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Division II  
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**NO. 51891**

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

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STEVEN G. HOPKINS,  
Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,  
Respondent.

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**OPENING BRIEF OF APPELLANT,  
STEVEN G. HOPKINS**

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**A. ASSIGNMENTS OF ERROR**

**Assignment of Error**

1. The trial court erred in failing to vacate Notice and Order of Assessment No. 0617031 (hereinafter “NOA 0617031”) although it was time barred by RCW 51.16.190.

**Issue Pertaining to Assignments of Error**

1. Is the Department estopped from assessing premiums against Appellant more than five years after the premiums became due when RCW 51.16.190 requires any action to collect any delinquent premium, assessment, contribution, penalty or other sum must be brought less than three years after such sum became due? (Assignment of Error 1.)

**B. STATEMENT OF THE CASE**

This matter arises from the Notice and Order of Assessment No. 0617031 (hereinafter the “Hopkins Assessment”) assessing against Appellant as his personal liability pursuant to RCW 51.48.055 the amount of \$60,193.73 in workers’ compensation insurance premiums, penalties, and interest due from Frontier Contractors Inc. for the 4th quarter of 2006 through the 3rd quarter 2009. CBR 71-73<sup>1</sup>.

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<sup>1</sup> Certified Board Record (CBR)

The Department had previously issued Notice and Order of Assessment No. 0503730 (hereinafter the "Frontier Assessment") on January 15, 2010 assessing those premiums for the 4th quarter of 2006 through the 3rd quarter 2009 against Frontier Contractors Inc.. CBR 276, 282-285. The Frontier Assessment was appealed to the Board of Industrial Insurance Appeals (hereinafter the "BIIA"), and after hearings on the matter, the BIIA ordered the matter remanded to the Department for some minor modification, and that order became final and binding on all parties on November 21, 2012. CBR 276-277.

Frontier Contractors Inc. was a Washington State corporation. Steven G. Hopkins was its president and responsible for filing its workers' compensation returns. Frontier Contractors, Inc. went out of business in November 2012 and was administratively dissolved on July 1, 2013. CBR 277, 340.

The Department issued the Hopkins Assessment on February 9, 2015 assessing against Appellant as his personal liability pursuant to RCW 51.48.055 the same workers' compensation insurance premiums that had been assessed against Frontier Contractors Inc. in the Frontier Assessment, together with penalties and interest from the date those premiums were originally due from Frontier Contractors Inc.. CBR 71-73

Appellant timely requested reconsideration of the Hopkins

Assessment on March 2, 2015, additionally asserting therein that the Hopkins Assessment was time-barred pursuant to RCW 51.16.190. CBR 74, 371-372. On August 3, 2015, the Department affirmed the Hopkins Assessment with some minor modification. CBR 67-68, 75-77.

Appellant timely appealed to the BIIA on August 14, 2015 resulting in BIIA Docket NO. 15 18810, asserting again that the Hopkins Assessment was time-barred. CBR 61-66.

Appellant filed a motion for summary judgment on March 11, 2016 asserting again that the Hopkins Assessment was time-barred. CBR 373-389.

The BIIA judge denied Appellant's motion on June 21, 2016. CBR 1011-1017.

After further hearings the BIIA affirmed the Hopkins Assessment and the ruling on summary judgment by proposed decision and order on September 27, 2016, which was then affirmed in the Decision and Order of the Board on December 27, 2016. CBR 3-7, 48-60.

Appellant timely appealed to Pierce County Superior Court, paying the amount assessed in the Hopkins Assessment as required under RCW 51.52.112, and the Superior Court affirmed the decision of the BIIA on January 11, 2018. See Petition for Judicial Review and Order Confirming/Affirming Ruling.

Appellant timely appealed to this Court on February 9, 2018.

**C. SUMMARY OF ARGUMENT**

Any action, other than in cases of fraud, to collect any delinquent premium, assessment, contribution, penalty, or other sum due to the department from any employer subject to this title shall be brought within three years of the date any such sum became due. RCW 51.16.190. The Hopkins Assessment is an “action” to collect delinquent premiums subject to RCW 51.16.190, and it was not brought within three years of the date the delinquent premiums became due. This is not a case of fraud.

Therefore, the Hopkins Assessment is time barred and must be vacated.

**D. ARGUMENT**

**1. Standard of Review**

Appeals from the BIIA of an assessment of industrial insurance premiums are governed by the Administrative Procedure Act, chapter 34.05 RCW. *Department of Labor and Industries v. Lyons Enterprises, Inc.*, 185 Wn.2d 721, 731, 374 P.3d 1097 (2016) (citing RCW 51.48.131).

The appellate court sits in the same position as the superior court and the review of the assessment is limited to the record available to the Board. *Id.*

Findings of fact are reviewed using the substantial evidence standard, under which there must be evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Id.*

Questions of law are reviewed de novo. *Id* at 732. The Department's interpretation of the Industrial Insurance Act, although not binding, is given deference.; *Doty v. The Town of South Prairie*, 155 Wash.2d 527, 537, 120 P.3d 941 (2005). But deference is not appropriate if the agency's interpretation conflicts with its statutory directive. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 812, 16 P.3d 583 (2001).

## **2. Argument #1**

“Nearly every employer doing business in the state of Washington is required to have workers’ compensation insurance for his/her employees.” WAC 296-17-31004; see also RCW 51.16.060. Frontier Contractors, Inc. was one such employer.

Workers’ compensation insurance premiums are due on the last day of the month following each quarter. RCW 51.16.060; *Dolman v. Dep’t of Labor & Indus.*, 105 Wn.2d 560, 565, 716 P.2d 852 (1986).

The Frontier Assessment assessed premiums for the 4<sup>th</sup> quarter of 2006 through the 3<sup>rd</sup> quarter 2009. CBR 71-73. The premiums for the 3<sup>rd</sup> quarter of 2009 became due on October 31, 2009, which is the latest any of the assessed premiums became due. RCW 51.16.060.

“Any action to collect any delinquent premium, assessment, contribution, penalty, or other sum due to the department from any

employer subject to this title shall be brought within three years of the date any such sum became due.” RCW 51.16.190(2).

“Action’ means, but is not limited to, a notice of assessment pursuant to RCW 51.48.120, an action at law pursuant to RCW 51.16.150, or any other administrative or civil process authorized by this title for the determination of liability for premiums, assessments, penalties, contributions, or other sums, or the collection of premiums, assessments, penalties, contributions, or other sums.” RCW 51.16.190 (1).

The Hopkins Assessment was issued pursuant to RCW 51.48.131, and pursuant to RCW 51.48.055 under which an officer, member, manager or other person responsible for the filing of workers’ compensation returns may become personally liable for any unpaid premiums and interest and penalties on those premiums upon the termination, dissolution, or abandonment of a corporate or limited liability company business. CBR 71-73, 75-77.

RCW 51.48.055 does not create a new “due date” for such premiums. By its plain language, when RCW 51.48.055 applies, a liable person “is” personally liable for currently due premiums. RCW 51.48.055. The responsible person is not liable for premiums that “became due” during any time when he or she was not responsible for the company’s workers’ compensation premiums. RCW 51.48.055(2).

The Department will argue Hopkins Assessment premiums become due, when the company dissolved, but this would be a “discovery rule.” The law “specifically provides that collection actions for such premiums shall be barred 3 years after the sum became due, not when the Department “discovered” it. *Dolman*, 105 Wn.2d at 565. The ability to conduct timely audits within the limitation period overcomes any policy arguments in favor of a “discovery” rule. *Id.* As does the fact that the Department’s statutory authority to estimate and assess unreported premiums under RCW 51.16.155 means the Department does not need to rely upon self-reporting by the employer. *Id.* 565-566. A “discovery rule” is unnecessary. *Id.* at 566.

The Department will further argue that RCW 51.16.190 will limit their ability to collect premiums because the Department must serve the business and the personal liability assessments at the same time. Just as described in *Dolman*, the Department has many other options available in such a circumstance: RCW 51.48.170, .180, and .190 provide for “Emergency assessment and collection of taxes” if “the collection of any taxes accrued will be jeopardized by delaying collection”; RCW 51.16.190(3) specifically excludes cases involving “false or fraudulent” reporting; and the Department retains the ability to estimate and assess

unreported premiums under RCW 51.16.155. As in *Dolman*, All of these options overcome any need for a “discovery rule”.

The Hopkins Assessment, dated February 9, 2015, assessing liability for premiums which became due, at the latest, on October 31, 2009 is time barred because it is a collection action contemplated by RCW 51.16.190(2) which was not brought within three years of the date the premiums became due. The law is clear and unambiguous. The Hopkins Assessment must be vacated.

### **3. Attorney Fees**

The Appellant requested an award of fees and costs at each stage in this long process, and the Appellant first notified the Department that RCW 51.16.190 barred the Hopkins Assessment on March 2, 2015. CBR 371-372.

The Department has been on notice for more than three years that the Hopkins Assessment is clearly time barred and yet continued to pursue this matter. Before the BIIA the Appellant requested fees pursuant to RCW 4.84.185 because of the Department’s continued insistence to pursue their frivolous claim. CBR 386-388.

Before the Superior Court, the Appellant requested fees and costs pursuant to RCW 4.84.170 and the Equal Access to Justice Act (RCW 4.84.340 - .360) in the Petition for Judicial Review of State Action filed in

January 26, 2017. The Appellant is an individual whose net worth is less than \$1,000,000, this is judicial review of an agency action as defined by chapter 34.05 RCW, and the Department was not substantially justified in continuing to pursue its plainly time-barred claim against Appellant.

In accord with Washington State Rules of Appellate Procedure 18.1 the Appellant reasserts herein its requests for attorney fees and costs

**E. CONCLUSION**

WHEREFORE, the Appellant asks the Court for relief:

1. Finding RCW 51.16.190 time-bars assessment of personal liability under RCW 51.48.055, except in cases of fraud, for premiums due more than three years prior to the issuance of the assessment.
2. Setting aside the Superior Court Order Confirming/Affirming Ruling, the BIIA Decision and Order, and vacating in its entirety the Hopkins Assessment.
3. Refunding to Appellant the full amount of assessed taxes, penalties and interest paid by the Appellant and further awarding interest thereon from the date such taxes, penalties and interest were paid at the rate allowed by law as prejudgment interest. RCW 51.52.112.

4. Awarding costs, fees and other expenses, including reasonable attorneys' fees to Appellant pursuant to RAP 18.1, RCW 4.84.170, the Equal Access to Justice Act (RCW 4.84.340 - .360), or other appropriate statute, and
5. Awarding such further relief this Court deems proper.

Respectfully submitted this 13th day of June 2018.

s/ Sean Walsh  
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**CERTIFICATE OF SERVICE**

I certify that on June 13, 2018, I caused the original and copy of this **Appellant's Opening Brief** to be filed via Electronic Filing, with the Court of Appeals, Division II, and that I further served a true and correct copy of same, on:

**(X) Court of Appeals, Division II Electronic Filing,  
Facsimile and U.S. Mail, Postage Prepaid**

**Via Facsimile and First Class United States Mail, Postage  
Prepaid, to Counsel(s) for Respondent/Washington State  
Department of Labor and Industries:**

Katy Janelle Dixon  
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DATED this 13<sup>th</sup> day of June 2018, in Lacey, Washington.

*s/ Kaleena Lechowicz*

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