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In the Supreme Court of Washington

JOHN M. KALAHAR AND PEGGY L. KALAHAR,

Petitioners,

v.

ALCOA INC.,

Respondent.

Respondent's Brief

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Table of Contents

Table of Contents i

Table of Authorities ii

Introduction 1

Statement of the Case 1

1. Alcoa's Industrial Hygiene Program 1

2. The Petitioners' Own Experts Agreed That Exposing a Worker to Asbestos is Not Certain to Cause Disease 5

Argument 6

1. Asbestos Exposure is Not Certain to Cause Disease 7

2. *Walston* Required the Court of Appeals to Affirm 9

3. *Walston* Cannot Properly be Distinguished 11

4. The Petitioners Seek to Re-Write the WIIA 15

5. The Legislature Has Provided the Petitioners a Remedy 17

6. Alcoa is Entitled to Judgment Under the Second Prong of the *Birklid* Test 18

Conclusion 20

TABLE OF AUTHORITIES

Cases

Baker v. Schatz,
80 Wn. App. 775, 912 P.2d 501 (1996) 19

Birklid v. Boeing Co.,
127 Wn.2d 853, 904 P.2d 278 (1995) .... *passim*

Dep't of Labor & Indus. v. Landon,
117 Wn.2d 122, 814 P.2d 626 (1991) 12, 13

Foster v. Allsop Automatic, Inc.,
86 Wn.2d 579, 547 P.2d 856 (1976) 14, 15

Riehl v. Foodmaker, Inc.,
152 Wn.2d 138, 94 P.3d 930 (2004) 1, 7

Seattle First Nat'l Bank v. Shoreline Concrete Co.,
91 Wn.2d 230, 588 P.2d 1308 (1978) 18

State v. Peeler,
183 Wn.2d 169, 349 P.3d 842 (2015) 17

Vallandigham v. Clover Park Sch. Dist. No. 400,
154 Wn.2d 16, 109 P.3d 805 (2005) 14, 18, 19

Walston v. Boeing Co.,
173 Wn. App. 271, 294 P.3d 759 (2013) 7

Walston v. Boeing Co.,
181 Wn.2d 391, 334 P.3d 519 (2014) .... *passim*

Statutes

RCW 51.04.010 17

RCW 51.08.100 15

RCW 51.24.020 13

RCW 51.24.030(3) 16

RCW 51.32.050-.095 17

RCW 51.36.010 17

Introduction

The petition for review should be denied. This Court decided the very same issue presented here just over a year ago when it issued its decision in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014)—a decision the Washington State Legislature has made no effort to reverse through legislation. There is no material distinction between the facts and the issue presented in this case and in *Walston*, meaning the petition for review is nothing more than a *sub silentio* plea to overrule *Walston*. But where, as here, statutory language remains unchanged after a court decision, this Court "will not overrule clear precedent interpreting the same statutory language." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930, 935 (2004).

Statement of the Case

1. Alcoa's Industrial Hygiene Program.

John Kalahar worked various jobs at the Alcoa plant known as the "Wenatchee Works" in Wenatchee, Washington from March 1963 to September 1963 and from June 1964 to April 1971. CP 36-39, 120-121. Well before Mr. Kalahar worked there, the Wenatchee Works had an Industrial Hygiene Committee that took steps to reduce the risk of asbestos exposure to its workers, including controlling dust levels throughout the plant, installing ventilation and other engineering solutions to reduce asbestos exposure, changing procedures and the locations of

work, and monitoring compliance with available personal safety equipment such as dust masks for employees working directly with asbestos-containing products. CP 41-45, 49-109, 167-171.

Mr. Kalahar's alleged exposure to asbestos at Wenatchee Works occurred during a very different era. All of his work at Alcoa predated the creation of OSHA and the first federal regulations on asbestos exposure. *See* 59 FR 40694 (Aug. 10, 1994). Mr. Kalahar left Alcoa in April 1971. CP 36-39, 120. The first OSHA regulation was not even promulgated until six weeks later. 59 FR 40694 (Aug. 10, 1994). But starting in 1964, Alcoa voluntarily adopted stricter asbestos exposure standards than the then-existing industry and governmental standards. CP 99-109.

During Mr. Kalahar's tenure, Alcoa regularly performed industrial hygiene surveys to identify and correct safety issues. CP 41-45, 49-109. Documentation indicates numerous attempts to improve safety conditions, including controlling dust levels throughout the plant, installing ventilation and other engineering solutions to address asbestos exposure, and monitoring compliance with available personal safety equipment, such as dust masks for potliners and other employees working with asbestos-containing products. *Id.* Years before OSHA issued its first emergency asbestos regulations in 1971, Alcoa had already instituted numerous measures to reduce the risk of asbestos exposure to its employees,

including the following:

- In 1964, Alcoa installed special ventilation equipment in the Carpenter Shop on the saw used to cut Marinite board, which reduced the asbestos exposure to less than 1 mppcf on an elapsed time basis (and even less on an 8-hour time-weighted average) in the saw operator's breathing zone – well below the then-applicable standard of 5 mppcf. CP 99-104, 204-205.
- In 1966, Alcoa conducted an industrial hygiene survey that found "good" to "excellent" conditions, but instructed workers to wear masks in areas of high dust concentrations. CP 64-65.
- In 1967, Alcoa upgraded the ventilation equipment associated with the saw in the Carpenter Shop when a change in the thickness of Marinite boards created additional dust. CP 80-83.
- In 1967, Alcoa conducted regular industrial hygiene surveys throughout the plant. The surveys inspected dust levels, cited workers who were not wearing dust masks while working with asbestos-containing materials, and noted recommendations and changes to work practices with respect to asbestos-containing materials. CP 67-68, 74-86.
- In fact, in 1967, Alcoa conducted air sampling for asbestos in the Machine Shop where Mr. Kalahar was assigned. CP 107-109. The

results demonstrated levels far below the maximum allowable concentration that Alcoa had adopted. Nonetheless, Alcoa's industrial hygienist recommended additional exhaust ventilation be added. *Id.* The recommended ventilation was installed. *Id.*

- Alcoa installed a ventilated Marinite sanding table in the Machine Shop where molds were being refurbished, and in the late 60s built a separate mold room in the Machine Shop to protect employees such as Mr. Kalahar from asbestos exposure related to the removal of Marinite and refurbishment of molds by others. CP 123-124.
- In 1968, Alcoa industrial hygiene surveys found that safety conditions throughout the plant were generally good, provided reminders to supervisors about ventilation practices, and noted that potlining crew members were wearing dust mask. CP 88-94.
- In 1969, surveys again found generally good conditions throughout the plant, recommended increasing the fan motor size in the exhaust ventilation system, but reminded that "[t]he use of dust masks while handling asbestos should be re-emphasized by the foreman and made a standard practice." CP 96-97.
- In 1969, Alcoa made work practice changes following a grievance regarding asbestos dust from the digging of transfer troughs inside the brick masons shop. CP 41-43, 130-133. Alcoa moved the

digging of the transfer troughs outdoors and repaired a fan in the shop that improved ventilation, and Mr. Kalahar's union indicated that it was satisfied with Alcoa's solution to the problem. *Id.*

- By January 1970, Alcoa required all operators to wear adequate dust masks in the brick masons room. CP 49.
- Alcoa provided workers with lockers and showers to wash off any dust at the end of shifts as well as yearly physical exams that included chest x-rays. CP 47, 135-136, 138-140, 166, 182-185.

2. The Petitioners' Own Experts Agreed That Exposing a Worker to Asbestos is Not Certain to Cause Disease.

The testimony of the Petitioners' own medical experts—the only medical evidence in the appellate record—was that asbestos exposure, at any level, is not certain to cause mesothelioma. Dr. Andrew Churg, current chair of the U.S.-Canadian Mesothelioma Panel, admitted that establishing a level of exposure to asbestos that is certain to cause mesothelioma is "an unprovable proposition." CP 211, 214-215; *see* CP 212-213, 216-217.

The Petitioners' experts conceded that the overwhelming majority of people with occupational exposure to asbestos even at the highest known levels will never develop mesothelioma. CP 211-217, 223-230, 237-239. Dr. Churg noted that the "worst case reported scenario" involved workers

who manufactured asbestos-containing cigarette filters, but "only 18 percent" of those workers developed mesothelioma. CP 211-213.

Similarly, with regard to workers who directly used asbestos-containing products, the Petitioners' expert Dr. Arnold Brody conceded that only a "very small number" of workers with significant occupational exposure will develop mesothelioma. CP 223-224. In fact, Dr. Brody admitted that the diagnosis rate of mesothelioma in the worst occupational group—insulators whose full-time job was to install and remove asbestos-containing insulation—was no higher than 10 percent. CP 224. As a result, Dr. Churg concluded that there was no way to know at the time of asbestos exposure if it would result in a particular worker developing mesothelioma. CP 215.

Argument

To reverse the Court of Appeals' judgment, the Court would have to accept the same arguments that it rejected in *Walston v. Boeing Co*, 181 Wn.2d 391, 334 P.3d 519 (2014), and overrule that year-old decision. *Walston* held that as a matter of law, an employer's knowledge that asbestos exposure can cause mesothelioma does not establish a "deliberate" injury under the Washington Industrial Insurance Act's ("WIIA") intentional-injury exception. The basis for that holding is the scientific fact that "asbestos exposure is not certain to cause

mesothelioma"—thus the employer cannot have "*actual knowledge* that injury was *certain to occur*." 181 Wn.2d at 397 (emphasis in original). Not only does *Walston* represent a correct application of the law, the Legislature has not amended the WIIA's intentional-injury exception in light of *Walston*'s holding. As such, this Court should decline the Petitioners' unspoken but very obvious invitation to overrule its clear precedent in *Walston* interpreting the same statutory language. *See Riehl*, 152 Wn.2d at 147, 94 P.3d at 935.

1. Asbestos Exposure is Not Certain to Cause Disease.

Walston involved a Boeing employee who claimed to have been exposed to asbestos on the job in 1985. By then, Boeing knew asbestos was a hazardous material. *Id.* In fact, it knew of several prior claims based on asbestos exposure at the same facilities, including a co-worker who had developed cancer after working in the same shop with Mr. Walston. *Walston v. Boeing Co.*, 173 Wn. App. 271, 276, 294 P.3d 759 (2013).

Nonetheless, Boeing ordered the plaintiff to "go back to work," without protective gear, directly underneath where other workers, who were wearing "moon suits" and ventilators, were rewrapping overhead pipes to encapsulate flaking asbestos insulation, thereby creating dust and debris that fell into plaintiff's work area. *Walston,* 181 Wn.2d at 394. The plaintiff produced testimony from his medical experts that his exposure at

Boeing caused his mesothelioma, including Dr. Arnold Brody who opined that asbestos exposure creates an immediate injury at the cellular level. But another of the plaintiff's experts—Dr. Andrew Churg—conceded that "asbestos exposure is not certain to cause mesothelioma or any other disease." *Id.* at 394, 398.

The plaintiff in *Walston*—represented by the same attorneys representing the Petitioners here—presented the same arguments the Petitioners have raised in this case. This Court, however, reiterated that the "deliberate intention" requirement is "a high standard that is met in Washington only when an employer had actual knowledge that an injury was certain to occur." *Id.* at 396. Substantial certainty or gross negligence is not sufficient to satisfy this standard. *Id.* at 396-97. Further, the standard is not satisfied by proof that the employer disregarded a *risk* of injury or that the employer knew that "someone, not necessarily the plaintiff" was certain to be injured. *Id.* at 397.

> Applying these principles, this Court held as a matter of law that because "asbestos exposure is not certain to cause mesothelioma," an employer cannot have "*actual knowledge* that [the plaintiff's mesothelioma] was *certain to occur*." *Id.* at 397 (emphasis in original). The Court further rejected the plaintiff's argument that manifesting a different type of injury or symptom at the time of exposure was sufficient because it would be inconsistent with the standard developed in prior decisions requiring "certainty" that the plaintiff would later develop a disease. *Walston*, 181 Wn.2d at 398. Accordingly, Boeing was entitled to summary judgment because its act of intentionally exposing the plaintiff to asbestos that

Boeing knew was hazardous was not certain to cause him to contract mesothelioma. *Id.* at 398-99.

2. *Walston* Required the Court of Appeals to Affirm.

Just as in *Walston*, the Petitioners did not raise a question of material fact whether Alcoa "had *actual knowledge* that injury was *certain to occur.*" *Walston*, 181 Wn.2d at 397 (emphasis in original). Again, as their own experts concede, it is a scientifically-established fact that asbestos exposure "is not certain to cause mesothelioma or any other disease." *Id.* And the fact that asbestos exposure poses a *risk* of disease is not sufficient to satisfy the second prong of the test enunciated in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). *Id.* Thus, even if, as the Petitioners contend, Alcoa exposed Mr. Kalahar to asbestos knowing that doing so posed a risk that he would contract mesothelioma, such exposure is not sufficient to trigger the deliberate-injury exception.

The crux of the holding in *Walston* was that even in 1985—14 years *after* Mr. Kalahar last worked at Alcoa—Boeing still could not *know* that the plaintiff's mesothelioma was *certain* to occur because asbestos exposure is never certain to cause mesothelioma. This Court specifically stated in *Walston* that "[a]s the experts in this case acknowledge, asbestos exposure is not certain to cause mesothelioma or any other disease" and

that the "*risk*" that it does cause mesothelioma "is insufficient to meet the *Birklid* standard." *Walston*, 181 Wn.2d at 397.

Here, the Petitioners used the same plaintiff's medical experts as Mr. Walston. And those experts provided the same testimony that was considered by this Court in *Walston* in concluding that "asbestos exposure is not certain to cause mesothelioma or any other disease." *Id.* at 394, 398. As in *Walston,* Dr. Churg admitted in this case as well that asbestos exposure, at any level, is never certain to cause mesothelioma or any other disease. CP 211, 214-215; *see* CP 212-213, 216-217.

In fact, the Petitioners' medical experts conceded that the overwhelming majority people who are exposed to asbestos, even those at the highest recorded occupational exposure levels, will never develop mesothelioma. CP 211-217, 223-230, 237-239. Because the Petitioners' own medical experts concede that asbestos exposure at any level is never certain to cause mesothelioma and that the contrary is "an unworkable proposition," it is a factual and legal impossibility that Alcoa had "actual knowledge" before 1971 that Mr. Kalahar's exposure to asbestos was "certain to cause" his mesothelioma four decades later. *Walston,* 181 Wn.2d at 397; CP 211, 214-215. Accordingly, *Walston* has already decided the controlling issue here and established the applicable rule: As a matter of law, the Petitioners cannot prove Alcoa knew it was certain Mr. Kalahar

would develop mesothelioma—the long-standing standard untouched by legislative amendment to avoid pre-emption of their civil claim here.

3. *Walston* Cannot Properly be Distinguished.

None of the arguments the Petitioners have asserted change the outcome of this case under *Walston*'s unequivocal holding based on the scientific truth that asbestos exposure is never certain to cause mesothelioma. Below, in an effort to distinguish *Walston*, the Petitioners pointed to this Court's comment that "[s]ince immediate and visible injury was not present in this case, Mr. Walston could not use that to show that Boeing had knowledge of certain injury." *Walston*, 181 Wn.2d at 397-98. In noting that comment, the Petitioners were attempting to bring their claims within the holding in *Birklid*.

In *Birklid*, employees suing for injury caused by toxic chemicals were able to raise a fact question on deliberate intent by producing evidence that they suffered immediate and visible injuries (injuries, not symptoms). *Id.* But the immediate, visible injuries in *Birklid* were dermatitis, rashes, nausea, headaches, dizziness, and workers passing out on the job—the same injuries for which the workers were seeking compensation—and the Boeing supervisor knew these injuries were reactions to working with the toxic substance. *Birklid*, 127 Wn.2d at 856, 863.

Here, the Petitioners have asserted that Mr. Kalahar sustained immediate and visible effects (not injuries) in the form of (i) an itchy, fuzzy sensation on his face, and (ii) sneezing and blowing his nose. Neither an itchy, fuzzy sensation on Mr. Kalahar's face nor sneezing and blowing his nose may be considered a "visible injury." Nor is there is anything in the record on appeal that those are symptoms of any asbestos-related disease, or that any Alcoa supervisor knew Mr. Kalahar's alleged sneezing and other effects were reactions to asbestos exposure, much less symptoms of an asbestos-related disease.

Further, *Walston* rejected the argument that it is enough to show that the plaintiff suffered some injury (the cellular injury in *Walston*, Mr. Kalahar's alleged sneezing and irritated skin here), even though it was a different injury than the mesothelioma on which they base their claims. Developing a different type of injury or symptom at the time of exposure did not create "certainty" that the plaintiff would later develop mesothelioma. 181 Wn.2d at 398. The Court further observed that the alleged "cellular-level injury here is not itself a compensable injury" because a compensable injury under the WIIA arises only when the disease manifests, not when exposure occurred. *Id.* (citing *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 125-28, 814 P.2d 626 (1991)).

This is consistent with the plain statutory language that the deliberate-injury exception applies only "[i]f injury results to a worker from the deliberate intention of his or her employer to produce *such* injury." RCW 51.24.020 (emphasis added). In other words, the exception only applies if the employee suffers the same injury that the employer intended to cause. Here, the only injury alleged in the Complaint is Mr. Kalahar's mesothelioma, which was not diagnosed until 2014. CP 141, 336. Mr. Kalahar therefore did not have a compensable injury until 2014. *See Walston*, 181 Wn.2d at 398. An asbestos-related occupational disease becomes a compensable injury under the WIIA "as of the date the worker's disease manifested itself, not the date of the worker's last exposure to the harmful materials." *Landon*, 117 Wn.2d at 123-25.

Just as this Court rejected the plaintiff's argument in *Walston* that the employer's knowledge that asbestos exposure was causing cellular injury was sufficient to establish "certainty" about Mr. Walston's mesothelioma, any knowledge that Alcoa may have had that Mr. Kalahar was sneezing or had irritated skin, even if related to asbestos exposure, does not create the required "certainty" that his mesothelioma would occur. *Walston*, 181 Wn.2d at 398.

Further, while the Petitioners have insisted that Alcoa knew asbestos was dangerous and that exposure could potentially cause an injury to Mr.

Kalahar, those arguments are simply a rehash of the "substantial certainty" argument this Court expressly rejected in both *Walston* and *Birklid*. *Walston*, 181 Wn.2d at 396-97; *Birklid*, 127 Wn.2d at 865. Under Washington law, "[d]isregard of a *risk* of injury is not sufficient to meet [*Birklid*]; *certainty* of actual harm must be known and ignored." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 28, 109 P.3d 805 (2005) (emphasis in original). There is no evidence Alcoa had actual knowledge that asbestos exposure was certain to cause Mr. Kalahar's mesothelioma. The Petitioners' own experts concede that Mr. Kalahar's mesothelioma was not certain to occur at any level of exposure.

The Petitioners have focused their arguments on the employer's alleged intention to perform a dangerous act (or to misrepresent the dangerousness of an activity) rather than the deliberate intention to cause the injury at issue. Their arguments are wholly misplaced because as this Court has explained in applying the deliberate-injury exception, "the required intention relates to the injury, not the act causing the injury." *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 580, 584, 547 P.2d 856 (1976). In *Foster*, the Court held that the "deliberate intention" exception did not apply as a matter of law to a case where the plaintiff injured his hand in a press after the employer had knowingly disabled a safety device because they did not show that the employer intended to cause the injury

that the plaintiff ultimately suffered. *Id.* Thus, contrary to the Petitioners' arguments, it is the actual knowledge of certain injury – not intent to perform a dangerous act – which determines whether the deliberate-injury exception applies.

4. The Petitioners Seek to Re-Write the WIIA.

The Petitioners' argument that the Court of Appeals' ruling removes occupational disease claims from the intentional-injury exception has no basis in either fact or law. They are attempting to modify the statutory definitions in the WIIA to somehow avoid the necessity to prove Alcoa's actual knowledge—in the 1963-1971 timeframe when Mr. Kalahar worked there—that his mesothelioma was certain to occur at some point in the future. The Petitioners offer their own definition of "disease" inconsistent with the WIIA's express terms. The general definitions for the WIIA define "injury" as follows:

> "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

RCW 51.08.100.

The chapter governing the deliberate-injury exception does not re-define "injury," but merely provides that "injury" includes any qualifying disease for which compensation and benefits are payable:

> For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

RCW 51.24.030(3).

Nothing in the WIIA indicates that the Legislature intended to treat a disease—even an occupational disease such as mesothelioma—differently from any other injury for purposes of the deliberate-injury exception simply because of its potential latency. And nothing in *Walston* or any other case precludes a court from applying the deliberate-injury exception to other occupational diseases that do satisfy the statutory terms. *Birklid*, for example, held that the deliberate-injury exception applied to the occupational disease caused by chemical exposure. Actual knowledge of certainty of injury was established because the company did nothing after the workers exposed to the chemical became ill.

The Petitioners' failure in this case to demonstrate Alcoa's knowledge that it was certain Mr. Kalahar would develop mesothelioma in no way prevents plaintiffs with other diseases from producing the required evidence that their employers had actual knowledge that their diseases were certain occur. But even if that were the case, it would be the result of the WIIA's plain language. Revising that language is a matter for the Legislature because this Court does not "rewrite [the law] to insert our

own policy judgments." *State v. Peeler*, 183 Wn.2d 169, 185, 349 P.3d 842, 850 (2015) (brackets original; internal quotation marks omitted).

5. The Legislature Has Provided the Petitioners a Remedy.

Finally, the Petitioners fail to acknowledge that they have a readily-available remedy in a workers compensation system that requires no proof of fault. RCW 51.04.010. The WIIA was "the product of a grand compromise" that gave employers "immunity from civil suits by workers" in exchange for giving injured workers "a swift, nofault compensation system for injuries on the job." *Birklid*, 127 Wn. 2d at 859. Long ago, the Legislature decided that it was in the best interests of this State to provide an exclusive remedy for workplace injuries in which workers received benefits without regard to the employer's or the worker's fault in exchange for foregoing unlimited potential damages.

The Legislature further decided that the employers would primarily fund the costs of this industrial insurance program. As a result, workers who sustain injuries or develop occupational disease are entitled to substantial benefits, including payment of their medical expenses and lost wages, vocational rehabilitation, awards for permanent full or partial disabilities, and even death benefits. RCW 51.36.010; RCW 51.32.050-.095. The injured worker receives full benefits even if the employer was not at fault or the worker was at fault. "The wisdom of that decision is not

a proper subject of [judicial] review." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 242, 588 P.2d 1308 (1978).

The Court should respect the Legislature's "grand compromise" by denying the petition for review while leaving the Petitioners free to recover their substantial benefits under the workers compensation system.

6. Alcoa is Entitled to Judgment Under the Second Prong of the *Birklid* Test.

Although the Court of Appeals did not reach this issue, even assuming for purposes of the underlying summary judgment motion the existence of admissible evidence that Alcoa had "actual knowledge" Mr. Kalahar's mesothelioma was certain to occur forty years after he left its employ (which as Petitioner's expert Dr. Churg acknowledges does not exist), Alcoa is still entitled to judgment. The Petitioners cannot satisfy the second prong of the *Birklid* test requiring proof that the employer "willfully disregarded" knowledge of such certain injury. Courts may not consider the "effectiveness of a remedial measure" in determining whether an employer acted with willful disregard; thus willful disregard cannot be established merely because "an employer's remedial efforts were ineffective." *Vallandigham*, 154 Wn. 2d at 34-35. The "willfully disregarded" prong is satisfied only in cases when it was "clear that [the employer] made *no effort* of record to alter or improve the working

environment." *Baker v. Schatz*, 80 Wn. App. 775, 784, 912 P.2d 501 (1996) (emphasis added).

Here, Alcoa took multiple remedial measures to reduce the risks of asbestos exposure during Mr. Kalahar's employment between 1963 and 1971—a fact that Mr. Kalahar himself concedes. Mr. Kalahar has only complained that when "looking back" in light of his mesothelioma diagnosis, the affirmative steps that Alcoa took "weren't enough" to prevent his disease from developing forty years later and that Alcoa was "negligent" by not further reducing "the risk" of mesothelioma to its employees. CP 144-145, 196-197.

While the Petitioners have argued that Alcoa should have taken additional precautions and that the steps Alcoa did take were ultimately ineffective, the undisputed evidence remains that Alcoa took numerous affirmative steps to reduce the risk of asbestos exposure to its employees and that Alcoa attempted to comply with the then-existing safety guidelines for asbestos exposure throughout the time Mr. Kalahar worked there. Because whether "an employer's remedial efforts were ineffective" cannot raise a fact question on "willful disregard," the Petitioners cannot satisfy this prong of the *Birklid* test to avoid workers' compensation pre-emption. *Vallandigham*, 154 Wn.2d at 34-35.

Conclusion

The Court of Appeals correctly held that the outcome of this case is controlled by the reasoning and holding in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014), which required affirmance of the trial court's decision. Alcoa requests that the Court deny the petition for review.

DATED this 29th day of October, 2015.

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