BAR BULLETIN

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November 2014

Washington Supreme Court Preserves Integrity of Industrial Insurance Act

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In September, the Washington Supreme Court issued a significant decision that preserves the integrity of the Industrial Insurance Act (IIA) — the state's workers' compensation law — in asbestos and other occupational disease cases. In *Walston v. Boeing Company*,[1] a 5-4 decision, the majority rejected plaintiff's invitation to interpret the IIA's "deliberate injury" exception in a permissive manner that would have largely eviscerated the exclusive remedy provided by the IIA.

Under the "grand compromise" that produced the IIA in 1911, workers were given a no-fault compensation system for occupational injuries and employers were given immunity from lawsuits by workers with workplace injuries.[2] The Legislature, however, created an exception to allow workers to sue employers that *deliberately* injure their employees. The IIA provides the exclusive remedy for workplace injuries unless a worker can prove that his or her injuries resulted "from the deliberate intention of his or her employer to produce such injury."[3]

Consistent with prior decisions, the *Walston* majority held that former Boeing employee Gary Walston could not bring a tort lawsuit for mesothelioma (a type of cancer) allegedly caused by workplace exposure to asbestos, because Walston could not prove that Boeing had "actual knowledge of certain injury" resulting from the asbestos exposure.[4] Consequently, Walston had not shown that Boeing "deliberately intended" to injure him.[5]

For most of the IIA's history, the "deliberate intent to injure" exception was applied in cases of physical assault against an employee. In 1995, the Washington Supreme Court in *Birklid v. Boeing Co.*[6] first considered the exemption in the context of a workplace exposure claim and held that "deliberate intention" means "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."[7] The Court said it was "mindful of the narrow interpretation Washington courts have historically given to the ['deliberate intent to injure' exception], and of the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in [the IIA]."[8]

In 2005, the Court, in *Vallandigham v. Clover Park Sch. Dist. No. 400*,[9] reiterated that the "deliberate intent" standard "provides only a very limited exception to the IIA's workers' compensation scheme in circumstances where an employer deliberately intends to injure an employee."[10] The Court added, "Even substantial certainty that employee injury will occur by virtue of an employer's action (or inaction) is insufficient."[11] The Court also said that "[d]isregard of a *risk* of injury is not sufficient to meet the [*Birklid* test]; *certainty* of actual harm must be known and ignored."[12] The court in *Walston* found the holdings from *Birklid* and *Vallandigham* to be "binding."[13]

In the context of asbestos, exposure is not certain to cause mesothelioma or any other disease, as the experts in *Walston* acknowledged. It may cause a *risk* of disease, but that is insufficient under the *Birklid* standard. Consequently, the majority in *Walston* concluded that the Court of Appeals had properly remanded the matter for entry of an order granting summary judgment to Boeing.

The Washington Supreme Court flatly rejected Walston's argument that the deliberate intention exception includes situations in which an employer knows that *someone*, but not necessarily the plaintiff, is certain to be injured.[14] The Court also rejected Walston's argument that Boeing had actual knowledge of certain injury because individuals exposed to asbestos may be injured at the cellular level.[15] The Court held that "an asymptomatic cellular-level injury … is not itself a compensable injury;" the condition merely creates a *risk* of compensable injury.[16] Thus, even if Boeing knew that asbestos exposure would cause an asymptomatic cellular-level condition, the *Birklid* deliberate intention standard would not be met.

The four dissenting justices believed that Walston had alleged sufficient facts to survive summary judgment. In their view, Walston presented enough evidence of Boeing's knowledge of the hazards of asbestos at the time of Walston's exposure (1985) to raise questions of fact as to whether Boeing knew its employees were being injured and willfully disregarded that knowledge.[17]

The majority in *Walston* reached the right result as a matter of statutory construction, respect for the principle of *stare decisis*, keeping Washington law in harmony with the clear majority rule nationwide, and as a matter of sound public policy.

The majority's ruling is consistent with the Legislature's intent to make the IIA the exclusive remedy for workers except in "those egregious cases where the employer deliberately intended to injure the workers."[18] As the majority in *Walston* appreciated, this narrow exception is a "high standard" that was never intended to swallow the IIA's exclusive remedy rule.[19] Knowledge of a risk is not the same thing as a deliberate intent to injure. The construction of the IIA's deliberate intention standard sought by Walston would have upset the balance achieved in the IIA.

The Washington Supreme Court's holding also falls squarely within several generations of Washington judicial precedent that narrowly construes the deliberate intention exception.[20] Washington courts have long held that there is no deliberate intention to injure merely because the employer allowed a dangerous condition to exist.[21]

Furthermore, a clear majority of other states, consistent with Washington law, require a plaintiff to show that an employer intended to harm an employee to meet the intentional tort exception to workers' compensation exclusivity. For instance, the Supreme Court of Nebraska recently reviewed the decisions of other jurisdictions and summarized the high bar that plaintiffs must hurdle to demonstrate that an exception to the exclusivity of workers' compensation for intentional conduct should apply.

Quoting the leading treatise, the court said:

> It is the "almost unanimous rule" that any intentional conduct exception to the workers' compensation exclusivity rule cannot be "stretched to include accidental injuries caused by gross, wanton, wil[l]ful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury."[22]

The Nebraska court also noted that a permissive interpretation of deliberate intent to harm that would include injuries that are "substantially certain" to occur would inject "complexities, costs, delays, and uncertainties into the compensation process."[23] These attributes are contrary to the purpose of workers' compensation laws, which legislatures adopted to "bring about a speedy settlement of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities."[24] Courts have long followed similar reasoning in the context of asbestos litigation.[25]

The majority's holding in *Walston* also reflects sound public policy. Had the Court reached a different decision, the likely impact on Washington businesses whose operations involve work with or around dangerous substances (and thus pose an inherent risk of occupational injuries) would have been significant, if not catastrophic. A ruling that any employer who engages in hazardous-materials operations has automatically acted with the specific intent to injure its employees simply because such work *may* cause *someone* to develop an illness would have subjected Washington employers to a flood of expensive tort litigation.

From a broader perspective, *Walston* is the most recent of what appears to be an emerging national attack on state workers' compensation systems by the personal injury plaintiffs' bar. For instance, recent decisions by the Pennsylvania Supreme Court and an Illinois appellate court (appeal allowed) have held that because the time limits specified by the state workers' compensation statutes operate to bar recovery for occupational diseases that take many years to manifest, tort liability can fill the gap.[26] Though *Walston* involved a different issue, the common thread uniting these cases is an inventive theory by a creative plaintiffs' lawyer to try to escape from the exclusivity of state workers' compensation laws in order to drag a new universe of solvent defendants into asbestos and other toxic tort cases.[27]

The majority in *Walston* deserves recognition for following the rule of law and respecting the "grand compromise" that has allowed the IIA to work for over a century. ■

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[1] No. 88511-7, 2014 WL 4648090 (Wash. Sept. 18, 2014). **Editor's Note:** As of the date of publication, a Motion for Reconsideration was pending.

[2] *Id.* at *1.

[3] RCW § 51.24.020.

[4] *Walston*, 2014 WL 4648090 at *4.

[5] *Id.*

[6] 127 Wn.2d 853, 904 P.2d 278 (1995).

[7] *Id.* at 865, 904 P.2d at 285.

[8] *Id.*

[9] 154 Wn.2d 16, 109 P.3d 805 (2005).

[10] *Id.* at 36, 109 P.3d at 815.

[11] *Id.*

[12] *Id.* at 28, 109 P.3d at 811 (emphasis in original).

[13] *Walston*, 2014 WL 4648090, at *3.

[14] *Id.*

[15] *Id.* at *4.

[16] *Id.*

[17] *Id.* at *9 (Wiggins, J., dissenting).

[18] *Id.* at *4.

[19] *Id.* at *3.

[20] *See*, *e.g.*, *Birklid*, 127 Wn.2d at 865, 904 P.2d at 285; *Vallandigham*, 154 Wn.2d at 26, 109 P.3d at 810; *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 584, 547 P.2d 856, 859 (1976) (supervisor's act of knowingly disabling safety device did not amount to deliberate intention to injure, as "the required intention relates to the injury, not the act causing the injury"); *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 287-88, 54 P.2d 235, 237 (1936) (neither gross negligence nor failure to observe safety procedures and laws governing safety constitutes a specific intent to injure); *Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 271–72, 534 P.2d 596, 597–98 (1975) (an act that has a substantial certainty of producing injury is insufficient to show deliberate intention).

[21] *See, e.g.*, *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 299–300, 205 P. 379, 380 (1922).

[22] *Teague v. Crossroads Co-op. Ass'n*, 834 N.W.2d 236, 244 (Neb. 2013) (alterations in original) (quoting Larson & Larson, §§ 103.03, 103.06).

[23] *Id.* at 245.

[24] *Id.*

[25] *See Joyce v. AC & S., Inc.*, 785 F.2d 1200, 1206 (4th Cir. 1986); *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448 (6th Cir. 2002); *Coltraine v. Fluor Daniel Facility Servs. Co.*, 1994 WL 279964 (Tenn. App. June 22, 1994).

[26] *Tooey v. AK Steel Corp.*, 81 A.3d 851, 865 (Pa. 2012); *Folta v. Ferro Eng'g*, 14 N.E.3d 717, 729 (Ill. App. Ct.), *appeal allowed* (Ill. Sept. 24, 2014).

[27] *See generally* Victor E. Schwartz & Mark A. Behrens, "Asbestos Litigation: The Endless Search for a Solvent Bystander," 23 Widener L.J. 59 (2013) (discussing ways plaintiffs' lawyers have tried to expand the asbestos litigation).