NO. 32473-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN D. KOVACS,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant.

REPLY BRIEF OF APPELLANT DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

Despite the plain language of RCW 51.28.050, which requires a worker to apply for workers' compensation benefits "within one year" of the injury, John Kovacs filed his application one day late. The Supreme Court and Court of Appeals have decided that the counting period under RCW 51.28.050 commences on the day of the injury. For his application to have been timely, Kovacs needed to apply for benefits on or before September 28, 2011, which is within one year after the injury. The Department of Labor & Industries (L&I) and Board of Industrial Insurance Appeals (Board) correctly decided that Kovacs' September 29, 2011 application was untimely.

To argue his claim is timely, Kovacs focuses on the word "after" in the statute: "No application shall be valid . . . unless filed within one year after the day upon which the injury occurred . . . ." He fails to recognize that of course the statute provides for the year to occur "after" the injury, it could hardly occur "before" it. More fundamentally, Kovacs reads the phrase "within one year" out of the statute despite the Legislature's use of that phrase to specify that the limitation period commences on the day of the injury. Under this controlling language, Kovacs' application was untimely.

II. ARGUMENT

A. Because the One-year Statute of Limitations Under RCW 51.28.050 Commences on the Day of the Industrial Injury and the Plain Language of the Statute Requires That Kovacs' Claim Be Filed Within One Year of September 29, 2010, His Claim Was Not Timely Filed

Kovacs failed to file his claim *within* the one year time period *after* his injury occurred. RCW 51.28.050 bars a claim for benefits unless the claimant files it "within one year after the day upon which the injury occurred." The year provided under RCW 51.28.050 began to run on September 28, 2010, when Kovacs claims he sustained an industrial injury. BR 10, 12, 43; *see Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 632, 115 P.2d 1014 (1941); *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 923, 185 P.2d 113 (1947); *Sandahl v. Dep't of Labor & Indus.*, 170 Wash. 380, 383-84, 16 P.2d 623 (1932); *Ferguson v. Dep't of Labor & Indus.*, 168 Wash. 677, 681, 13 P.2d 39 (1932); *Read v. Dep't of Labor & Indus.*, 163 Wash. 251, 252, 1 P.2d 234 (1931); *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 448, 213 P.3d 44 (2009); *Rector v. Dep't of Labor & Indus*, 61 Wn. App. 385, 388, 390, 810 P.2d 1363 (1991); *In re Gwen Carey*, No. 03 13790, 2005 WL 1658424 (Bd. Ind. Ins. Appeals March 30, 2005). L&I has no power to make exceptions to the rule that claims must be filed "*within* one year from the date of the accident." *See Leschner*, 27 Wn.2d at 923 (emphasis added).

RCW 51.28.050 plainly requires that a worker apply for benefits "*within* one year after the day upon which the injury occurred." Kovacs argues that the *after* language suggests that the one year begins on the day after the injury. Resp't's Br. 3. This reading renders meaningless the Legislature's inclusion of "within" in RCW 51.28.050, and the Legislature does not include unnecessary words in its legislation. *See McGinnis v. State*, 152 Wn.2d 639, 645-46, 99 P.3d 1240 (2004). Repeatedly emphasizing "after", Kovacs reiterates his desired reading of the statute, but fails to give meaning to the word "within". The Legislature could have omitted "within", leaving the statute to read: "No application shall be valid or claim thereunder enforceable unless filed [] one year after the day upon which the injury occurred . . . ." This hypothetical language could, *arguendo*, support Kovacs, but it is not the language chosen by the Legislature and contained in the statute. Instead the Legislature selected and used the word: "within". "Within" is defined as "on the inside or on the inner side: INTERNALLY, INSIDE . . . ." *Webster's Third New International Dictionary* 2627 (2002). Thus, the plain language of the statute requires that Kovacs file his injury claim "inside" the year following the injury.

L&I's reading of the statute to include the phrase "within one year" gives meaning to the entire statute. Kovacs argues that L&I does

not give meaning to the word "after" in the statute. Resp't's Br. 12. But L&I's and the Board's reading of the statute gives effect to the entire phrase "unless filed within one year after the day upon which the injury occurred." Of course the year comes *after* the industrial injury. It would make no sense to have it come *before* the injury. Moreover, Kovacs ignores that the time period is within one "*year*". "Each calendar year begins on January 1 and ends on December 31, not at the end of the succeeding January 1." *Carey*, 2005 WL 1658424, *3. To give plain meaning to the term a "year", the end of the year cannot occur the day after the year.

In his rendition of the language, Kovacs substitutes the language "within one year of the injury" for the "within one year after *the day upon which the injury occurred*" language in the statute. *Compare* Resp't's Br. 3 *with* RCW 51.28.050 (emphasis added). The above italicized statutory language shows that the Legislature intended the time to start running on the day of the injury itself rather than the day following the injury as Kovacs suggests—it emphasizes that the day upon which the injury occurs is the starting point for counting.[1]

The Washington Supreme Court has repeatedly recognized that the limitation period commences on the day of the accident. *E.g.*, *Nelson*, 9

[1] This is consistent with the changes the Legislature made in 1927 to the statutory scheme when it rejected a discovery rule. See discussion App's Br. at 11.

Wn.2d at 632. Kovacs disputes that the Washington Supreme Court has "established the rule that the one year period in which the claim must be filed commences to run on the day of the accident." *Id.* He calls *Nelson* dicta. Resp't's Br. 8. But *Nelson* specifically considered a question as to whether the statute of limitations was met and in order to do so it is necessary to state the beginning date. *Nelson*, 9 Wn.2d at 632. Moreover, *Nelson* relies on *Sandahl* and in *Sandahl*, the Court held that the statute of limitation began to run when the claimant fell and injured his shin: the time of the accident. *See Sandahl*, 170 Wash. at 383-54. The Supreme Court emphasized that it was the Legislature's intent that the statute of limitation commences with the injury itself:

> [I]t seems plain that, by the statutes, as amended, the legislature intended that the claim should be filed within one year after the date of the injury, and that this time began to run when there was a "sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without."

Sandahl, 170 Wash. at 383-84. This reasoning was necessary to *Sandahl's* decision as to what started the time period: the injury or the effects of the injury. *Id.* Because a decision as to the commencement of the limitation

period was necessary to the *Sandahl* Court's holding, it was, contrary to Kovacs' claim, not dicta.[2]

The Board correctly followed *Nelson* in *Carey*, 2005 WL 1658424, and the Board here correctly followed *Nelson* and *Carey* here.[3] In this decision, the Board correctly held that a worker must apply for benefits within one year of the injury. The Board revisited and affirmed its *Carey* analysis in a significant decision addressing the occupational disease statute of limitations. *See In re James Scales*, No. 09 10566, 2009 WL 6268490, *2 (Bd. Ind. Ins. Appeals Dec. 1, 2009) (applying the same commencement day that applies to industrial injuries to the statute of limitations for occupational diseases).

In *Carey*, the Board was charged with determining whether the claimant's claim—filed on November 20, 2002 for an alleged industrial injury that occurred on November 20, 2001—was timely filed under RCW

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[2] Likewise, *Nelson* relies on *Read* and *Ferguson*, both of which considered the limitation period. *See Nelson*, 9 Wn.2d at 932. In *Read*, the court had to decide whether an application was timely filed and stated it had to be filed "within one year from the date of the accident." *Read*, 163 Wash. at 252. In *Ferguson*, the Court had to decide when the statute of limitations began to run and said: "in order to avoid the bar of the statute, a claimant ... must present his claim within one year after the day upon which the accident occurred." *Ferguson*, 168 Wash. at 681. Subsequent to *Nelson*, the Supreme Court has reaffirmed the statute is inflexible and a worker must file an application "*within* one year from the date of the accident." *Leschner*, 27 Wn.2d at 923-24.

[3] Citing to the body of the proposed decision and order, Kovacs argues that the industrial appeals judge only ruled in the L&I's favor because she was bound by *Carey*. Resp't's Br. 4-5. Because the standard of review here is de novo for legal questions and this Court reviews the superior court's decision, the industrial appeals judge's analysis is irrelevant to this Court's analysis. *See Elliott*, 151 Wn. App. at 445-46.

51.28.050. *Carey*, 2005 WL 1658424, *1. Because RCW 51.28.050 and Supreme Court precedent require that the day of injury commences the limitation period, the Board held that Carey's application was late. *Id.* at *3-*5.

Contrary to Kovacs' claims, the Board appropriately discounted the commencement approach in *Wilbur v. Dep't of Labor & Indus.*, 38 Wn. App. 553, 556, 686 P.2d 509 (1984), because it is inconsistent with Supreme Court precedent. *Carey* based its conclusion largely upon "the series of decisions culminating with *Nelson*, [where] our Supreme Court adopted the interpretation that the RCW 51.28.050 limitation period begins to run on the day of injury." *Carey*, 2005 WL 1658424 at *3.

More to the point here, *Wilbur* is unpersuasive because it contradicts Supreme Court precedent and the plain language of RCW 51.28.050. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("Further, once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court."). The *Wilbur* Court's analysis is further undercut because it erred at the outset of its analysis when it presumed the last day of the statute of limitations was August 5, 1978, while it was actually August 4, 1978. *Wilbur*, 38 Wn. App. at 556. Moreover, because Wilbur filed the application for benefits several days after the deadline (on Tuesday,

August 8, 1978), Wilbur's application was untimely regardless of whether the counting started on the day of the injury or the day after the injury.

Wilbur has not been followed. The Court of Appeals in *Elliott* and *Rector* applied the plain language of RCW 51.28.050 that commences the statute of limitation on the day of the injury. *Elliott,* 151 Wn. App. at 448; *Rector*, 61 Wn. App. at 388. Kovacs makes no attempt to address the Court of Appeals cases since *Wilbur* that have reaffirmed that the time limit begins to run the day of the accident.

Kovacs takes the contradictory position that *Wilbur's* statement about the due dates for the applications for benefits is not dicta, while the statements in *Nelson, Sandahl*, *Read*, and *Ferguson* are dicta. Resp't's Br. 8-10. It is true that none of these cases have considered whether an application received a year and a day after the injury is timely (including *Wilbur*), but all of the cases considered a statute of limitation question with the necessary inquiry as to when the period commences. Even if the Supreme Court's analysis in *Nelson, Sandahl, Read,* and *Ferguson* is dicta, the Supreme Court recognizes that "'a deliberate expression of the court upon the meaning of the statute' should not be disregarded" even if dicta. *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 53, n.7, 959 P.2d 1091 (1998) (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925)).

The Supreme Court in numerous decisions has deliberately "passed" on the meaning of the statute and must be followed. The same does not hold true for *Wilbur* because it is unclear what authority *Wilbur* relied upon: the *Wilbur* Court does not cite RCW 1.12.040 and it did not follow the plain language of the RCW 1.12.040 in place at the time it was actually decided. *See* discussion App's Br. 16, n.8. Accordingly, it cannot be said that the *Wilbur* Court made a deliberate expression of the meaning of any statute. But in any event, *Nelson*, *Sandahl*, *Leschner*, *Read*, and *Ferguson* control over the passing statement in *Wilbur*.

L&I has consistently reiterated throughout the legal proceedings here the long-held position that the one year under RCW 51.28.050 begins on the day of the injury. CP 1-9; RP 10. To the extent this interpretation is relevant in plain language analysis, it is entitled to deference. *See Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). Likewise, the Board's interpretation of the Industrial Insurance Act in *Carey* is also entitled to "great deference." *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 138, 814 P.2d 629 (1991).[4]

[4] Kovacs points to L&I's adjudicatory decisions to suggest that L&I's interpretation should be given little weight. Resp't's Br. 10. However, L&I's prior adjudicatory decisions are not at issue here because it was the final order that was on appeal. *See* RCW 51.52.050, .060, .102; *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001) (L&I's deliberative processes are irrelevant).

B. The General Counting Statute, RCW 1.12.040, Is Superseded by RCW 51.28.050 Because RCW 51.28.050 Is A More Specific Statute that Applies to Filing Workers' Compensation Claims

RCW 51.28.050 applies to determine when the statute of limitation commences for filing a workers' compensation claim. The commencement date of the statute of limitations for filing an application for benefits for industrial injuries under RCW 51.28.050 conflicts with the commencement date of the general counting statute, RCW 1.12.040. The two are inconsistent because the specific workers' compensation counting statute provides that counting starts on the day of the injury. In contrast, the general statute starts counting the day *after* an event: "time[s] within which an act is to be done, [which] shall be computed by excluding the first day, and including the last, unless the last day is a holiday, Saturday, or Sunday, and then it is also excluded". RCW 1.12.040.

A specific statute prevails if there is a conflict with a general statute unless there is legislative intent that the more general statute controls. *See Kustura v. Dep't of Labor &Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010). The Legislature expressed no such legislative intent that the general counting statute control. In fact, the legislative intent is to the contrary. For decades, the courts have interpreted RCW 51.28.050 as commencing the day of the injury: *Read* (1931), *Ferguson* (1932), *Sandahl* (1932), *Nelson* (1941), *Leschner* (1947), *Rector* (1991), *Elliott*

(2009). *Read*, 163 Wash. at 252; *Ferguson* 168 Wash. at 681; *Sandahl*, 170 Wash. at 383-84; *Nelson*, 9 Wn.2d at 632; *Leschner*, 27 Wn.2d at 923; *Rector*, 61 Wn. App. at 388, 390; *Elliott*, 151 Wn. App. at 448-49; *see also Scales*, 2009 WL 6268490; *Carey*, 2005 WL 1658424. By not amending the statute to change its plain language meaning, the Legislature has acquiesced to the interpretation given the statute by the court. *See Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980).

Because the workers' compensation statute is more specific, it controls over RCW 1.12.040. *See In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004); *see also Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, n.2, 259 P.3d 190 (2011). Reading RCW 51.28.050 in its entirety shows that a worker must file an application for benefits "within one year" of the injury, which conflicts with RCW 1.12.040, which starts the counting the next day after the event. Because it presents a statutory conflict, the specific language of RCW 51.28.050 that starts counting the day of the injury supersedes the general counting statute.

Kovacs argues that there is not a conflict because he believes that both statutes start the counting "after" the event. Resp't's Br. 4, 6. Kovacs' interpretation of RCW 51.28.050 is fundamentally flawed,

though, because he does not give meaning to the phrase "within one year" in RCW 51.28.050. This expression of legislative intent, in the absence of stated intent to the contrary, controls and requires a worker to apply for benefits within one year after the industrial injury.

C. Because the Plain Language of RCW 51.28.050 Carries Out the Legislature's Intent, the Doctrine of Liberal Construction Does Not Apply to Kovacs' Untimely Claim

The doctrine of liberal construction does not apply to Kovacs' appeal of the Board's decision to uphold L&I's denial of his untimely application for benefits because neither party asserts that the statute is ambiguous. App's Br. 10-12; Resp't's Br. 4, 6, 12. Liberal construction in favor of the injured worker applies only to matters concerning the construction of an ambiguous statute under Title 51. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); *Raum v. City of Bellevue*, 171 Wn. App. 124, n.28, 155, 286 P.3d 695 (2012), *review denied,* 176 Wn.2d 1024 (2013); RCW 51.12.010. There is no ambiguous statute present here.

The courts do not apply liberal construction to permit the consideration of an untimely claim. In *Leschner*, the court considered whether to exercise its equitable discretion and permit the claimant's untimely application for benefits. *Leschner*, 27 Wn.2d at 923-26. In refusing to do so, the Court emphasized that: "'the liberal construction rule

has not yet been extended to permit the consideration of a claim which the statute, in effect, says shall not be considered.'" *Leschner*, 27 Wn.2d at 926. The Court cited the "ancient maxim: Equity aids the vigilant, not those who slumber on their rights." *Id.* at 927. Kovacs had an entire year to file his injury claim from the time of his injury, but failed to do so.

Statutory deadlines create certainty for workers, employers, and L&I. The Legislature created the state industrial insurance system to provide sure and certain relief for industrial injuries. RCW 51.04.010. This aids both workers and employers. Such sure and certain relief can be obtained only if there is a deadline to apply for benefits as contemplated by the plain language of the statute. Kovacs failed to meet this deadline and L&I properly rejected his claim as untimely.

III. CONCLUSION

Kovacs did not file his claim within one year of his alleged injury as required by the plain language of the controlling statute—RCW 51.28.050—and Supreme Court precedent. He filed his claim too late. L&I asks this Court to reverse the April 25, 2014 and April 11, 2014

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decisions of the superior court and to affirm the July 15, 2013 decision of the Board and the September 19, 2012 order of L&I.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

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DATED this 8th day of December, 2014, at Spokane, WA.

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