NO. 44035-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL S. MICHELBRINK, JR., a single man,

Respondent,

v.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

APPELLANT'S REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

ERIC C. MILLER
Assistant Attorney General
WSBA# 41040
PO Box 40126
Olympia, WA 98504
(360) 586-6300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Respondent Michael Michelbrink invites this court to discard almost two decades of Washington precedent and adopt a new rule of law that transforms every work-related activity known to cause pain or discomfort, no matter how fleeting, which results in a very rare but serious injury, into a "deliberate intent to injure" tort action. Tellingly, Michelbrink did not discuss anywhere in his brief the legal definition of "deliberate intent to injure" announced by the Washington Supreme Court 18 years ago in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). In *Birklid*, the Court held that "deliberate intent to injure" under RCW 51.24.020 is only satisfied if the worker establishes that his employer (1) had actual knowledge that his injury was certain to occur and (2) willfully disregarded that knowledge. 127 Wn.2d at 865.

Ignoring this test, Michelbrink asks this court to graft traditional negligence principles into the test for deliberate intent to injure. Thus, for example, Michelbrink's argument references "eggshell skull" plaintiffs, and relies on Restatement passages that discuss "degrees of fault" and "foreseeability." *See* Brief of Respondent (Br. of Resp't) at 7, 11. Omitted from his analysis are the numerous Washington cases that have specifically and consistently rejected every attempt to introduce common law negligence principles into RCW 51.24.020. *See, e.g., Vallandigham v.*

Clover Park Sch. Dist. 400, 154 Wn.2d. 16, 35, 109 P.3d 805 (2005) (disapproving two Court of Appeals decisions because they improperly applied a "reasonableness or negligence standard" to the two-part *Birklid* test); *Folsom v. Burger King*, 135 Wn.2d 658, 664-65, 958 P.2d 301 (1998) (negligence, even gross negligence or a failure to follow safety procedures, does not rise to the level of a deliberate intent to injure under RCW 51.24.020); *Birklid*, 127 Wn.2d at 865 (rejecting the "substantial certainty" and "conscious weighing" tests as inconsistent with the "narrow interpretation Washington courts have historically given to RCW 51.24.020); *Howland v. Grout*, 123 Wn. App. 6, 12, 94 P.3d 332 (2004) (rejecting plaintiff's attempt to equate foreseeability with the certainty of injury required by RCW 51.24.020).

It is undisputed that the "injury" Michelbrink seeks damages for in this lawsuit is the vertebral fracture and bulging disc he sustained during a Taser training exercise in the course of his employment with Appellant Washington State Patrol (WSP). *See* Br. of Resp't at 10 (defining his "industrial injury" as "to wit: a fractured vertebra and bulging disc"). Michelbrink also concedes, as he must, that WSP did not deliberately intend to produce this injury. Br. of Resp't at 7 ("Respondent does not contend that the State Patrol intended that he suffer vertebrae fractures as a result of the tasing."). Indeed, Michelbrink does not dispute that it was

exceedingly rare for *any* injury to occur during Taser training, much less a fractured vertebra. CP at 39, ¶ 3; 46. These undisputed material facts are dispositive of the issue in this appeal. As a matter of law, Michelbrink failed to produce any evidence establishing that WSP specifically intended to produce his injury or that WSP willfully disregarded any knowledge that Michebrink's injury would occur. RCW 51.24.020 (worker must establish that his injury "results from the deliberate intention of his employer to produce *such* injury"); *Folsom*, 135 Wn.2d at 664 ("Washington courts have required a specific intent to injure in order to sustain a claim under RCW 51.24.020."). As a result, Michelbrink cannot recover damages in excess of the workers' compensation and employer-provided benefits he has already received. *Folsom*, 135 Wn.2d at 664. Accordingly, this Court should reverse the trial court, grant WSP's motion for summary judgment, and dismiss Michelbrink's lawsuit in its entirety.

II. UNDISPUTED FACTS

The undisputed facts in the record are: (1) only 1 percent of all WSP Troopers and cadets who received Taser exposures during training reported any type of injury, most of which were minor and resulted in no missed work; (2) one Trooper out of 791 reported an injury caused by the Taser prongs; and (3) there have been no reported injuries based solely on

the temporary incapacitation caused by the exposure. *See* CP at 39, ¶ 3; 46.

Moreover, the Taser training exposure requirement was consistent with the practices of other law enforcement agencies and was encouraged by the manufacturer. CP at 50-52, ¶¶ 7-8. To mitigate against the risk of injury, WSP implemented control measures such as the use of spotters to prevent injuries caused by falling. CP at 52-53, ¶ 11; 55, ¶ 15. Again, Michelbrink concedes that WSP did not intend to produce the injury that is the subject of his lawsuit and demand for damages. Br. of Resp't at 7.

Michelbrink applied for and received workers' compensation benefits, as well as additional benefits from WSP.[1]

Michelbrink erroneously claims the existence of one material factual dispute: "whether the Washington State Patrol intended to injure Trooper Michelbrink[.]" Br. of Resp't at 14. This claim is based on Michebrink's argument, discussed *infra*, that the momentary pain

[1] Michelbrink asserts that WSP "wants to accept no responsibility for having purposefully injured Trooper Michelbrink." Br. of Resp't at 12. Of course, there is no evidence that WSP purposefully injured Michelbrink. This statement also overlooks the fact that Michelbrink *did* receive workers' compensation benefits paid, in part from the premiums of WSP, that provided him with medical care, wage replacement, and a monetary award for his impairment. CP at 35, ¶ 4; 36, ¶ 7; 28, ll. 9-13. In addition, he may be entitled to further workers' compensation benefits if his condition worsens at any point over his lifetime. *See* RCW 51.32.160. Moreover, Michelbrink has kept his job as a Trooper at his same rate of pay and benefits in a position which accommodates his restrictions. CP at 35-36, ¶ 7. The Legislature recognizes the inherent dangers of being a WSP Trooper and has ensured Troopers have protections in the event they are injured. Michelbrink has received such benefits. *See Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929 P.2d 510 (1997) (describing the statutory benefits available to disabled Troopers).

experienced during the two-second Taser exposure constituted an injury. However, Michelbrink provided no medical evidence that the penetration of the Taser prongs inflicted any actual injury. Indeed, he did not seek any medical treatment until days after the exposure and had no diagnosis related to "signature marks" from the Taser prongs. *See* CP at 25, ll. 16-20. As Michelbrink testified in his deposition, when he was exposed to the Taser, "the pain [was] there and the pain [was] done and [the trainers holding you brought] you down to the floor." CP at 25, ll. 14-20. His lawsuit is based solely on the fracture at the T5 level of his thoracic spine as well as a degenerative bulge in his neck, both of which were diagnosed after the exposure. CP at 32, ll. 4-7. By all accounts, the types of injuries sustained by Michelbrink were extremely rare. *See, e.g.*, CP at 61 (strain injury risks).

III. STANDARD OF REVIEW

Michelbrink mistakenly argues that this Court's review of the denial of summary judgment is somehow tied to the "obvious error" standard for granting discretionary review found in RAP 2.3(b)(1). *See* Br. of Resp't at 5.[2] Michelbrink also suggests that this Court should dismiss this appeal because there is no transcript containing the trial

[2] Michelbrink raised the same issues in his motion to modify the Commissioner's ruling accepting discretionary review. On December 4, 2012, this Court denied Michelbrink's motion.

court's reasoning for denying the motion for summary judgment, and, thus, it is "impossible" to determine whether the trial court committed obvious error. Br. of Resp't at 5. Michelbrink misunderstands the standard of review on this appeal.[3] The test is not whether substantial evidence exists to support the trial judge's determination. Rather, this Court reviews the grant or denial of summary judgment *de novo*, and performs the same inquiry as the trial judge. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). By definition, a transcript of the trial judge's reasoning is neither crucial nor relevant to this inquiry. *See id.*

IV. ARGUMENT

A worker's exclusive remedy for a work related injury are the benefits provided by Washington's Industrial Insurance Act. RCW 51.04.010, 51.32.010. These intentionally broad exclusivity provisions are overcome only in the rare instance when the worker demonstrates that his employer deliberately intended "to produce [his] injury." RCW 51.24.020. Under RCW 51.24.020, a deliberate injury claim fails as a matter of law unless the worker establishes that his employer (1) had knowledge of certain injury and (2) willfully disregarded

[3] Michelbrink's claim that this Court cannot consider subject matter jurisdiction is similarly flawed. *See* Br. of Resp't at 3. Even if the trial court had not considered this issue, this Court may do so on appeal. RAP 2.5(a).

that knowledge. *Birklid,* 127 Wn.2d at 865; *Vallandigham.*, 154 Wn.2d at 27-28.

Because WSP met its burden in showing that there are no disputed material facts under the *Birklid* test, the burden shifted to Michelbrink to raise a material dispute about whether WSP had actual knowledge that the Taser exposure was certain to cause his injury and willfully disregarded that knowledge. *Walston v. Boeing Co.*, __ Wn. App. __, 294 P.3d 759, 760 (2013).

Michelbrink failed to meet his burden of introducing a material fact under both prongs of the *Birklid* test. Given the low injury rate for Taser training, WSP could not possibly have been certain that Michelbrink would sustain any injury, much less an extremely rare vertebral fracture. Further, there is no evidence that the purpose of the training program was to injure Troopers, and no legal authority supports Michelbrink's apparent claim that an employer's knowledge of transitory pain satisfies the first *Birklid* prong. Additionally, even if Michelbrink could establish the first *Birklid* prong, he failed to address—much less establish—the second prong which requires willful disregard of knowledge of certain injury.

A. There Is No Evidence That WSP Was Certain Michelbrink Would Sustain An Injury

Michelbrink does not dispute that 99 percent of the trainees who attended WSP's Taser training did not report any type of injury following the exposure exercise, much less a fractured vertebra. CP at 39, ¶ 3; 46. Additionally, he does not dispute that WSP relied upon information provided by the manufacturer of Taser, as well as information obtained in consultation with other law enforcement agencies, which demonstrated that the possibility of injury from an exposure in a controlled training environment was extremely rare. CP at 50-52, ¶¶ 7-8.

In *Vallandigham*, the state Supreme Court held that a plaintiff cannot meet his burden by establishing an employer's knowledge of a *risk* of injury, even if injury is substantially certain to occur. 154 Wn.2d at 33. "Only actual knowledge that injury is *certain* to occur will meet the first prong of the *Birklid* test." *Id.* (emphasis in original).

Despite the holding in *Vallandigham* and a legion of other Washington cases,[4] Michelbrink apparently maintains that WSP deliberately injured him because it knew that a Taser exposure carried the

[4] *See, e.g., Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003) (plaintiff seriously injured by ice bagging machine failed to prove actual knowledge of certain harm, even when the employer stated that "we knew this was going to happen, we just didn't know when"); *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004) (no actual knowledge of certain injury due to asbestos exposure because "we know now that asbestos exposure does not result in injury to every person"); *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200 (1997) (no actual knowledge even when an employer is alleged to have ignored clear safety warnings from manufacturers).

risk of causing a stress fracture. Br. of Resp't at 2. For example, while conceding that WSP did not deliberately intend to cause a stress fracture when it exposed him to a Taser during a controlled-environment law enforcement training exercise (Br. of Resp't at 7), Michelbrink asserts that WSP was nonetheless certain that he would sustain the "physical condition that resulted from [the Taser exposure], to wit: a fractured vertebra and bulging disk." Br. of Resp't at 10. Tellingly, however, he failed to produce any evidence to substantiate this conclusion. To the contrary, it is undisputed that over a six-year period, only eight of 791 trainees sought workers' compensation for Taser-related injuries. CP at 39, ¶ 3; 46.[5] There is simply no evidence before this Court establishing that WSP knew, with certainty, that Michelbrink would sustain a fractured vertebra during Taser training.

Accordingly, Michelbrink did not introduce a material factual dispute regarding certainty of injury on the part of WSP. Rather, the undisputed material facts demonstrate that WSP had no certainty that Michelbrink's injury would occur.

[5] WSP has never maintained that Michelbrink did not sustain an injury. The issue in this case is only whether Michelbrink can recover damages beyond the compensation he already received under the narrow exception to the exclusivity provisions of the Industrial Insurance Act.

B. The Purpose Of The Taser Training Exercise Was Not To Injure Troopers

It is undisputed that the purpose of the Taser training program was not to injure Troopers but to train them to use a new law enforcement tool. CP at 54-55, ¶ 14; 91; *see also* CP at 53, ¶ 12. WSP included an exposure requirement so that officers would fully understand the capabilities of the tool, giving them both the confidence in using the Taser when necessary and the restraint not to use the Taser when lesser means of force are called for. CP 43-44, ¶ 9; CP at 54-55, ¶ 14; 91; *see also* CP at 53, ¶ 12.

As discussed in the previous section, Michelbrink acknowledges that the relevant injuries for purposes of applying the *Birklid* test are the stress fracture and cervical disk bulge. *See* Br. of Resp't at 10. He inconsistently argues, however, that the first *Birklid* prong can be satisfied because, even if WSP did not know he would sustain a stress fracture, it was certain he would be injured by the transitory pain caused by a Taser exposure. Br. of Resp't at 7. Michelbrink failed to provide any relevant legal authority to support this assertion, and indeed, courts in Washington and elsewhere have rejected similar claims.

As a threshold matter, Michelbrink's interpretation violates the Supreme Court's cautionary instruction to narrowly interpret deliberate injury claims. *See Vallandigham*, 154 Wn.2d at 27. His interpretation

means that any law enforcement training or activity known to cause temporary pain or discomfort constitutes a deliberate intent to injure. *See* Opening Brief of Appellant (Br. of Appellant) at 4-6 (providing examples of law enforcement training). According to Michelbrink's interpretation, even the vaccination of employees by a shot or the pinprick of a tuberculosis test would give rise to a deliberate injury claim if the employee later sustains a rare reaction to the shot or test. The Legislature simply did not intend this loophole in the Industrial Insurance Act.

More importantly, the state Supreme Court and other courts have consistently rejected arguments similar to the one advanced by Michelbrink. *Folsom*, 135 Wn.2d at 667 (rejecting claim of estate of worker murdered by a former Burger King employee that she only needed to demonstrate that "some injury was certain to occur" and that the "exact knowledge of the particular injury that occurred is not necessary"); *see also Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 159 P.3d 494 (2007) (rejecting plaintiff's claim that because the employer knew of harm caused by toxic exposure from pipes, it deliberately injured an employee who was killed by ruptured pipes); *see also Bustamante v. Tuliano*, 248 N.J. Super. 492, 591 A.2d 694 (1991) (officer who lost his eye when he was purposefully shot with a training round was not

deliberately injured simply because the law enforcement agency knew that the round would cause temporary pain).

More recently, this Court again rejected the same argument advanced by Michelbrink here. In *Walston*, an employee injured by asbestos exposure argued that the first *Birklid* prong was established because asbestos exposure was certain to cause "cellular injury" even if exposure was not certain to result in an asbestos-related disease. 294 P.3d at 767. In other words, the employee maintained that the "relevant injury" for purposes of applying RCW 51.24.020 was the cellular injury, and not the disease that he ultimately contracted prior to bringing suit. Unlike Michelbrink who provided no medical evidence in support of his claim, the plaintiff in *Walston* provided medical testimony that lung cells in individuals repeatedly exposed to asbestos will experience some scarring. *Id.* at 762, n.6. In rejecting *Walston's* argument, this court distinguished between a "cellular injury" and the development of an actual asbestos-related disease, noting medical testimony in the record that "not every injurious exposure to asbestos manifests itself in asbestos disease." *Id.* The same distinction applies in this case: while trainees experience momentary pain from a Taser exposure, only a few have actually been injured.

Additionally, the plain language of the deliberate injury statute requires that the employer intend to cause "such injury," meaning that it must have certain knowledge of the specific injury sustained. RCW 51.24.020. An "injury" requires the development of an actual physical condition, not just temporary pain or discomfort. *See* RCW 51.08.100; *In re: Kenneth Heimbecker*, BIIA Dec., 41,998 (1975).[6]

---

[6] In this "significant decision," the Board of Industrial Insurance Appeals rejected the notion that temporary pain alone constitutes an injury under the Industrial Insurance Act. In *Heimbecker*, a worker sought workers' compensation benefits following a workplace incident where he was servicing a farm tractor, raised up and struck the back of his head on a metal hydraulic lift. The worker claimed that he "felt dizzy for about five minutes" after this incident but then returned to his tasks. The Department of Labor and Industries rejected the claim and the worker filed an administrative appeal.

On appeal, the worker argued that to prove that he sustained an "injury" under the Industrial Insurance Act, he only needed to establish that the incident where he struck his head occurred. Rejecting this argument, the Board stated as follows:

> The [worker's] argument is not correct. The term "injury," as defined by RCW 51.08.100, has two distinct elements. First, there is the tangible happening or incident which may be termed the accident. Second, there must be a resulting "physical condition," or what may be termed the bodily harm. **Obviously, every slip, fall, bump, and the like, does not result in bodily harm -- in other words, not every accident results in some physical condition.** Thus, every industrial accident does not constitute an industrial "injury." Further, the law requires that causal relationship between the incident and the physical condition must be established by medical testimony.

Heimbecker, BIIA Dec., 41,998 at 2 (*citing Jackson v. Dep't of Labor & Indus.*, 54 Wn.2d 643, 343 P.2d 1033 (1959)) (emphasis added).

Thus, for example, while WSP knows that defensive tactics training will cause trainees momentary discomfort and temporary pain such as muscle soreness and fatigue, it does not deliberately injure every trainee who participates in this training. If a trainee is injured during such training (i.e., develops an actual physical condition such as a pulled muscle or fracture), he or she will be eligible for industrial insurance benefits.

Here, 99 percent of WSP Taser trainees sustained no injury. CP at 39, ¶ 3; 46. No trainee reported an injury based solely on the one- to five-seconds of pain experienced during the exposure and one trainee reported an injury caused by the Taser prongs. CP at 39, ¶ 3; 46. Indeed, there is no evidence that Michelbrink claimed an injury on the day of his training. He reported an injury several days after the training only after he experienced continued pain. CP at 25, ll. 16-20.

In sum, knowledge of temporary pain or discomfort is not the equivalent of knowledge of certain injury. Michelbrink has not met his burden in introducing a material factual dispute under the first *Birklid* prong and his lawsuit must be dismissed.

C. WSP Did Not Willfully Disregard Knowledge Of Certain Injury

Even if Michelbrink could establish that WSP knew of certain injury, he has not introduced any facts suggesting that WSP willfully disregarded such knowledge as required under the second prong of the *Birklid* test.

Willful disregard "cannot be based on the simple fact that the employer's remedial measures were ineffective." *Crow v. Boeing Co.*, 129 Wn. App. 318, 325, 118 P.3d 894 (2005). Steps taken by an employer to alleviate the risk of injury to its employees effectively undermines any

possibility of demonstrating "willful disregard." *See Vallandigham*, 154 Wn.2d at 29.

Here, the undisputed evidence establishes that WSP had control measures in place to mitigate against any risk of injury occurring during the training exercise, such as using spotters to prevent injuries from falling. CP at 52-53, ¶ 11; 55, ¶ 15. The exposure was performed by Sgt. Tegard who was certified as a trainer by the manufacturer, and he conducted the exposure exercise using the technique taught to him by Taser International, Inc. instructors. CP at 55, ¶ 15. Sgt. Tegard understood the risk of injury to be low and that stress fractures were unlikely but could occur in individuals with pre-existing conditions. CP at 55, ¶ 15. Based on this understanding, Sgt. Tegard informed trainees that they need to notify him of any pre-existing medical condition prior to participating in the exposure exercise. CP at 54, ¶ 13. Further, WSP relied on information provided by the manufacturer of the Taser, as well as other law enforcement agencies, in putting together the training program. CP at 50-51, ¶¶ 6-7; 52-53, ¶ 11; 55, ¶ 15; 82.

Willful disregard also implies some knowledge beforehand that Michelbrink's injury was certain to occur. However, it is undisputed that the vast majority of trainees completed the training without incident and did not sustain any injury. CP at 39, ¶ 3; 46. As a result, there can be no

willful disregard on the part of WSP and Michelbrink's lawsuit must be dismissed. *Crow*, 129 Wn. App. at 330.

V. MICHELBRINK HAS NOT PLED AN OUTRAGE CLAIM, AND EVEN IF HE HAD, SUCH A CLAIM FAILS UNDER *BIRKLID*

Even if properly pled, Michelbrink's outrage claim fails as a matter of law under *Birklid* and *Grimsby*[7]. In *Birklid*, the Supreme Court held that the Industrial Insurance Act bars an outrage claim against an employer when, as here, the plaintiff fails to meet his burden of proving a deliberate intention to injure under RCW 51.24.020 and there is no evidence of an injury separate from the workplace injury. 127 Wn.2d at 872. Michelbrink's outrage claim is inextricably tied to his industrial injury and is, therefore, barred by the immunity provisions of the IIA. *Id.*; RCW 51.04.010, 51.32.010; *see also Goad*, 85 Wn. App. at 104-05 (dismissing claims for infliction of emotional stress because the claim "stem[med] directly" from the workplace injury).

Even if his outrage claim was not barred by the Industrial Insurance Act, which it is, Michelbrink's claim fails because no reasonable jury could conclude that this training program, intended to familiarize Troopers with a new law enforcement tool, was so outrageous in character and so extreme in degree as to go beyond all possible bounds

[7] *Grimsby v. Samson,* 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

of decency and be regarded as atrocious and utterly intolerable in a civilized community. *See Grimsby,* 85 Wn.2d at 59; *see also Corey v. Pierce County,* 154 Wn. App. 752, 763, 225 P.3d 367 (2010) (the court must initially determine whether the alleged conduct was "sufficiently extreme" before submitting an outrage claim to a jury).

In his response, Michelbrink does not address these arguments. Instead, he only addresses the issue of whether he properly pled an outrage claim. Br. of Resp't at 14-15. In doing so, he erroneously claims that WSP challenged the sufficiency of his outrage claim "for the first time" in its Opening Brief. Br. of Resp't at 14-15. However, WSP did address Michelbrink's failure to plead an outrage claim in its Motion for Discretionary Review (p. 19, n.14) as well as in its Motion for Summary Judgment filed in superior court (CP at 118) and its reply in support of the summary judgment motion (CP at 146). In any event, Michelbrink's outrage claim additionally fails because he never pled such a claim. *See* CP at 1-4; *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351-52, 144 P.3d 276 (2006) (cause of action that was not pled in the complaint and only raised in response to summary judgment failed to provide defendant fair notice of the claim).

Accordingly, this Court should reverse the trial court, grant WSP's motion for summary judgment, and dismiss Michelbrink's outrage claim.

VI. MICHELBRINK IS NOT ENTITLED TO ATTORNEY'S FEES

Michelbrink requests attorney's fees, apparently irrespective of whether he prevails on the merits of this case. Br. of Resp't at 16. In Washington, the court may only award attorney fees on appeal "if authorized by contract, statute, or a recognized ground in equity." *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. 384, 393, 220 P.3d 1259 (2009). Moreover, even if some lawful basis for an award of attorney's fees existed, Michelbrink has yet to prevail on the merits. Michelbrink failed to explain any basis for his demand for attorney fees, nor does any exist; accordingly, Michelbrink's unsupported demand for attorney fees should be denied.[8]

VII. CONCLUSION

For the reasons stated in the Appellant's Opening Brief and herein, the trial court erred when it denied WSP's motion for summary judgment.

[8] The statute which allows attorney's fees for actions brought pursuant to the Industrial Insurance Act, RCW 51.52.130, does not apply because Michelbrink's lawsuit is not based on a decision of the Board of Industrial Insurance Appeals.

The trial court's ruling should be reversed and this lawsuit should be dismissed.

RESPECTFULLY SUBMITTED this 29th day of March, 2013.

ROBERT W. FERGUSON
Attorney General

s/Eric C. Miller
ERIC C. MILLER, WSBA No. 41040
Assistant Attorney General
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
(360) 586-6300

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the Appellant's Reply Brief was electronically filed with the Court of Appeals as follows:

http://www.coa2filings@courts.wa.gov

And that one copy was served by US Mail to:

Respondent's Attorney:

Curtis Janhunen
BROWN LEWIS JANHUNEN & SPENCER
101 East Market Street, Suite 501
P.O. Box 1806
Aberdeen, WA 98520

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of March, 2013, at Tumwater, Washington.

Laurel B. DeForest

LAUREL B. DeFOREST

WASHINGTON STATE ATTORNEY GENERAL

March 29, 2013 - 3:48 PM

Transmittal Letter

Document Uploaded: 440351-Reply Brief.pdf

Case Name: Michelbrink, Resp. v. State of Washington, Appellant

Court of Appeals Case Number: 44035-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Laurel B Deforest - Email: **laureld@atg.wa.gov**

A copy of this document has been emailed to the following addresses:

CathyW@atg.wa.gov
EricM4@atg.wa.gov
Aprylj@atg.wa.gov