981). See also *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (“asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible.”); *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (discussing “medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter”); *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1223 (6th Cir. 1980) (recognizing medical knowledge that inhalation of asbestos constitutes bodily injury); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981) (same); *ACandS, Inc. v. Aetna Casualty and Surety Co.*, 764 F.2d 968, 972 (3d Cir. 1985) (same).

its staff of industrial hygienists had long been familiar with that fact. They were familiar with the 1978 Selikoff text (CP 4618; CP 3450 (27:14-28:12, 29:2-15); CP 1064 (¶ 9), the 1977 *Toxicology* text (CP5268 and CP 5277), and the 1977 NIOSH report—all of which said the same thing as Dr. Brodtkin. (CP 1979, 5307).

Thus, in 1985, when Boeing forced Walston to work for a month under an asbestos rain – despite his protest and request for protection – Boeing knew it was injuring Walston. The only thing Boeing did not know was if its deliberately inflicted harm would kill him. Dr. Longo had this to say about Boeing’s 1985 conduct:

I've never seen anything like that. I was astonished. I showed this to our [industrial hygiene] chair, and he used words like criminal that they would do something like that. . . . [T]his is such an outrageous example of complete disregard for the workers in that facility . . .

CP 2230-31 (92:20-93:5). Dr. Longo’s words were not hyperbole.

Employers have been put in federal prison for less.²

² See, e.g., *United States v. Starnes*, 583 F.3d 196, 219 (3d Cir. 2009) (affirming 33-month prison sentences for employers who failed to provide workers with personal protective equipment during asbestos abatement project and instructed workers to engage in work practices that created visible asbestos dust); *United States v. Rubenstein*, 403 F.3d 93, 101 (2d Cir. 2005) (upholding criminal conviction of defendant who hired workers to remove asbestos-containing pipe insulation, failed to tell the workers that

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals wrongly interpreted this Court's precedents as holding that an employee cannot meet the "deliberate intent" exception in cases of toxic exposure unless workers become immediately and "visibly sick" when the employer coerces them into a chemical exposure. That is not Washington law or a correct interpretation of this Court's precedents. If the Court of Appeals were right, it would mean that employers *can* be sued when they intend to cause trivial, but immediately "visible" injuries, but *cannot* be sued when they intend to cause "invisible" injuries to all employees that they know will kill some of them. Unless the Court accepts review and clarifies the law, Washington employers will be granted tort immunity when they 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. Yet as a policy matter, the Court should be more, not less, vigilant in protecting workers when employers deliberately expose their workers to invisible injuries in the hope that any resultant terminal illness will be sufficiently remote that the employer may act in its short term economic interest with no fear of long-term repercussions. This Court should accept review to

they were removing asbestos, and directed them to remove the insulation by using a knife or scissors).

correct the Court of Appeals' mistake and clarify the law. While "immediate and visible" illness provides proof of an employer's actual knowledge and willful disregard to satisfy the *Birklid* test in toxic exposure cases, that is not the *only* means of proving *Birklid*'s elements.

In *Birklid*, Boeing urged that it should remain within the protective cloak of the worker compensation laws when it deliberately injures its workers "so long as that conduct was *reasonably calculated to advance an essential business purpose.*" *Birklid*, 127 Wn.2d at 862 (emphasis added). This Court quickly saw the folly of such a proposed standard and rejected it. With the Court of Appeals' decision, Boeing has taken back ground and effectively limited *Birklid* to toxic exposures that cause immediate and visible but often trivial injuries while it enjoys the right to pursue its "essential business purpose" when it deliberately causes its workers to suffer invisible injuries that it knows will kill some of them. That cannot and should not be the law.

A. The Case Meets the Criteria for Accepting Review.

This case meets the criteria of RAP 13.4(b)(1), (2) and (4), any one of which compels granting review. Defining the scope of the "deliberate intent" exception to the worker compensation laws is a matter of "substantial public interest." RAP 13.4(b)(4). The Court has justifiably interpreted the "deliberate intent" exception narrowly, yet at the same time, it has affirmed that employers who engage in "egregious conduct should not burden and compromise the industrial

insurance risk pool,” *Birklid* at 859, particularly where coerced toxic exposure is involved. The Court of Appeals’ decision creates an enormous loophole for an employer to force its employees to suffer toxic insults while the employer enjoys immunity. If that decision stands, Washington employers will enjoy tort immunity when they decide it is in their economic self-interest to deliberately force their employees into a toxic exposure that causes invisible injury with long-term impacts to some of the workforce.

This Court’s understanding of the manner in which an employer may manifest a deliberate intent to injure its employee has evolved over time, and *Birklid* reflects a more sophisticated perspective on how an employer may deliberately harm an employee in the context of coerced toxic exposures. For decades, the “deliberate intent” exception was applied only where an employer physically hit an employee. *Birklid* moved the Court beyond such a simple formulation, and recognized that assault and battery may manifest in less traditional, but equally, if not more, harmful ways. This case compels the Court to again elucidate the *Birklid* rule, and interpret it in a manner so as not to exempt employers from criminally and deliberately harming employees through coerced toxic exposures for the arbitrary reason that their coercive conduct causes immediate invisible injuries that may eventually kill the employee, instead of immediate visible injuries that may be trivial.

The Court should also grant review, because the Court of Appeals’ decision conflicts with *Birklid*, *Baker v. Shatz*, 80 Wn. App.

775, 783-84, 912 P.2d 501 (1996) and *Hope v. Larry's Markets*, 108 Wn. App.185, 194, 29 P.3d 1268 (2001), *overruled on other grounds by Vallandigham*, 154 Wn.2d at 35, 109 P.3d 805 (2005), which collectively establish the appropriate framework for considering the deliberate intent exception in toxic exposure cases. See RAP 13.4(b)(1) and (2). While the Court of Appeals claimed simply to implement the holdings of this Court in *Birklid* and *Vallandigham*, the Court of Appeals misapplied the *Birklid* rule for toxic exposure cases, and *Vallandigham* was not a toxic exposure case. This Court in *Birklid* and the Court of Appeals in *Baker* and *Hope* correctly applied the law and held that where the employer knew of the health risk of forcing its employees into a toxic exposure, was aware that its employees had suffered injuries from such toxic exposures, and proceeded to force employees into such toxic exposures without altering workplace conditions, a jury was entitled to hear the case. In *Baker*, employees of General Plastics were forced to work with toxic chemicals that caused breathing difficulties. Despite their repeated protests, supervisors ordered them to continue to work and said the chemicals were not causing the workers' problems. Then Judge Wiggins wrote that the deliberate intent exception could go to the jury, even where the employer insisted that it did not intend harm to any of its employees. *Baker*, 80 Wn. App. at 784. In *Hope*, the court similarly held that the deliberate intent exception should be decided by the jury where a worker repeatedly got rashes from industrial strength cleaners, that the employer knew of the past rashes, and its remedial

measures were illusory. Under Washington law, this Court should similarly hold that an employer is not immune from suit when it deliberately forces an employee to inhale asbestos dust for a month, with full knowledge that such coerced conduct triggers an injurious process in all of its coerced employees that will cause death to some.

B. The Evidence Presented by Walston Parallels the Evidence Presented in *Birklid*.

Birklid arose from Boeing's use of phenol formaldehyde resin at its Auburn fabrication facility between 1987 and 1988. *Birklid*, 127 Wn.2d at 856. During pre-production testing, Boeing's supervisor wrote to Boeing administrators reporting that obnoxious odors were present and that some "employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach." *Id.* He stated that "[w]e anticipate this problem to increase as temperatures rise and production increases." *Id.* Boeing thus "anticipated" that some of its workers would get acutely sick when it decided to commence resin production, but it did not know which workers, what the specific injuries would be, whether the injuries would be compensable, or the severity of illnesses workers would experience.

Birklid recognized that a principled standard must be established to determine if the "deliberate intent" exception to the worker compensation laws is met. This Court held that the exception

is met when an employer (1) had actual knowledge (2) that an injury was certain to occur, and (3) it willfully disregarded that knowledge. *Birklid*, 127 Wn.2d at 865. *Birklid* found that plaintiffs there had demonstrated Boeing's "willful disregard," because Boeing was aware that in the past some of its workers had become ill when exposed to the same chemicals, yet, armed with that knowledge, Boeing supervisors ordered workers to continue to work even when they complained. *Birklid*, 127 Wn.2d at 863.

This case is remarkably similar. Boeing knew in 1985 — when it forced Walston and his co-workers over their protest to inhale large quantities of asbestos dust — that they would suffer immediate invisible lung injuries from such coerced inhalation of asbestos, triggering an injurious process that would eventually kill some of them. One of Walston's co-workers already had died of mesothelioma. A number of other cases had been reported at Boeing in 1985, and over sixty Boeing employees have died from such asbestos exposure. Despite that knowledge, Boeing told Walston and his co-workers to "go back to work," CP 1655 (98:4-99:3), over their strenuous protest.

C. The Court of Appeals' Holding That The Injury Must Be Immediate and Visible Imposes a Requirement That Does Not Exist Under Washington Law.

The single factor that the Court of Appeals found different and dispositive about Walston's case is that in *Birklid* the worker's injuries were immediate and visible. As the Court of Appeals stated:

When exposed to the injurious chemical, the *Birklid*, *Hope*, and *Baker* employees became visibly sick—exhibiting symptoms such as passing out, dizziness, burning eyes, upset stomach, difficulty breathing, nausea, headaches, and skin rashes and blisters—and complained to their employers about the effect of the chemical exposure. . . . Here, unlike in *Birklid*, *Hope*, and *Baker*, where the injury to the employees was immediate and obvious, Walston and his co-workers were not immediately or visibly injured by the exposure to asbestos.

2013 WL 326309 at *5.

The Court of Appeals was certainly correct that Walston did not become immediately and visibly ill based on his coerced inhalation of asbestos. Walston submits, however, that the Court of Appeals was wrong in concluding that *Birklid*, *Baker* and *Hope* held that immediate and visible injury is a prerequisite to bringing a tort claim based on a coerced toxic insult. Walston submits that while immediate and visible injuries provide a “means” to prove an

employer's actual knowledge and willful disregard, such evidence is not the *only* way to prove those elements of the *Birkliid* test.

Immediate and observable symptoms from chemical exposures provide evidence that an employer has actual knowledge that workers suffer certain injury, but when an employer acts in its short term economic self-interest to cause undetectable injuries to its employees that may kill them, the Court also should not hesitate to hold the employer accountable. Boeing's counsel agreed that if an employer forced a worker to handle plutonium with no protection while the employer watched from behind a lead shield, it "would be a classic intentional tort," adding, "I don't see how that wouldn't fall under the physical assault or battery that would have been actionable under preexisting law [prior to *Birkliid*]." CP 5746-47 (23:18-24:8); CP 5770 (47:20-25).

Yet Walston's case is no different. Under Washington law, a "battery" is any "harmful or offensive contact . . . resulting from an act intended to cause the plaintiff or a third person to suffer such contact." *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000). An "assault" is an act "of such a nature that causes apprehension of a battery." *Id.* A jury could readily find that when

Boeing forced Walston to work with no protection under the asbestos abatement personnel who showered him with falling asbestos, Boeing committed an assault and battery on Walston that triggered an injurious process that led to his terminal illness — no different from forcing an employee to handle plutonium without protection or to walk into an irradiated power plant. *See Restatement (Second) of Torts* § 18 at 31, comment c (“battery” includes deliberate action that causes another “to come into contact with a foreign substance in a manner which the other will reasonably regard as offensive”).

Yet deliberate slow-poisoning or coerced irradiation do not involve immediate and visible injuries to the employee. What matters in such cases, as in *Birkliid*, is that the employer knows that its workers had suffered injuries from such exposures in the past, yet with that knowledge, the employer coerces its employees into a toxic insult, presumably because the employer feels that it was economically beneficial for the employer to do so and that any resultant terminal illness will be sufficiently remote that the employer will not be held accountable.

The Court of Appeals misplaced its reliance on *Vallandigham v. Clover Park School District*, 154 Wn.2d 16, 109 P.3d 805 (2005), to

suggest that the injury about which Boeing knows must be immediate and visible. 2013 WL 326309 at *4. But *Vallandigham* is not a chemical exposure case. *Vallandigham* addressed the more difficult question of predicting future human conduct. *Vallandigham* held that because special education students are unpredictable, the school district could not know that certain injury to staff would continue at the hands of the special education student. *Id.* at 36. In reaching that holding, the Court distinguished the “anticipated” impact of chemical exposures in *Birklid* from the less predictable future behavior of a special education student. The Court explained:

[T]he employer in *Birklid* was in a vastly different position than the employer in this case. While Boeing *knew* that the phenol-formaldehyde fumes would continue to make employees sick absent increased ventilation, the Clover Park School district could not know what R.M.’s behavior would be from day to day. No one could be sure that R.M.’s violent behavior would not cease as quickly as it began.

Id. at 33. *Vallandigham* thus reflects a sensible policy judgment that distinguishes the unpredictability of volitional human behavior from chemical reactions and biologically certain events. See *Katanga v. Praxair Surface Technologies, Inc.*, 2009 WL 506832, *3 (W.D. Wash. Feb. 27, 2009) (distinguishing *Vallandigham* based on its

reliance on “the unpredictability in human behavior” and holding that plaintiff stated a claim under *Birklid* based on certain knowledge of continuing chemical explosions).

This case plainly falls in the *Birklid* group of cases that recognize certainty in toxic exposures. But the certainty of toxic insults should not be limited to when the injury produces immediate and visible symptoms.

Finally, the Court of Appeals relied heavily on the indisputable fact that not everyone who is coerced to inhale asbestos dust gets a deadly disease, citing *Shellenbarger v. Longview Fibre Paper & Packaging*, 125 Wn. App. 41, 103 P.3d 807 (2004). But that is true for any toxic insult that triggers an injurious process leading to a chronic disease. The extent of a worker’s illness will depend on his sensitivity to the toxic insult. That was the case with the chemical exposures in *Birklid*, *Baker* and *Hope*, as well. And it is equally true in poisoning and irradiation cases. In such cases, the worker’s body is immediately but invisibly insulted, and no one can foretell if the worker will die from the insult. The Court of Appeals noted that Walston could not point to any evidence that Boeing knew to a certainty that coercing Walston to inhale asbestos fibers for a month

would cause him to get mesothelioma (2013 WL 326309 at *7), yet that will always be the case when an employer deliberately forces an employee to suffer a toxic insult that starts an injurious process that may kill him. Yet such deadly diseases, when they do occur – are far more devastating than the injuries at issue *Birklid*, and the Court should be more protective of workers when the invisibility of the injury provides further incentive to the employer to act in its short-term economic self-interest and deliberately harm its employee. A pistol with one bullet in the chamber may or may not kill the first target, but it will be lethal to someone. That kind of uncertainty does not exempt employers under the worker compensation law.

What Boeing *did* know is that other Boeing workers already had suffered deadly diseases from forced exposure to asbestos and that one of Walston's co-workers had recently died of mesothelioma. Indeed, the fact that the abatement workers above Walston were wearing "moon suits" is proof-positive that Boeing knew it was forcing Walston to suffer an injurious process. The fact that the toxic insult does not cause an immediate, visible sickness is not a principled reason to exempt employers for such deliberately caused injuries

under the *Birklid* rule. Walston is entitled to have a jury consider that evidence and decide if the “deliberate intent” exception applies.

Not only is *Shellenbarger* not controlling here, but it is also readily distinguishable from Walston’s case. In *Shellenbarger*, the plaintiff suffered his only documented exposure to asbestos fibers in 1964-65 when he tore open and dumped bags of asbestos powder as part of his job. *Shellenbarger*, 125 Wn. App. at 43. Shellenbarger presented no evidence that Longview Fibre knew in 1965 that inhaling asbestos dust was harmful and would trigger an injurious process that could lead to his deadly disease. *Shellenbarger* thus is more akin to the circumstances surrounding Walston’s early career at Boeing – which is *not* the basis upon which he contends here that the deliberate intent exception applies. Here, Boeing forced Walston into a month-long toxic insult to his lungs, which Boeing knew began an injurious process for Walston – in this case, an injurious process that produced a terminal disease.

VI. CONCLUSION

For the foregoing reasons, this Court should grant review of the published opinion of the Court of Appeals, and hold that the Court of

Appeals erroneously applied well-developed principles allowing a direct action in toxic exposure cases.

DATED this 28th day of February, 2012.

Respectfully submitted,

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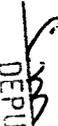
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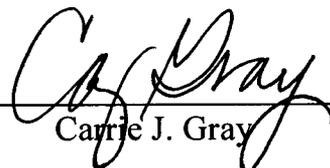
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Carrie J. Gray

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

v.

THE BOEING COMPANY; and
SABERHAGEN HOLDING, INC., as
successor to TACOMA ASBESTOS
COMPANY and THE BROWER COMPANY,
Appellants.

No. 42543-2-II

PUBLISHED OPINION

Van Deren, J. — The Boeing Company appeals the trial court’s denial of its motion for summary judgment under RCW 51.04.010 and RCW 51.24.020, which provide that workers’ compensation is the exclusive remedy for injured employees subject to the industrial insurance act (IIA), title 51 RCW, absent an employer’s deliberate intention to cause such injury. Because Boeing met its burden to show that no disputed material facts exist here, the burden shifted to Walston to raise a material factual dispute about whether Boeing had actual knowledge that the complained-of asbestos exposure was certain to cause injury and that Boeing willfully disregarded that knowledge. Walston failed to meet that burden; thus, we reverse the trial court’s order and remand for entry of an order granting summary judgment to Boeing.

FACTS

Gary Walston worked in Boeing's hammer shop at plant 2 in Seattle from 1956 to 1992. Hammer shop workers fabricated a variety of metal airplane parts. Walston asserts that "[d]uring his employment at Boeing, he worked with and around asbestos containing products from various sources and inhaled asbestos fibers into his lungs." Clerk's Papers (CP) at 13. Walston claims that the asbestos exposure at issue occurred when he worked around other employees who were repairing pipe insulation that contained asbestos.¹

The hammer shop had asbestos-insulated pipes running the length of the shop ceiling and from the ceiling to the hammer machines. In January 1985, Boeing assigned maintenance workers to repair the pipe insulation because a white powdery substance determined to be asbestos was flaking and falling from the overhead pipes. The maintenance workers re-wrapped the overhead pipes to contain the flaking asbestos insulation.

While performing this work, the maintenance workers used ventilators and were fully enclosed in protective clothing that the hammer shop workers referred to as "moon suits." CP at 2014. Walston and the other hammer shop workers continued to work during the repairs without protective clothing or respirators.

The 1985 repairs created visible asbestos dust and debris that fell on Walston and the other hammer shop workers. Walston covered his tool box with plastic to stop the dust from

¹ Walston identifies other sources of asbestos exposure, such as cutting asbestos board; mixing asbestos powder and oil in the lead plate area; and wearing gloves, coats, and leggings issued to shop employees. But the issue on appeal is whether there is a material issue of fact about whether Boeing deliberately injured Walston—had actual knowledge of certain injury and willfully disregarded that knowledge—by exposing him to asbestos when abatement contractors repaired asbestos insulation on overhead pipes in the hammer shop in 1985.

accumulating in it. Hammer shop workers, including Walston and John Stewart, asked their supervisor whether they could leave their workstations or wear protective gear during the pipe repair. The supervisor told them to “go back to work” but recommended that the workers avoid working directly under the overhead repairs.² CP at 1655. Walston said that the repairs lasted approximately one month, but Stewart recalled that the repairs were finished in only a few days.

There is no dispute that Boeing was aware that asbestos was a hazardous material well before the 1985 “moon suit incident” in the hammer shop. Walston’s evidence shows that Boeing was aware of the dangers associated with asbestos exposure, including manifestation of asbestos-related diseases decades after initial exposure.³ The record includes memoranda from Boeing

² Stewart also complained to his union about the asbestos exposure, and the union recommended that he write a letter documenting the exposure for his medical file.

³ For example, in December 1972, Boeing issued Industrial Hazards Control Bulletin (IHCB) No. 5, which warned that asbestos dust was “[d]angerously toxic” and that “[i]nhalation of asbestos dust or fibers over prolonged periods may result in lung damage.” CP at 5238. On July 18, 1977, industrial hygiene engineers, Richard H. Kost and Rick Carbone, wrote a memorandum stating that asbestosis results from chronic inhalation of asbestos dust, and that bronchial cancer is associated with asbestos exposure 20 to 30 years after initial exposure. The same document explained the effect of asbestos inhalation on the lungs, “Lung fibrosis is characteristic of asbestos is with fibrotic lesions tending to be diffuse and predominating primarily in the basal portions of the lung” and “pulmonary fibrosis, -pleural plaques and calcification are early radiologic findings occurring after 20 years of exposure to asbestos and may be found in the absence of any other disease symptoms.” CP at 5247.

An undated document titled “Information about Asbestos,” authored by Dr. Barry E. Dunphy, Manager at Boeing Corporate Occupational Medicine, states:

Breathing air which contains hazardous amounts of asbestos fibers causes no discomfort or warning sign at the time of exposure. Ten or more years after breathing air that contains hazardous amounts of asbestos, a serious lung disease called “asbestosis” may slowly begin to develop. Asbestosis causes scarring of the lungs, which may lead to severe impairment of breathing, and even death. Breathing air which contains hazardous amounts of asbestos can also cause an increased risk of lung cancer fifteen to fifty years after exposure. The risk of developing lung cancer due to asbestos is much greater among smokers than among non-smokers. Individuals exposed to hazardous amounts of asbestos may also be at increased risk of developing cancers of the larynx, esoph[a]gus, stomach

industrial hygiene engineers discussing the risks associated with asbestos exposure, surveys and investigations conducted at Boeing to determine levels of exposure, and procedures and recommendations for reducing worker exposure to asbestos.⁴

Between October 1978 and 1986, Boeing received at least three workers' compensation

and large intestine.

CP at 2616.

⁴ IHCN No. 5, issued in 1972, stated that workers should avoid breathing asbestos dust or fibers, and that respirators should be used for the removal or demolition of asbestos insulation or coverings.

A Boeing industrial hygiene investigation conducted on May 14, 1977, revealed that removal of asbestos-containing materials would result in excessive asbestos exposure. Based on that investigation, Kost recommended that Boeing limit asbestos exposure in work environments, train employees about the hazards of asbestos and the importance of following procedures and precautions, evaluate current respiratory requirements and equipment, and provide easier access to protective equipment.

In January 1978, N.P. Novak, a Boeing industrial hygiene engineer, wrote in a memorandum evaluating asbestos use that due to the carcinogenic potential of asbestos, the National Institute for Occupational Safety and Health recommended setting the exposure limit at the lowest level detectable by available analytical techniques. He explained that the recommended standard was "intended to protect against the noncarcinogenic effects of asbestos, and substantially reduce the risk of asbestos-induced cancer." CP at 3231. He wrote in a parenthetical that "[o]nly a ban can assure protection against the carcinogenic effects of asbestos." CP at 3231.

In 1980, Boeing industrial hygiene engineer Thomas P. O'Keeffe reported on a survey taken to evaluate possible employee exposures to asbestos from falling insulation matter. O'Keeffe wrote that air samples indicated that ambient levels of asbestos were well below 0.1 fibers per cubic centimeter, but he recommended that fallen insulation material should be cleaned up and handled as asbestos and that Boeing should take actions to remove the ceiling insulation or bind it to prevent it from falling on employees and possibly increasing asbestos levels in the ambient air.

In 1982, Novak wrote that stripping and removing asbestos insulation on pipes generates the highest airborne concentrations of asbestos out of any operations monitored at Boeing. In April 1983, J.W. LaLonde, the Boeing fabrication division safety manager, ordered asbestos ceiling insulation to be encapsulated or sealed to eliminate a source for potential employee overexposure in a building at Boeing's Auburn facility. The memorandum stated that although the levels of asbestos fibers were not such that would lead to asbestosis, "Boeing Medical-Occupational Health [wa]s concerned about the possibility of lower exposures leading to lung cancer and mesothelioma." CP at 5305.

claims based on asbestos-related injuries at Boeing facilities in Renton and Auburn. Also, in 1981, another hammer shop employee, who worked there from 1957 to 1975, sued an asbestos manufacturer based on his developing cancer from asbestos exposure in Boeing's hammer shop.⁵ In the late 1980s, Boeing received similar workers' compensations claims alleging asbestos related injuries, including mesothelioma, which is cancer in the lung lining.

Walston's experts, Dr. Arnold Brody, a cellular biologist; Dr. Richard Lemen, an epidemiologist; and Dr. Carl Brodtkin, a physician who examined Walston's medical records; variously opined that exposure to asbestos causes cellular level lung injury that increases the risk of developing an asbestos-related disease.⁶ But these same experts also admitted that no amount

⁵ Although the employee did not sue Boeing, Boeing became aware of the lawsuit at least by February 6, 1985, when it received a request for third-party discovery.

⁶ Dr. Brody explained in his declaration that when humans breathe asbestos fibers, the body has good defense mechanisms for shielding and clearing the fibers out of the lung. But if an individual is repeatedly exposed, some proportion of the fibers will cause scarring and injury at the cellular level. Visible scar tissue in the lungs caused by exposure to asbestos fibers is asbestosis. Asbestos can also cause mesothelioma and bronchogenic carcinoma (lung cancer) because lung cells divide to replace injured ones, thereby increasing the opportunity for cancer to develop. Dr. Brody declared, "The more often an individual is exposed [to asbestos], the more of these cellular and molecular injuries are sustained and the more likely the individual is to develop cancer[.]" *but "[n]ot all injuries result in asbestosis or cancer."* CP at 1025-26 (emphasis added). He also opined that a person "exposed to asbestos at levels above background can sustain microscopic injury to their lung tissue" within 48 hours of exposure to asbestos, and if the person continues to be exposed to asbestos, the early microscopic injuries "can result in clinical manifestation of disease decades after the initial exposures." CP at 1026.

Similarly, Dr. Lemen, who helped draft the initial Occupational Safety and Health Administration asbestos exposure standards in the early 1970s, declared that every "exposure to asbestos constitutes an injury in and of itself," but "*not every injurious exposure to asbestos manifests itself in asbestos disease.*" CP at 1065 (emphasis added). And Dr. Brodtkin testified in his deposition that an asbestos fiber in the lungs creates an inflammatory response at the cellular level that an individual is not aware of. He said that persons with only ambient exposure to asbestos breathing in the city of Seattle, for example, may have asbestos fibers in their lungs causing the same type of cellular inflammation injury but, at such a low concentration, there is not a demonstrated increased clinical risk of disease. A cellular injury from asbestos exposure puts a person at an increased risk for asbestos-related disease, but it does not mean that disease will

occur.

Dr. Brodtkin also described the process by which asbestos fibers cause mesothelioma. He explained that asbestos exposure sufficient to overcome the body's defenses causes a direct genetic injury to an individual's deoxyribonucleic acid (DNA). Then "subsequent injuries and exposures [to asbestos] over many generations of cells . . . increase the changes in the DNA, the behavior of the cells, [and] potentially alter[s] cellular division." CP at 2850. Eventually, clinical tumors and clinical illnesses develop. Mesothelioma is a tumor in the lining of the lung or pleura. Dr. Brodtkin testified that the sub-clinical process and tumor initiation caused by the interaction between the asbestos fiber and the DNA begins shortly after inhalation, but that process does not produce symptoms of illness. The "time between exposure and development of illness is called the 'latent period.'" CP at 2850. Asbestos-related diseases have a prolonged latent period, often decades. For mesothelioma, an average latency may be 35 years. The "latency is one of sub-clinical effects, where there is injury to the DNA, tumor initiation and tumor promotion" but "[i]t's not until the . . . change in the behavior of the cells, and the development of a clinically apparent tumor, that one gets the clinical illness, . . . and usually diagnoses are obtained at that time." CP at 2850.

Dr. Brodtkin related that the relationship between exposure to asbestos and risk of mesothelioma is called "dose response." CP at 2853. Medical science has not determined whether there is a threshold exposure below which there is no clinically significant increased risk and above which there is a clinically significant increased risk; but as dose ranges increase, so does the risk of mesothelioma. There is no level of exposure to asbestos that will guarantee that the exposed person develops mesothelioma or other asbestos related disease. "Mesothelioma is a – overall, a rare disease. As dose increases, the risk for [m]esothelioma increases[,] . . . but . . . there is not an exposure which all individuals will develop [m]esothelioma" or other asbestos related diseases. CP at 2855. Mesothelioma is extremely rare in the general population, including exposed workers. But among certain groups of workers with the highest cumulative asbestos exposure, such as asbestos insulators, the rate of mesothelioma rises to nine percent.

When asked whether asbestos exposure is certain to cause injury, Dr. Brodtkin said:

[I]n terms of the exposures that I have evaluated with . . . Walston, [it] *would certainly cause increased risk for injury . . . [but] . . . it doesn't guarantee that disease will occur.*"

. . . .

But a hypothetical individual with similar exposure [as Walston], I can't say with certainty that they would develop disease. They would have increased risk for disease. They would likely have injury at a cellular level, but whether that would eventually be manifest by disease, I couldn't say with certainty.

CP at 2865 (emphasis added). Dr. Brodtkin clarified that in an isolated incident, exposure to asbestos is not certain even to cause injury at the cellular level, but significant asbestos exposure over time is likely or almost certain to cause cellular injury. Dr. Brodtkin characterized Walston's career exposure as significant exposure over time and testified that Walston's proximity to a larger scale rip out or removal of pipe insulation, which was described as the "moon suit incident" by Walston and his co-workers, represented a very significant exposure—likely the highest level of exposure experienced by Walston.

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of exposure to asbestos is certain to result in disease.

In 2010, Walston was diagnosed with mesothelioma. Walston sued Boeing, alleging that he contracted mesothelioma as a result of his exposure to asbestos while working at Boeing.⁷ Boeing moved for summary judgment dismissing Walston's claims because it was entitled to employer immunity under the exclusivity provisions of the IIA. The trial court denied Boeing's motion for summary judgment. We granted Boeing's petition for discretionary review of the trial court's denial of its summary judgment motion.

ANALYSIS

I. Standard of Review

We review a trial court's denial of a motion for summary judgment *de novo*. *Baker v. Schatz*, 80 Wn. App. 775, 782, 912 P.2d 501 (1996). "Summary judgment should only be granted if after considering all the pleadings, affidavits, depositions or admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law." *Baker*, 80 Wn. App. at 782.

⁷ By the time Walston was diagnosed with mesothelioma he was over 65 years old and a combination of Medicare and his supplemental medical insurance policy covered his medical costs. Thus, he never applied for workers compensation benefits since he could not get wage loss and had no out-of-pocket expenses related to the disease.

Donna Walston also brought claims against Boeing for (1) her own alleged exposure to asbestos based on laundering her husband's asbestos-laden work clothes and (2) loss of consortium arising out of her husband's exposure and injury. By stipulation, Donna Walston's claims arising from her own alleged exposure to asbestos, including fear of future cancer, were dismissed. Her claims for loss of consortium remain pending, but they are not the focus of this appeal. The Walstons also sued Saberhagen Holdings for supplying asbestos-containing products to Boeing; but the trial court dismissed the claims against Saberhagen.

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II. Washington's Industrial Insurance Act

The IIA created a swift and certain no-fault workers' compensation system for injured employees in exchange for granting employers immunity from lawsuits arising from workplace injuries. RCW 51.04.010; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). But employers who deliberately injure their employees are not immune from civil suits by employees who are entitled to compensation under the IIA.⁸ RCW 51.24.020 provides:

If injury results to a worker from the *deliberate intention of his or her employer to produce such injury*, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

(Emphasis added.) Washington courts have consistently interpreted RCW 51.24.020 to require proof of the employer's specific intent to injure an employee before the employee can maintain a separate cause of action against a covered employer. *Vallandigham*, 154 Wn.2d at 27.

Until 1995, our courts applied the "deliberate intention" exception to the workers' compensation statute only where there had been a physical assault by one worker against another. *See, e.g., Perry v. Beverage*, 121 Wash. 652, 655, 659-60, 209 P. 1102 (1922), 214 P.146 (1923) (supervisor struck employee in the face with a water pitcher during an argument); *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 7, 9, 856 P.2d 410 (1993) (forklift driver purposely crushed another worker between two drums). But in 1995, in *Birklid v. Boeing Company*, our Supreme Court held that "deliberate intention" is not limited to physical assaults but includes

⁸ "Employers who engage in such egregious conduct should not burden and compromise the industrial insurance risk pool." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995).

incidents where the employer (*I*) has “actual knowledge that an injury is certain to occur” and (2) “willfully disregard[s] that knowledge.” 127 Wn.2d 853, 865, 904 P.2d 278 (1995). The Court expressly rejected the more lenient “substantial certainty”⁹ and “conscious weighing”¹⁰ tests used by other states with similar “deliberate intention” statutory provisions. *Birklid*, 127 Wn.2d at 865.

III. Cases Applying the *Birklid* Standard

In *Birklid*, Boeing “[e]mployees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach[s]” during pre-production testing of a new material containing phenol-formaldehyde. 127 Wn.2d at 856 (quoting *Birklid* Clerk’s Papers at 115). A Boeing supervisor reported the employees’ symptoms, advised that the effects would likely worsen as production and temperatures increased, and requested improved ventilation in the work area. *Birklid*, 127 Wn.2d at 856. Boeing denied the request. *Birklid*, 127 Wn.2d at 856. Boeing proceeded with production of the new material and, as anticipated, its workers became sick. *Birklid*, 127 Wn.2d at 856.

When addressing the “deliberate intention” issue raised in the employees’ lawsuit subsequently filed against Boeing, our Supreme Court distinguished all prior cases decided under

⁹ Under the “substantial certainty” test, “[i]f the actor knows that the consequences are *certain*, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” *Birklid*, 127 Wn.2d at 864 (emphasis added) (internal quotation marks omitted) (quoting *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, 21-22, 398 N.W.2d 892 (1986)).

¹⁰ Oregon’s “conscious weighing” test focuses on “whether the employer had an opportunity consciously to weigh the consequences of its act and knew that someone, not necessarily the plaintiff specifically, would be injured.” *Birklid*, 127 Wn.2d at 865 (citing *Lusk v. Monaco Motor Homes, Inc.*, 97 Or. App. 182, 185, 775 P.2d 891 (1989) (interpreting Or. Rev. Stat. § 656.156(2))).

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the “deliberate intention” exception by explaining that in this instance Boeing knew in advance its workers would become ill. *Birklid*, 127 Wn.2d at 863. It held that in earlier cases, employers may have been aware that they were exposing workers to unsafe conditions, but workers were not being injured until accidents occurred. *Birklid*, 127 Wn.2d at 860-61, 863 (citing *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 580, 547 P.2d 856 (1976); *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 285-86, 54 P.2d 235 (1936); *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 299-300, 205 P. 379 (1922); *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 354, 734 P.2d 961 (1987); *Peterick v. State*, 22 Wn. App. 163, 166-67, 189, 589 P.2d 250 (1977), *overruled on other grounds by Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 719-20, 709 P.2d 739 (1985)); *Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 270, 534 P.2d 596 (1975); *Winterroth v. Meats, Inc.*, 10 Wn. App. 7, 8, 516 P.2d 522 (1973). It further held that the Boeing employees presented sufficient evidence to justify a trier of fact’s finding that Boeing deliberately intended to injure them. *Birklid*, 127 Wn.2d at 865-66.

Following *Birklid*’s articulation of the proper standard to apply when employees covered by the workers’ compensation system allege a deliberate intent to injure, two cases—*Hope v. Larry’s Markets*, 108 Wn. App. 185, 193-94, 29 P.3d 1268 (2001), *overruled by Vallandigham*, 154 Wn.2d at 35, and *Baker*, 80 Wn. App. at 777-79—addressed employment situations involving employees who were repeatedly exposed to chemicals that made them visibly sick and who complained of illness and injury at the time of exposure. The employees in *Hope* and *Baker* satisfied the “actual knowledge” prong of the deliberate injury test by providing evidence that the employer knew that employees were suffering injuries from chemical exposure and that they would continue to do so until the exposure stopped. *Hope*, 108 Wn. App. at 194; *Baker*, 80 Wn.

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App. at 783-84. The employees in both cases also presented evidence relevant to the employers' "willful disregard" of that knowledge.¹¹ *Hope*, 108 Wn. App. at 194-95; *Baker*, 80 Wn. App. at 783-84. These cases held that the employees' evidence was sufficient to justify a trier of fact finding deliberate intention to injure and the employees were entitled to have a jury determine whether the employer deliberately intended to injure them, thus, precluding summary judgment in favor of the employer. *Hope*, 108 Wn. App. at 195; *Baker*, 80 Wn. App. at 784.

In *Shellenbarger v. Longview Fibre Company*—an asbestos exposure case—Division One of this court affirmed summary judgment for the employer, holding that a fact finder could not reasonably conclude that Longview Fibre had actual knowledge of certain injury. 125 Wn. App. 41, 43, 103 P.3d 807 (2004). Shellenbarger developed asbestosis and lung disease allegedly as a result of asbestos exposure during his employment at Longview Fibre Company. *Shellenbarger*, 125 Wn. App. at 43-45. The court reasoned that although the employer became aware of the dangers of asbestos, evidenced by the employer's warning employees in its "Special Hazards Manual" that asbestos could lead to asbestosis and advising employees to wear a respirator when around asbestos dust, knowledge of risk of injury is not knowledge of certain injury. *Shellenbarger*, 125 Wn. App. at 44-45, 48-49. The court held that "the relevant injury is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury." *Shellenbarger*, 125 Wn. App. at 49. The *Shellenbarger* court reiterated that under *Birkliid*, "known risk of harm or carelessness is not enough to establish certain injury, even when the risk is substantial." *Shellenbarger*, 125 Wn. App. at 47.

¹¹ The Supreme Court expressly disapproved of *Hope*, 108 Wn. App. at 194-95, insofar as it held that ineffective remedial measures satisfy the willful disregard prong of the *Birkliid* standard. *Vallandigham*, 154 Wn.2d at 35.

Ten years after *Birklid*, in *Vallandigham*, our Supreme Court further elaborated on the *Birklid* standard. 154 Wn.2d at 29. In *Vallandigham*, school district employees sued to recover for injuries caused by a severely disabled special education student. 154 Wn.2d at 17. Although the student had allegedly injured staff members and students 96 times during one school year, our Supreme Court held that “the behavior of a child with special needs is far from predictable”; thus, the school district could not *know* that the child would continue to injure employees; and, thus, the school district could not be sued by employees for intentionally causing them injuries. *Vallandigham*, 154 Wn.2d at 33-34. In distinguishing *Birklid*, the Court recognized that the impact of exposure to a chemical is predictable in a way that the behavior of a special education student is not. *Vallandigham*, 154 Wn.2d at 24, 33-34. The Court emphasized that “[d]isregard of a *risk* of injury is not sufficient to meet the first *Birklid* prong; *certainty* of actual harm must be known and ignored.” *Vallandigham*, 154 Wn.2d at 28.

IV. Walston’s Claim Does Not Satisfy the *Birklid* Standard

Walston claims that he presented evidence raising a material factual dispute about whether Boeing had (1) actual knowledge that he was certain to be injured and (2) that Boeing willfully disregarded such knowledge. Walston argues that he—like the employees in *Birklid*, *Hope*, and *Baker*—was injured as a result of being exposed to a substance at work that his employer knew was certain to injure him.

But the facts in *Birklid*, *Hope*, and *Baker* differ from this case in an important way. When exposed to the injurious chemical, the *Birklid*, *Hope*, and *Baker* employees became visibly sick—exhibiting symptoms such as passing out, dizziness, burning eyes, upset stomach, difficulty breathing, nausea, headaches, and skin rashes and blisters—and complained to their employers

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about the effect of the chemical exposure. *Birklid*, 127 Wn.2d at 856; *Hope*, 108 Wn. App. at 189-91, 194; *Baker*, 80 Wn. App. 778-79, 783-84. These employees' visible injuries and complaints created a reasonable inference that the employers had actual knowledge of certain injury to its employees. *Birklid*, 127 Wn.2d at 856, 863, 865-66; *Hope*, 108 Wn. App. at 194; *Baker*, 80 Wn. App. 783-84. In *Vallandigham*, our Supreme Court also acknowledged that "in cases involving chemical exposure, repeated, continuous injury and the observation of the injury by the employer can satisfy the first prong of the *Birklid* test." 154 Wn.2d at 30-31 (citing *Hope*, 108 Wn. App. at 193-94).

Here, unlike in *Birklid*, *Hope*, and *Baker*, where the injury to the employees was immediate and obvious, Walston and his co-workers were not immediately or visibly injured by the exposure to asbestos. Nor did they complain of injuries caused from their exposure to asbestos. Walston was not diagnosed with an asbestos related disease until 25 years after the "moon suit incident" in the hammer shop. The immediate visible effects of chemical exposure present in *Birklid*, *Hope*, and *Baker* provided the requisite material issue of fact relating to the employer's actual knowledge of certain injury. *Birklid*, 127 Wn.2d at 856, 863, 865-66; *Hope*, 108 Wn. App. at 194; *Baker*, 80 Wn. App. 783-84. But here, there is no material factual dispute relating to Walston's injury and Boeing's alleged actual knowledge that injury was certain to occur.

Walston argues that Washington has adopted a more liberal standard of proof in asbestos injury cases that allows his case to survive summary judgment. He relies on *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 248-49, 744 P.2d 605 (1987); *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000); and *Mavroudis v. Pittsburgh-Corning Corp.*, 86

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Wn. App. 22, 32, 935 P.2d 684 (1997) to support this argument. *Lockwood, Berry, and Mavroudis* recognize that the peculiar nature of asbestos products and development of asbestos-related disease make it difficult to prove causation. *Lockwood*, 109 Wn.2d at 248-49; *Berry*, 103 Wn. App. at 323-25; *Mavroudis*, 86 Wn. App. at 31-33. For purposes of summary judgment and this appeal, Boeing does not deny that Walston produced evidence showing that his mesothelioma was caused by his exposure to asbestos while he was an employee at Boeing. Thus, the relaxed proof standard related to causation does not apply here, where the issue is whether Walston has provided evidence showing that Boeing had actual knowledge that its employees were certain to contract an asbestos-related disease. That issue requires wholly separate evidence.

Walston first attempts to bridge the gap between his injury and Boeing's alleged actual knowledge that injury was certain to occur by showing that even though its workers were not suffering immediate visible injuries, Boeing knew that diseases caused by asbestos exposure have long latency periods and that they materialize at some later date. He points to at least three workers' compensation claims against Boeing alleging asbestos-related injuries between 1978 and 1986, and a 1981 lawsuit by a Boeing employee against a third-party asbestos manufacturer that alleged asbestos-caused cancer.

But the record here does not support a holding that Boeing's awareness that some workers developed asbestos-related diseases raised 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. As Division One recognized in *Shellenbarger*, not everyone exposed to asbestos develops an asbestos related disease. 125 Wn. App. at 49. Even Walston's experts conceded that there is no known threshold of exposure to asbestos that results in certain asbestos related disease.

Walston secondarily argues that certainty of injury can be shown through 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. Walston's experts described a subclinical¹² cellular inflammation caused by asbestos fibers that may result in abnormal cell division that increases the chance of a genetic defect in the division of cells, leading to cancer. We are mindful of the narrow exception the legislature provided and the strict standard announced by our Supreme Court in *Birklid* that preclude holding that Walston has shown 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. See *Vallandigham*, 154 Wn.2d at 28.

Walston also points to various internal Boeing documents discussing the risk of asbestos exposure and its potential to cause injury years after exposure. This evidence does show that Boeing knew that exposure to asbestos was dangerous to its employees because it increased the risk that an asbestos-related disease could materialize. Nevertheless, "the relevant inquiry is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury." *Shellenbarger*, 125 Wn. App. at 49. In *Birklid*, our Supreme Court acknowledged that the deliberate intent exception was very narrow. 127 Wn.2d at 865. Risk of injury, even risk amounting to substantial certainty of injury, is not certain injury mandated

¹² A "subclinical" cellular inflammation would not be detectable as a disease in a medical examination. See *Stedman's Medical Dictionary* 1692 (26th ed. 1995) (defining "subclinical" as, "[d]enoting the presence of a disease without manifest symptoms; may be an early stage in the evolution of a disease"); *Webster's Third New International Dictionary* 2273 (2002) (defining "subclinical" as "marked by only slight abnormality and not being such as to give rise to overt symptoms : not detectable by the usual clinical tests").

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under the *Birklid* test. 127 Wn.2d at 865; *Vallandigham*, 154 Wn.2d at 28.

Walston has not directed us to any evidence in the record demonstrating that a material factual dispute about whether Boeing had actual knowledge in 1985 that asbestos exposure was certain to cause injury; nor did our independent search of the record uncover such evidence. Here, as in *Shellenbarger*, 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. See 125 Wn. App. at 49. Under these facts (no actual knowledge of certain injury), we need not reach the second prong of the *Birklid* deliberate intent test, which considers whether the employer willfully disregarded actual knowledge of certain injury.¹³

¹³ Because most courts applying the *Birklid* test have held that the employer did not have actual knowledge that injury was certain to occur, few courts have considered whether an employer willfully disregarded such knowledge. See, e.g., *French v. Uribe, Inc.*, 132 Wn. App. 1, 12, 130 P.3d 370 (2006); *Crow v. Boeing Co.*, 129 Wn. App. 318, 330, 118 P.3d 894 (2005); *Shellenbarger*, 125 Wn. App. at 49; *Byrd v. Sys. Transp., Inc.*, 124 Wn. App. 196, 205, 99 P.3d 394 (2004). In *Stenger v. Stanwood School District*, 95 Wn. App. 802, 813-16, 977 P.2d 660 (1999), overruled by *Vallandigham*, 154 Wn.2d at 35, and *Hope*, 108 Wn. App. at 194-95, Division One of this court focused on the adequacy or effectiveness of attempted remedial measures. In *Stenger*, school employees sued their school district to recover for injuries caused by a special education student. 95 Wn. App. at 803. Division One of this court held that “a jury could reasonably conclude that the [school d]istrict had actual knowledge that the staff would continue to be injured by [the student] in the future” and the district’s efforts to prevent injury were inadequate and, thus, amounted to willful disregard of certain injury. *Stenger*, 95 Wn. App. at 813-14, 816-17. The district did not file a petition for review with the Supreme Court, but the court’s holding in *Vallandigham*, on very similar facts, abrogated *Stenger*. See 154 Wn.2d at 31-32, 34-35.

Our Supreme Court in *Vallandigham*, did not reach the willful disregard issue in its analysis but, in dicta, it disapproved of the holdings in *Stenger* and *Hope* to the extent that they suggested a finding of willful disregard can be based on the simple fact that an employer’s remedial efforts were ineffective. *Vallandigham*, 154 Wn.2d at 34-35; see *Stenger*, 95 Wn. App. at 813; *Hope*, 108 Wn. App. at 195. The Supreme Court “reject[ed] any notion that a reasonableness or negligence standard should be applied to determine whether an employer has acted with willful disregard.” *Vallandigham*, 154 Wn.2d at 35. It held that willful disregard may not be met by showing that the employer’s remedial action is ineffective. *Vallandigham*, 154 Wn.2d at 28, 34-35.

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In sum, Boeing met its burden to show that there is no dispute of material fact that Boeing knew in 1985 that the pipe repairs in the hammer shop were certain to cause injury to its employees. After Boeing met its burden, the burden shifted to Walston to raise a genuine issue of material fact about Boeing's knowledge of certainty of injury to the Boeing employees in the hammer shop in 1985. See *Vallandigham*, 154 Wn.2d at 35. This he failed to do.

Because Walston has failed to carry his burden to demonstrate that there remains a material question of fact about Boeing's actual knowledge of certain injury as required by RCW 51.24.020, Boeing is immune from Walston's suit for workplace injury under RCW 51.04.10. Accordingly, Boeing is entitled to summary judgment as a matter of law. *Vallandigham*, 154 Wn.2d at 35.

We reverse the trial court's denial of Boeing's summary judgment order and remand to the trial court for entry of an order granting summary judgment to Boeing on Walston's claims.¹⁴

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, J.

¹⁴ Donna Walston's claims for loss of consortium arising from her husband's injury are still pending. Those claims are not addressed in this appeal, but because we hold that Boeing is entitled to summary judgment on her husband's personal injury claims, the trial court will undoubtedly address the continuing viability of her claims.