

**Court of Appeals No. 42543-2**

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**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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

**Respondents,**

**v.**

**THE BOEING COMPANY,**

**Petitioner.**

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**REPLY BRIEF OF PETITIONER BOEING**

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## I. INTRODUCTION

The evidence Walston cites does not meet the narrow deliberate injury standard the Supreme Court established in *Birklid*. Walston's attempt to circumvent the workers' compensation bar and show that Boeing deliberately intended to injure him is based solely on the 1985 repair of pipe insulation in the area in which he worked. (Walston Br. 3-5) But he cites no evidence that Boeing had actual knowledge that the repair was certain to cause his mesothelioma 25 years later, or even that it would cause any asbestos disease in any employee.

The evidence Walston cites concerns Boeing's alleged knowledge of asbestos hazards and risk of injury. But disregard "of a *risk* of injury is not sufficient to meet the first *Birklid* prong ...." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 28, 109 P.3d 805 (2005).

"Washington courts have repeatedly held that known risk of harm or carelessness is not enough to establish certain injury, even when the risk is substantial." *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 47, 103 P.3d 807 (2004).

Because Walston's evidence falls short of what the law requires, he tries to change the law. He asks the Court to accept knowledge of risk as knowledge of certain injury; to redefine injury as mere exposure to or inhalation of asbestos fibers regardless of whether disease ever occurs; and

to treat the probability of injury to some unknown employee as certainty. But each step is contrary to established Washington law. If accepted, Walston's version of the legal standard would expand the "deliberate injury" exception far beyond what the statutory language and the Supreme Court's interpretation of it can support, and flood the courts with claims that properly belong in the workers' compensation system. Under this approach, any employees who could show they were exposed to chemicals, dusts, or any substance at work that the employer knew could pose a potential risk, could sue that employer and claim "injury" merely by finding an expert to opine about potential sub-clinical, asymptomatic, cellular-level effects of exposure. Although Walston says he does not challenge the balance the Legislature drew between swift, no-fault compensation for on-the-job injuries and employer immunity from civil suits (Walston Br. 1), his approach would turn the narrow deliberate injury exception into a broad new rule of employer liability. Any such rebalancing must come from the Legislature, if at all.

Ultimately, the evidence Walston cites does not meet the narrow deliberate injury standard the Supreme Court established in *Birkliid*. The Court should therefore reverse the superior court's denial of summary judgment.

## II. ARGUMENT

### A. Boeing Did Not Willfully Disregard Actual Knowledge of Certain Injury When It Repaired Pipe Insulation in 1985

The 1985 pipe repair does not create a fact issue for trial. As a matter of law, “[s]imply exposing employees to unsafe conditions is not enough.” *Valencia v. Reardan-Edwall Sch. Dist. No. 1*, 125 Wn. App. 348, 351, 104 P.3d 734 (2005) (affirming summary judgment to employer). Rather, “*certainty* of actual harm must be known and ignored.” *Vallandigham*, 154 Wn.2d at 28. Walston has not shown that.

To begin with, Walston distorts the record with his exaggerated discussion of “asbestos rain.” The work involved re-wrapping pipes, not demolition (CP 438 (19:9-10, 15-16), 449 (65:12-15)), and the re-wrapping work was finished “in a few days,” not a month. (CP 438 (21:10-11), 450 (67:4-5)) Moreover, the regulations in 1985 required only that workers “engaged in” asbestos spraying, removal, or demolition have respiratory protection—not bystanders. WAC 296-62-07517(3)(b)(iii) (1985).

In any event, Walston cites no evidence that Boeing knew that the 1985 repair was certain to cause him or any other employee to develop any asbestos disease. No employee was injured during the work. (CP 1018) Walston’s injury developed 25 years later. The only other Hammer Shop injury he cites, to Berthold Altenburg, is irrelevant because

the injury occurred before the repair, and Boeing learned of it after that repair. (Walston Br. 14; CP 2614-15; RP 44) Altenburg stopped working at Boeing in 1975 and died in 1984. (CP 5372) The repair occurred on January 5 and 6, 1985, and, even assuming knowledge that a former employee made allegations of an injury somehow equates to knowledge that such injury is possible, Boeing did not learn of Altenburg's claim until it was served with third-party discovery in February 1985. (CP 2614-15; RP 44)

The lack of any observed injury at the time of exposure distinguishes Walston's claim from *Birklid*, *Hope*, and *Baker*, in which employees were injured at the time of exposure to a substance, the employer witnessed the injuries, and the employer continued the exposure in the face of those continuing injuries. See *Birklid v. The Boeing Co.*, 127 Wn.2d 853, 863, 904 P.2d 278 (1995); *Hope v. Larry's Markets*, 108 Wn. App. 185, 193-94, 29 P.3d 1268 (2001); *Baker v. Schatz*, 80 Wn. App. 775, 783, 912 P.2d 501 (1996) (all discussed at Boeing Br. 16-19). Because the employers in those cases had observed injury to employees at the time of the exposure, a jury could find that continued exposure was certain to cause injury. See *Shellenbarger*, 125 Wn. App. at 48 n.14 (distinguishing *Birklid* and *Hope* because "workers exhibited signs of illness and complained to their employers when they used the chemicals"). Here, by

contrast, Boeing observed no such injury and there was (and still is) substantial doubt that exposure of the sort Walston alleges would cause certain injury. Indeed, it is undisputed that mesothelioma is rare and unpredictable.

Walston asserts that employer observation of injuries at the time of exposure is not required, analogizing to a husband who poisons his wife with arsenic. (Walston Br. 35-36) Poisoning a spouse or employee with arsenic is a classic premeditated act done with *knowing* intent to kill and would have qualified as deliberate intent to injure under pre-*Birklid* law because it involves a determination “to injure an employee and used some means appropriate to that end.” *Delthony v. Standard Furniture Co.*, 119 Wn. 298, 300, 205 P. 379 (1922); *see also Shellenbarger*, 125 Wn. App. at 46 (“Specific intent to injure is equated to physical assault.”).

Just as the arsenic analogy is a red herring, so too are the battery cases that Walston cites. By definition, battery requires the intent “to cause a harmful or offensive contact.” Restatement (Second) of Torts § 13 (1977); *see also McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000) (defining battery as a harmful or offensive contact “resulting from an act intended to cause the plaintiff ... to suffer such a contact”). Causing a harmful contact without intending to is not a battery—otherwise every personal injury would be a battery. *See, e.g.,*

*Acevedo v. Consol. Edison Co. of New York, Inc.*, 189 A.D.2d 497, 501, 596 N.Y.S.2d 68 (N.Y. App. 1993) (affirming dismissal of battery claim because employer did not intend to expose workers to asbestos). Walston has neither argued nor presented evidence that Boeing intended to expose him to asbestos or to cause him to develop mesothelioma.

Potential injuries from exposure to asbestos have a long latency period, and develop, if at all, years or decades after exposure. Using the defective arsenic analogy, Walston argues that such exposures involve “an employer who knows it is causing unseen, latent injuries ....” (Walston Br. 35-36) But he assumes what he has to prove. He has presented no evidence that Boeing knew that asbestos exposure was certain to cause Walston any injury.

The evidence Walston has presented on knowledge focuses on *risk* of injury, not certainty. (Boeing Br. 19-24) He argues, for example, that Boeing knew that “breathing any asbestos fibers was dangerous to Mr. Walston” and that “workers in the vicinity of asbestos abatement were endangered and required protection.” (Walston Br. 11-12) And he claims Boeing “knew that loose asbestos falling from pipe insulation ... was a danger to workers below.” (Walston Br. 13) But even taking these allegations as true, evidence of knowledge of *risk* is not enough to show knowledge of certain harm. *Vallandigham*, 154 Wn.2d at 28.

Citing a 1977 memorandum, Walston asserts that Boeing knew of “common scientific knowledge” that inhalation of asbestos causes immediate injury and “immediately begin[s] to impair lung function.” (Walston Br. 15, CP 5247) That document is the core of his claim that Boeing knew that mere inhalation of asbestos fibers is certain to cause injury. But the passage Walston cites and selectively misquotes merely states that asbestos disease, such as fibrosis, may occur decades after exposure. (CP 5247) Nothing in the document reflects knowledge, by Boeing or anybody else, that inhalation is certain to cause cellular level injury, much less fatal mesothelioma. Indeed, there is no “common scientific knowledge” that inhalation of any amount of asbestos causes certain injury, as evidenced by the fact that federal and state regulators, even today, set allowable asbestos exposure limits deemed sufficient to address the *risk* of exposure. *See* 29 C.F.R. § 1910.1001(c); WAC § 296-62-07705.

The nine workers’ compensation claims that Walston cites also do not establish that Boeing had actual knowledge that an injury was certain to occur at the time he was allegedly exposed to asbestos. (Walston Br. 14-15, 33) None of the claims involved a Hammer Shop employee. Moreover, six of the nine claims post-dated the January 1985 insulation repair, and thus cannot show knowledge at that time. Of the three claims

that pre-dated January 1985, two (the January 1981 and June 1983 claims) were initially thought to relate to asbestos and were thus identified to claimants in a case called *Arnold*. (CP 5317-21) Boeing later verified, however, that neither claim actually involved exposure to asbestos, and served a supplemental discovery response clarifying this fact. (CP 1104-05, 1109-10) The February 1982 claim related to asbestos, but it involved asbestosis, not mesothelioma. (CP 1105, 1181)<sup>1</sup>

The Supreme Court has held that knowledge of prior injuries, *even to the plaintiff employee*, is not enough to state a deliberate-injury claim, absent knowledge that an injury was certain to occur. In *Vallandigham*, a disabled student caused 18 injuries to school staff in one five-week period, another 20 injuries in a three-week period, another 38 in a six-week period, and another 15 in a two-month period. 154 Wn.2d at 19-23. Seven workers' compensation claims were filed that year. *Id.* at 24. Those prior claims and injuries did not satisfy the *Birkliid* test because the employer could not predict with certainty that the injuries would continue.

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<sup>1</sup> Walston claims that mesothelioma reached "epidemic proportions" after he retired in 1995. (Walston Br. 15-16) That allegation, however, is based on clients of plaintiff's counsel and another plaintiff's firm "whose social security records indicated Boeing employment" at some point in their careers. (CP 986) No evidence indicates that any of them were exposed to asbestos at Boeing, as opposed to in the military, construction, or other employment. In any event, mesothelioma incidents after 1995 have no bearing on Boeing's knowledge of certain injury a decade earlier.

*Id.* at 33-34. The Court held that the “first prong of the *Birklid* test can be met in only very limited circumstances where continued injury is not only substantially certain, but *certain* to occur.” 154 Wn.2d at 32.

Division II has also repeatedly held that prior injuries do not create a fact issue. *Howland v. Grout*, 123 Wn. App. 6, 94 P.3d 332 (2004), involved multiple slip and fall injuries to employees and customers. *Id.* at 8, 11-12. Although it was “arguably foreseeable, or maybe even substantially certain, based on prior accidents and the floor’s condition that [plaintiff] might injure herself,” the evidence was insufficient “to prove that [the employer] had actual knowledge of *certain injury* as required by *Birklid*.” *Id.* at 12. Similarly, in *Brame v. Western State Hosp.*, 136 Wn. App. 740, 150 P.3d 637 (2007), numerous past assaults by patients on hospital staff were “not sufficient to create a certainty that any individual patient will assault any individual staff member.” *Id.* at 749. The “past patient-to-staff assaults demonstrate[d], at the most, that such assaults are foreseeable, not that they [we]re certain.” *Id.*

Walston cannot sidestep *Vallandigham* and other cases by arguing that the injuries were caused by unpredictable human actions. (Walston Br. 42-44) The results of asbestos exposure are also unpredictable, as his experts conceded. (CP 621-22 (17:20-18:7, 13-16), 625-26 (33:23-34:6), 713 (41:18-25), 715 (46:9-17)) The chemicals in *Birklid*, *Hope*, and *Baker*

caused immediate, observable injury, which meant that the employers knew of certain injury. Asbestos lacks that critical characteristic.

Precisely because asbestos exposure does not involve certain or even predictable injury, Division I held in *Shellenbarger* that the employer (Longview) was entitled to summary judgment. Walston's attempt to distance his claim from Shellenbarger's fails. He claims that Shellenbarger's only exposure preceded 1966, before Longview knew that asbestos was hazardous, and therefore the case supposedly turned on lack of evidence of Longview's knowledge. (Walston Br. 39-42) A simple reading of the case belies Walston's interpretation. The court merely stated that the "most obvious exposure" occurred from 1964 to 1965, but documented exposures extending well into the plaintiff's second period of employment after 1976. *Shellenbarger*, 125 Wn. App. at 43-44. Shellenbarger's testimony regarding "pieces of old pipe covering falling down to the floor and blowing around the work area when the new insulation was being installed" parallels Walston's claim. *Id.* at 44. The court documented testimony that Longview knew about hazards of asbestos at least by 1968, and perhaps by 1964. *Id.* at 44-45.

The court's reasoning focused on Longview's lack of knowledge of certain injury from asbestos exposure in general, not its lack of knowledge at the time of Shellenbarger's exposure. The court wrote that "asbestos

exposure does not result in injury to every person,” and that the requirement of *certainty* “leaves no room for chance.” *Id.* at 47, 49. The claims failed because a jury “could not conclude that Longview Fibre knew injury *was certain to occur.*” *Id.* at 48-49 (emphasis added). The point in time that Longview knew of the *hazards* of asbestos was irrelevant. *Id.* at 49. The lack of certain injury was central to the court’s holding, and not, as Walston describes it, dicta. (Walston Br. 42)

Walston’s evidence, taken in the light most favorable to him, shows at most potential bystander exposure from re-wrapping asbestos pipe insulation, plus knowledge that asbestos exposure posed some risk to employees. The only injury Walston can allegedly connect to the re-wrapping work is his own, which occurred 25 years later. There is no evidence that Boeing had actual knowledge that Walston, or any other employee, was certain to be injured from that exposure. Any disregard by the employees’ supervisor of their concern involved disregard of risk, which, as a matter of law, does not equate to knowledge of certain injury. *Vallandigham*, 154 Wn.2d at 28.

Walston argues that the inferences he draws from circumstantial evidence necessarily defeat summary judgment. (Walston Br. 24-26) But the court is not required to accept his unsupported characterizations of the evidence. *See Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204,

254 P.3d 778 (2011) (holding that plaintiffs' characterization of defendants' electronic mails did not create a fact issue on "knowing" misrepresentation). The evidence Walston submitted could not support a verdict that Boeing willfully disregarded actual knowledge of injury that was certain to occur. *See Howland*, 123 Wn. App. at 11 (affirming summary judgment to employer because the facts plaintiff alleged, "even taking them in the light most favorable to her, do not show actual knowledge of certain injury as required under *Birklid*").

**B. The Court Should Reject Walston's Attempt to Change the Legal Standards**

Even if credited, the evidence Walston cites would not satisfy the *Birklid* standard. Walston thus asks this Court to establish a lower legal standard that would permit claims based on knowledge of risk, treat inhalation of asbestos fibers itself as injury, and regard a possibility of injury to some unknown employee as certain injury to this employee. This Court should reject Walston's effort to change the legal standard.

**1. Evidence that an Unknown Employee Would Likely be Injured Cannot Satisfy the Certainty Requirement**

Walston argues that "*Birklid* requires Mr. Walston to show that Boeing knew that *some* workers were being injured when forced to inhale asbestos fibers," not that Walston himself would be injured. (Walston Br. 30-31) As noted above, there is no evidence that Boeing knew any

employee would be injured merely by exposure to asbestos. But even if Walston could cite such evidence, the test he describes is the Oregon test, which “focused on whether the employer had an opportunity consciously to weigh the consequences of its act and knew that *someone*, not necessarily the plaintiff, would be injured.” *Vallandigham*, 154 Wn.2d at 28 (emphasis added); *see also Birklid*, 127 Wn.2d at 865. The Supreme Court expressly rejected that approach in *Birklid*, and confirmed that position in *Vallandigham*. *Birklid*, 127 Wn.2d at 865; *Vallandigham*, 154 Wn.2d at 28.

Walston tries to piece together an argument that the Supreme Court adopted the injury-to-somebody approach despite the Court’s express disavowal of it. (Walston Br. 27-29) He contends that not all exposed employees in *Birklid* developed injuries and then infers that the Court regarded injury to some (less than all) employees as sufficient. (Walston Br. 27-28, 42) But *Birklid* does not hold that injury to *some* employees—random employees other than the plaintiffs—was sufficient. *Birklid* did not even involve that issue because the evidence supported employer knowledge of certain injury to the *employee-plaintiffs* themselves. In rejecting the Oregon injury-to-somebody test, the Court did not open the back door to claims based on an equivalent theory like Walston’s.

Walston dismisses as “unauthoritative” the multiple court of appeals cases rejecting claims where the plaintiff could not prove that the employer knew injury was certain to occur to the plaintiff. (Walston Br. 29 n.3 (cases discussed at Boeing Br. 27-28)) But those decisions were straightforward applications of *Birklid*'s and *Vallandigham*'s rejection of the injury-to-somebody approach. No Washington case supports Walston's attempt to re-write the legal standard.

Walston also refers to other liability standards, such as the standard under the federal Clean Air Act (CAA). (Walston Br. at 37-38 & n.8 (citing cases upholding convictions under the CAA)) But *Birklid* establishes a test for Washington tort liability that is unrelated to whether the conduct could support civil or criminal liability in another setting. The CAA establishes criminal liability for knowingly violating certain environmental laws and regulations. 42 U.S.C. § 7413(c)(1). Violation of those standards is not relevant to the *Birklid* analysis because not even the “failure to observe safety laws or procedures rise[s] to the level of deliberate intention.” *Brame*, 136 Wn. App. at 746; *see also Vallandigham*, 154 Wn.2d at 27 (“Even failure to observe safety laws or

procedures does not constitute specific intent to injure, nor does an act that had only *substantial* certainty of producing injury”).<sup>2</sup>

## **2. Cellular Level Effects of Fiber Inhalation Are Not a Legally Cognizable Injury**

Walston cites no evidence that Boeing knew, when it re-wrapped pipes in 1985, that Walston would be injured 25 years later. He also cannot escape his experts’ admissions that asbestos exposure is not certain to cause mesothelioma and that there was never any certainty that he would develop mesothelioma from exposure. (CP 51-52, 592-93 (43:7-18, 46:10-22, 48:5-9), 621 (14:17-18, 14:23-15:2), 636-37 & 639 (29:7-30:5, 32:17-24, 38:22-39:5), 684 (162:10-14, 165:21-23), 713, 719 (38:14-16, 63:3-8)) He attempts to sidestep that problem by arguing that mere inhalation of fibers was the relevant injury. But the Industrial Insurance Act and established Washington law preclude that argument.

The expert opinions and statements from case law in Walston’s brief (at 16-19) do not create a fact issue because the cellular-level effects of inhaling asbestos fibers are not a legally cognizable injury. The Industrial Insurance Act defines “injury” for purpose of the “deliberate injury”

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<sup>2</sup> Walston’s attempt to equate the 1985 repair to cases upholding convictions under the CAA is irrelevant and unsupported. (Walston Br. 38 & n.8) The regulations at issue in those cases govern demolition, renovation, and waste handling, not insulation repair. *See* 40 C.F.R. §§ 61.145, .150. Furthermore, even if applicable, the relevant regulations in 1985 required the employer to provide respirators only to employees “engaged in” asbestos spraying, removal, or demolition, not bystanders. WAC 296-62-07517(3)(b)(iii) (1985).

exception as a compensable condition, which in turn is defined, for occupational diseases such as mesothelioma, as the manifestation of disease. (Boeing Br. 30-31) The relevant injury is the manifestation of a *disease*, not the cellular level effects of asbestos that, after several years or even decades, may turn into disease in a tiny fraction of the exposed population.

Nor do the insurance cases on which Walston relies support his argument that inhalation of asbestos fibers is a compensable injury under Washington tort law. (Walston Br. 17-18) They involve the separate and irrelevant issue of whether asbestos exposure or manifestation of disease is “bodily injury” under liability insurance policies. They interpret the policy language and hold that coverage is triggered by manifestation of disease or exposure to asbestos. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1045, 1047 (D.C. Cir. 1981).

Interpreting exposure as constituting “bodily injury” under the explicit terms of certain insurance policies does not support similar definitional treatment under Washington workers’ compensation laws, or imply that the cellular level effects of fiber inhalation are compensable. There is “a clear distinction between when bodily injury occurs and when the bodily injury which has occurred becomes compensable.” *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1223 (6th Cir.

1980). Moreover, as the court in *Keene* pointed out, “injury” has different meanings in the contexts of workers’ compensation, statutes of limitations, and health insurance, and they are only “minimally relevant” to each other. 667 F.2d at 1043-44; *see also ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 972 (3d Cir. 1985).

Further, the insurance cases Walston cites do not endorse any view of the effect of asbestos exposure. In *Keene*, the court stated that the details of disease progression were not relevant to its decision, and that its holding did not depend on exposure causing injury at the cellular level. *Keene*, 667 F.2d at 1038 n.3, 1044 n.19; *see also Forty-Eight Insulations*, 633 F.2d at 1218 (describing the issue of when asbestos disease occurs as a “matter of contract law”). Similarly, Boeing did not, as Walston suggests, endorse any view of injury causation in filing a federal court brief, twenty years ago, in a case that did not involve asbestos. (Walston Br. 20) Far from “reach[ing] the same conclusion as Mr. Walston’s experts,” Boeing simply explained how a statement from the *Keene* case that one of the defendant insurance companies relied on did not support the insurance company’s position. (Walston Br. 20 & App. C 18)

The cases cited by Walston adopted exposure as the trigger, acknowledging that they do so in the unique context of interpreting insurance policy language that was intended to protect the policyholders’

expectations, and applying the presumption that ambiguity is interpreted against the insurer. But the issue here is not insurance coverage. Instead, the issue is the scope of the narrow exception to the workers' compensation exclusivity rule that forms the basis of the "Grand Compromise" the Legislature reached a century ago. *Birklid*, 127 Wn.2d at 859. The insurance cases are not relevant to the statutory analysis, which equates injury to manifestation of disease. *See Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 482-83, 745 P.2d 1295 (1987) ("our Industrial Insurance Act is unique and the opinions of other state courts are of little assistance in interpreting our Act"). Moreover, the policy concerns that drive the insurance cases do not apply. Workers who develop asbestos disease have a remedy in the workers' compensation system.

The Washington cases Walston cites are similarly off point. (Walston Br. 18-19) The issue in *Koker* and *Krivanek* was whether asbestos claims were governed by the 1981 Tort Reform Act when most of the claimed exposure pre-dated the statute. *See Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 470, 804 P.2d 659 (1991); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635, 865 P.2d 527 (1993). The court interpreted the term "arising" in the statute as meaning the origin of the injury, which for asbestos-related disease is exposure. *Koker*, 60 Wn. App. at 470-71.

The court did not suggest that exposure was the relevant injury for tort claims. Indeed, it distinguished when a claim “arises” from when it “accrues,” which is when all the elements necessary for the cause of action are present. 60 Wn. App. at 470-72. Had the court regarded exposure as the relevant injury, all elements of the claim would have existed at the time of exposure and the claim would have accrued when it arose—a result the court rejected. Ironically, if this Court accepted Walston’s argument that exposure is a compensable injury, then his claim and those of countless others would be time-barred because exposure to asbestos usually precedes disease by decades.

There is no dispute that an asbestos-related disease, when it occurs, is caused by exposure many years before. Statements in case law indicating that exposure is the injury-producing event do not mean exposure is a cognizable injury. Thus the passages Walston cites in *Villella* and the dissent in *Kilpatrick* are beside the point. (Walston Br. 19) The on-point material is the *majority* opinion in *Kilpatrick*, in which the Court followed *Landon* (see Boeing Br. 31-32) and held that the applicable benefits schedule for an asbestos claim under the Industrial Insurance Act is based on the “date of injury,” which in “the context of occupational disease” is the “date of manifestation.” *Kilpatrick v. Dept. of Labor & Indus.*, 125 Wn.2d 222, 228, 232, 883 P.2d 1370 (1995). The

dissent does not help Walston because even it regarded the triggering event for asbestos benefits as the “diagnosis of the original asbestos-related condition,” not, as Walston’s argument assumes, exposure. *Id.* at 235 (Madsen, J., dissenting).

Similarly, the *Fankhauser* case does not support Walston’s position. *See Dept. of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993) (discussed at Walston Br. 32-33). The Court held that the IIA allows compensation for occupational diseases that manifest after employment covered by the Act if the disease-causing exposure occurred during covered employment. 121 Wn.2d at 315-17. The Court did not hold that exposure is the relevant injury, or that anything short of manifestation of asbestos disease is compensable.

Walston has not identified a single case that treats exposure to or inhalation of asbestos fibers as a compensable injury under the Industrial Insurance Act, or under tort law generally. The courts avoid such an expansive notion of injury for good reason. Inhalation of many common substances such as smog can causes asymptomatic, cellular level effects in the lungs, as Walston’s experts conceded. (CP 612 (124:21-125:8), 638 (37:15-23)) Treating exposure as injury would dramatically expand the narrow deliberate injury exception into a broad rule of liability for asbestos and many other substances. (Boeing Br. 30, 33-34)

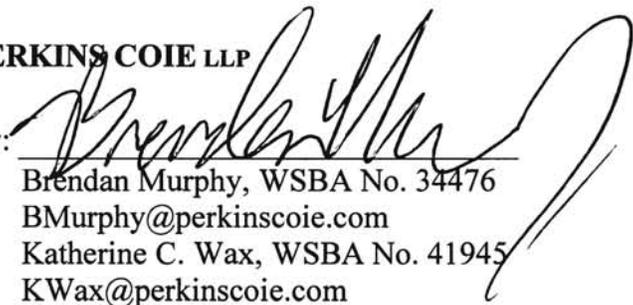
Moreover, even if Walston could muster authority for his novel cellular injury argument, he has cited no evidence that Boeing had actual knowledge that inhalation of asbestos fibers was certain to cause cellular level injury to its employees. The evidence Walston cites is, at most, that exposure creates a risk of lung disease, not a certainty of cellular or other actual injury.

### III. CONCLUSION

Walston has no evidence that Boeing willfully disregarded actual knowledge of injury certain to occur. The Court should reverse the denial of summary judgment and direct entry of judgment in favor of Boeing.

DATED: April 18, 2012

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**DECLARATION OF SERVICE**

On said day below I deposited in the U.S. Mail and served via email a true and accurate copy of the REPLY BRIEF OF PETITIONER to the following:

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

DATED: April 18, 2012, at Seattle, Washington.



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