

ORIGINAL

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2013 MAY 30 P 3:00

No. 885117

BY RONALD R. CARDENIEL

E
CLERK
CDF

IN THE SUPREME COURT OF WASHINGTON

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

Petitioners,

v.

THE BOEING COMPANY,

Respondent.

RESPONDENT BOEING'S RESPONSE TO BRIEF OF
AMICUS CURIAE UNITED STEELWORKERS LOCAL 12-369

Eric D. Miller, WSBA No. 45214
EMiller@perkinscoie.com
Brendan Murphy, WSBA No. 34476
BMurphy@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Respondent
The Boeing Company

TABLE OF CONTENTS

	Page
ARGUMENT.....	1
CONCLUSION.....	3

TABLE OF AUTHORITIES

	Page
CASES	
<i>Baker v. Schatz</i> , 80 Wn. App. 775, 912 P.2d 501 (1996).....	1
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	1, 2
<i>Hope v. Larry's Markets</i> , 108 Wn. App. 185, 29 P.3d 1268 (2001).....	1
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	2

ARGUMENT

Amicus United Steelworkers 12-369 devotes its brief to attacking a straw man. Specifically, amicus argues (Br. 9) that the Court of Appeals was wrong to hold that “immediate manifestation of injury” is necessary in order to establish that an employer “had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge,” *Birkliid 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.

As explained in Boeing’s response to the petition for review (at 9-10), the Court of Appeals did not so hold. Immediate and visible manifestation of injury can be strong evidence of an employer’s actual knowledge of certain injury to the plaintiff, and the Court of Appeals correctly observed that, in *Birkliid*, as well as in *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), “[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.” 294 P.3d at 766. In this case, by contrast, the court identified “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.* Nowhere in the opinion of the Court of Appeals is there any statement that immediate manifestation of injury is required to satisfy the *Birklid* test.

Under *Birklid*, an employee may sue an employer for work-related injuries only when “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); *see also id.* at 28 (“Disregard of a *risk* of injury is not sufficient,” but “*certainty* of actual harm must be known and ignored.”). The Court of Appeals correctly applied that test and determined that Walston had “failed to carry his burden to demonstrate that there remains a material question of fact about Boeing’s actual knowledge of certain injury.” 294 P.3d at 768.

Like Walston, amicus does not argue that exposure to asbestos is certain to result in mesothelioma or any other disease, still less that Boeing was aware of such a certainty of harm. Under the rule established in *Birklid*, that fact is sufficient to resolve this case.

CONCLUSION

The petition for review should be denied.

DATED: May 30, 2013

Respectfully submitted,

PERKINS COIE LLP

By: 

Eric D. Miller, WSBA No. 45214

EMiller@perkinscoie.com

Brendan Murphy, WSBA No. 34476

BMurphy@perkinscoie.com

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Respondent

The Boeing Company

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of the RESPONDENT BOEING'S RESPONSE TO BRIEF OF AMICUS CURIAE UNITED STEELWORKERS LOCAL 12-369 to the following:

Matthew P. Bergman
Glenn S. Draper
Brian F. Ladenburg
Anna D. Knudson
Bergman Draper & Frockt
614 First Avenue, 4th Floor
Seattle, WA 98104
Attorneys for Petitioners

John W. Phillips
Phillips Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Attorneys for Petitioners

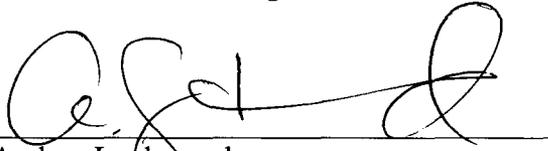
Timothy Kost Thorson
Carney Badley Spellman
701 – 5th Avenue, #3600
Seattle, WA 98104
**Attorneys for Defendant
Saberhagen Holdings Inc.**

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
**Attorney for Amicus
Washington State Labor Council**

Kristopher I. Tefft
Association of Washington Business
1414 Cherry St. NE
Olympia, WA 98507
**Attorney for Amici Association of Washington Business and
Washington Self Insurers Association**

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED: May 30, 2013, at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'A. Lockwood', written over a horizontal line.

Andrea Lockwood
Perkins Coie LLP