

Interplay of the Washington Industrial Insurance Act and Asbestos Exposure Claims

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Although the Washington Industrial Insurance Act (WIIA) often provides the exclusive remedy for employees' tort claims against employers, there are exceptions. Attorneys filing asbestos personal injury claims have found creative ways to try to use those exceptions to their clients' advantage. Even if an employee's claims seem to fall within the exceptions to the exclusivity provision of the WIIA, employers should carefully review the case for the details that could protect them.

Deliberate Intention and the WIIA Exception

The Revised Code of Washington (RCW) 51.24.020 carves out an exception to the exclusivity provision of the WIIA for any injury which results from the "deliberate intention of [the] employer to produce such injury." In *Walston v. The Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014), the Washington Supreme Court addressed what type of behavior constitutes "deliberate intention." In *Walston*, a former employee sued his employer for injury resulting from asbestos exposure from overhead repair of pipe insulation by maintenance workers in 1985. The Court held that an employee must prove two things to fulfill the "deliberate intention" requirement: (1) the employer had actual knowledge that an injury is certain to occur and (2) the employer willfully disregarded that knowledge. It is not enough for an employee to prove that the employer had knowledge of an increased *risk* for injury—the employer must have known of *certain* injury. Further, the employee cannot satisfy the second requirement by showing that the employer was grossly negligent—the employer's actions must show willful disregard. Because the employee in *Walston* presented no evidence of the employer's actual knowledge of certain injury, he failed to meet the deliberate intention requirement. Thus, the standard for establishing deliberate injury is high, and employers should be prepared to challenge that the employee's evidence meets such a burden.

Isolating Injuries as Both an Employee and Contractor

Another worker compensation related issue that arises in the asbestos personal injury realm involves employee plaintiffs who allege exposure from an employer's premises from two different time periods. For example, a former employee returns to an employer's premises as an independent contractor and alleges exposure. Or, an employee alleges secondary exposure from a family member who was at one time also employed by the same employer. Although Washington courts have not addressed these situations directly, good arguments can be made that these allegations merely attempt to skirt the exclusivity provision of the WIIA. The nature of asbestos exposure would make it impossible for a jury to isolate which exposure period contributed to the asbestos-related disease. A jury could not separate exposure that occurred while the plaintiff was an employee—an exposure period barred by the exclusivity of the WIIA—from exposure while the plaintiff worked as an independent contractor—an exposure period not subject to the exclusivity of the WIIA. The plaintiff's own evidence in the case may help support employer's argument. In asbestos personal injury cases, plaintiff experts often opine that every fiber cumulatively contributes to asbestos-related diseases. If that is the plaintiff experts' opinion, then one could never separate the employee-related exposure from the non-employee-related exposure and an argument should be raised that the claim against the employer should be dismissed because workers' compensation benefits are the plaintiff's exclusive remedy under the circumstances.

Maritime and Federal Law May Bar Recovery Under the WIIA

Finally, when faced with asbestos lawsuits filed in state court, employers should consider the effect of federal law on such claims. RCW 51.12.100 instructs that the WIIA does not apply to workers who have rights under maritime laws or the Federal Employees' Compensation Act. Many employees were exposed to asbestos while working for government-controlled facilities, such as shipyards or ships. The exclusive remedy for such employees is covered by the federal Longshore and Harbor Workers Compensation Act (LHWCA). Thus, the employee's lawsuit against the employer is not preempted by the WIIA and the employee may be able to bring suit against the employer pursuant to the LHWCA.

The details of employee-related asbestos injury cases often hold the key to defending them. Employers who are aware of these issues can often approach opposing counsel and resolve these cases early in favor of the employer.