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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 291251

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

ELIZABETH A. OLSEN,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent.

APPELLANT'S REPLY BRIEF

William D. Hochberg WSBA # 13510
Amie C. Peters, WSBA #37393
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

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ARGUMENT

A. The Fankhauser Last Injurious Exposure Rule is Controlling.

In *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), the Washington Supreme Court adopted the Ninth Circuit's interpretation of the last injurious exposure rule from *Todd Shipyards v. Black*, 717 F.2d 1280 (9th Cir. 1983), and guaranteed Title 51 benefits to occupational disease claimants whose work history shows both IIA-covered and non-covered employment, so long as some exposure occurred in employment covered by the Industrial Insurance Act-covered (hereinafter "IIA"). *Fankhauser*, 121 Wn.2d at 315. The last injurious exposure rule is codified in WAC 296-14-350(1): "[t]he liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure . . . during employment within the coverage of Title 51 RCW. . . ." The doctrine of the last responsible employer is supreme in Washington workers' compensation law, and is the best policy to protect injured workers and their families.

This interpretation of *Fankhauser* is also supported by the Board of Industrial Insurance Appeals decisions in cases like *In re John L. Robinson*, BIIA Dec., 91 0741 at 2 (1992)(Significant Decision); *In re John R. Sikes*, BIIA Dec., 02 13513 (2004); *In re Amy J. Dunnell*, BIIA Dec., 03 18764 at 4 (2005); and *In re Cindy A. Meisner*, BIIA Dec. 95 6101 (1997). Brief of

Appellant 30-32. These cases affirm the last injurious exposure rule is not to be used as a basis to deny benefits when exposure has occurred under different compensation systems, particularly between the IIA and another state or federal system of industrial insurance, like the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"). As in the case of the its 1993 and 1987 Reports to the Legislature, the Department of Labor and Industries' (hereinafter "Department") only defense to these cases is to allege they conflict with *Gorman*, even though *Gorman* did not consider the last responsible employer rule. Brief of Respondent 41.

In this case, Mrs. Olsen filed a claim for Washington State workers' compensation benefits under the IIA because her husband's last asbestos exposure occurred in employment covered by the IIA. CABR 26-27. Accordingly, *Fankhauser* would be definitive here, entitling Mrs. Olsen to widow's benefits under Title 51 RCW, but for the Department's interpretation of the ruling in *Gorman*. Brief of Appellant 18. *Gorman*, however, failed to address the issues in *Fankhauser* or the present case. The parties focused on the LHWCA and whether *Gorman* could sue federally-covered employers under state tort law, failing to mention *Fankhauser* entirely in oral argument and only making passing references to the case in the briefs. *Id.*

The Department suggests Title 51's prohibition on double recovery and the *Todd* rule of last injurious exposure prevent a worker who is exposed to asbestos in both maritime and IIA-covered employment from receiving regular benefits under the IIA, even if the last exposure occurred in IIA-covered employment. Brief of Respondent 32. This is not the case. As in *Gorman*, the Department fails to recognize Washington State had already adopted the *Todd* rule for state workers' compensation claims under the IIA in *Fankhauser*. *Fankhauser*, 121 Wn.2d at 314. In fact, the Department argues *Fankhauser* and *Gorman* do not conflict with each other in any way, despite the fact of the related subject matter of the two cases, the plain language of the statutes involved, the Department's own pre-*Gorman* Reports to the legislature, internal policy and actions, and the cases of the Board of Industrial Insurance Appeals all show *Fankhauser* applied in a way inimical to *Gorman*. Brief of Respondent 39.

The Department cannot show the Supreme Court meant to abandon *Fankhauser*. The doctrine of *stare decisis* "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 139, 147, 94 P.3d 930 (2004), quoting *In re: Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Where, as here, the majority of the evidence points to a grave effect on the scope and interpretation of *Fankhauser* caused by *Gorman*, when

Gorman did not overrule *Fankhauser*, *stare decisis* must play a role. Where the Court expresses a clear rule of law, as in *Fankhauser*, the court should not overrule it *sub silentio*. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Here, if the Supreme Court abandoned *Fankhauser*, which is unlikely, it did so *sub silentio*.

B. *Gorman v. Garlock* is Inapposite Because It Did Not Consider Eligibility for Washington Workers' Compensation Benefits.

Gorman v. Garlock, 155 Wn.2d 198, 118 P.3d 311 (2005), is not controlling here: the case only concerned an employee's attempt to bring civil suit in state court against longshore-covered employers for intentional asbestos exposure. *Gorman*, 155 Wn.2d at 206–208. To contrast, this case concerns a claim for workers' compensation benefits, not a tort lawsuit. A tort case does not properly relate to workers' compensation issues.

Neither plaintiff in *Gorman* attempted to make a claim for state or federal workers' compensation benefits. *Id.* The Department alleges this contention is untrue because the *Gorman* opinion does not mention the fact the plaintiffs did not file for benefits. Brief of Respondent 19. However, a cursory reading of the *Gorman* case reveals what the Supreme Court stated: "Helton, like *Gorman*, has not filed a claim for compensation under the WIIA or the LHWCA." *Gorman* at 204. Therefore, as it is clear Mrs. Olsen is bringing a claim that was not brought by the workers in *Gorman*, despite

the Department's arguments, any discussion of RCW 51.12.102(1) in *Gorman* is dicta. The Supreme Court did not have before it the foregoing issue of a claim for state workers' compensation benefits.

Since *Gorman* did not concern workers' compensation, the *Gorman* court did not consider the ramifications of its decision on injured workers. Such a decision should be limited in scope and any discussion regarding RCW 51.12.102 should be considered inapplicable because the Supreme Court has already considered the issue presented here of a claimant seeking benefits under the IIA under *Fankhauser*.

Accordingly, the Department's reference to *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) is inaccurate and ignores the thrust of Mrs. Olsen's argument. In its Brief, the Department incorrectly states *Gore* "held" the Supreme Court's interpretation of a statute is binding on all lower courts until the Supreme Court overturns its own decision. Brief of Respondent 20. However, *Gore* is distinguishable.

First, *Gore* was a criminal case with a holding on revocation of felony convictions. *Gore*, 101 Wn.2d at 482. The Supreme Court only discussed the binding nature of its decisions within the context of the Washington Court of Appeals' favoring the United State Supreme Court's interpretation of a similar federal criminal statute over the Washington Supreme Court's interpretation of a state criminal statute. *Gore* at 487.

Second, the Department's contentions regarding *Gore* are irrelevant because *Gore* is inapplicable to this case. The *Gore* Court stated that "once this court has decided an issue of law, that interpretation is binding on all lower courts until it is overruled by this court." *Gore* at 487. Here, Mrs. Olsen does not ignore binding interpretations of statute, but rather argues against the Department's interpretations of *dicta* from a case that did not involve a claim for workers' compensation.

C. The United States Department of Labor has Jurisdiction Over the Determination of Claims Under the Longshore Act.

The United States Department of Labor has original, federal jurisdiction to interpret and determine the coverage of the Longshore Act. U.S. Const. art. III, § 2; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*; 20 C.F.R. § 700 *et seq.* The Department agrees. Brief of Respondent 42.

At the same time, however, the Department attempts to avoid the fact the Department does *not* have original jurisdiction to decide entitlement under the LHWCA by arguing the determination made by the Department in such cases is somehow lesser in nature and effect than a determination made by the U.S. Department of Labor. Brief of Respondent 42-43. This is an empty argument, as the result of the Department's determination in these cases is exactly the same as though the U.S. Department of Labor itself had

actually made a determination of federal liability: the worker is precluded from receiving regular benefits under the IIA. *Id.*

It is incorrect that the Department must decide if a claimant has a right or obligation under the Longshore Act in order to determine whether a claimant suffering from asbestos-related disease is entitled to benefits under the IIA. *Id.* The Department need only determine whether the Claimant's last injurious exposure occurred while working for an employer covered by the IIA.

Furthermore, the Department's reference to *Lindquist v. Dep't of Labor & Indus.*, 36 Wn.App. 646, 677 P.2d 1134 (1984); is inapposite. Not only was *Lindquist* decided before RCW 51.12.102 was enacted, but it also involved an injury at a marine terminal, not an occupational disease like asbestosis. *Lindquist*, 36 Wn.App. at 647. The distinction between occupational disease claims and injury claims is long established in workers' compensation law. RCW 51.08.100; RCW 51.08.140; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 577, 141 P.3d 1 (2006); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987).

Lindquist discusses injuries as distinct events that occur "at the time of injury" and are covered by one compensation act or another. *Lindquist*, 36 Wn.App. at 655. Occupational diseases like asbestosis, on the other hand, can occur as the result of multiple exposures under multiple

compensation acts, as in this case. It is undisputed maritime claims for injuries, like the injury in *Lindquist*, are excluded from state coverage under RCW 51.12.100, but claims for occupational exposure to hazardous substances, as in this case, are allowed as provided by the later enacted RCW 51.12.102, and by the fact there is distinct injurious exposure at an IIA-covered employer.

In addition, in *Lindquist* the only employer paid both IIA and Longshore premiums, effectively employing workers covered by both state and federal law, depending on the nature and location of the work performed. *Lindquist* at 656; therefore, the employer had the ability to introduce facts about which Act covered this worker. In this case, the Department is making a coverage determination without the Longshore Employer.

If the responsibility of an IIA-covered insurer is in doubt, the WAC implementing RCW 51.12.102, WAC 296-14-350, makes it clear the only time a Title 51 insurer is not responsible is when a “worker has a claim . . . that is *allowed* for benefits under the maritime laws” WAC 296-14-350(1) (emphasis added). Simply, this gives the injured worker an election of remedies. No claim for maritime or longshore benefits has been allowed in this case.

This interpretation of WAC 296-14-350 saves the Department both from having to make a technical determination under the LHWCA not within its jurisdiction and from a possible error in interpretation of federal law harmful to workers. It also allows the U.S. Department of Labor's Office of Workers' Compensation Programs to properly address claims before the Department takes action.

RCW 51.12.102 can and should be interpreted in light of the WAC; the Department fails to recognize WAC 296-14-350(1) was enacted to implement the proper interpretation of RCW 51.12.102 as it was understood when enacted by the legislature, not the artificially imposed interpretation of the statute currently advanced by the Department. Brief of Respondent 47.

Furthermore, the Mrs. Olsen has not attacked the "constitutionality of a duly-enacted statute," as alleged by the Department. Brief of Respondent 49. Mrs. Olsen's arguments have thus far focused on the merits of the Department's various interpretations of RCW 51.12.102, not on its constitutionality.

In the alternative, if the Department can determine the liable insurer, regardless of federal jurisdiction, it must do so under the last injurious exposure rule. As discussed above, the last injurious exposure rule applies to all exposure regardless of other coverage, so long as the Department uses the

rule to aid the claimant. *See Fankhauser*, 121 Wn.2d at 316–317 (holding WAC 296-14-350 may not be used to deny IIA benefits).

D. The Legislative History of RCW 51.12.102 Shows the Legislature Did Not Contemplate Temporary Benefits.

The Department is not authorized to add extra words to a statute. Contrary to *Fankhauser*, the Department starts from the incorrect supposition workers who have ever been exposed to asbestos by a maritime employer are never entitled to benefits under the IIA, even if later exposed by an IIA-covered employer, and then adds the idea of “temporary benefits” to the statute to fit that presupposition. There is no statutory language to support this, and in fact, the Department’s addition is contrary to clear legislative history.

Nowhere did the legislature, in drafting RCW 51.12.102, include the term “temporary.” In fact, the Floor Synopsis quoted by the Department in its Brief supports the Claimant’s position benefits should be awarded before a determination of liability, since the Floor Synopsis first states benefits should be paid when liability is disputed, and second states “the Department is *then* required to determine whether the state fund, a self insurer or a federal maritime insurer is responsible for the claim...” Floor Synopsis, Substitute House Bill 1592, p. 1 (1988)(emphasis added); Brief of Department 21. Considered in context, these benefits would only be

“provisional” in the sense that liability had not yet been determined; in actual content the benefits would be regular benefits. Contrary to the Department’s contention the Floor Synopsis shows the House understood RCW 51.12.102 to create only provisional benefits, this language demonstrates instead the understanding benefits would be ordered and paid before liability was determined.

Furthermore, the Department’s own reports to the legislature show the Department properly applying *Fankhauser*’s last injurious exposure rule to workers exposed in both IIA and LHWCA covered employment. The Department’s 1987 Report on Asbestos Related Disease to the House Commerce and Labor Committee states the last injurious exposure rule governs even if evidence exists of federal longshore exposure. This supports the contention the reference in the 1988 Floor Synopsis to disputes over liability is referring to a dispute over whether a worker’s last injurious exposure occurred in Longshore or IIA-covered employment. Asbestos Related Disease: Report to House Commerce and Labor Committee, Dep’t of Labor and Indus. at 2 (September 12, 1987).

In the Department’s 1993 Report to the legislature regarding RCW 51.12.102, the Department again reiterated claims where the last injurious exposure to asbestos occurred in employment covered by Title 51 RCW are to be accepted under the State Fund or by a Self-Insured Employer.

Asbestos-Related Disease: A Report to the Commerce and Labor Committee, Dep't of Labor and Indus. at 4 (1993). This same report states only workers last exposed in work covered by a federal program would be subject to "interim benefits." *Id.*

The Department's only defense to its use of *Fankhauser's* last injurious exposure rule in the 1987 and 1993 Reports to the legislature is to state they conflict with *Gorman*. A fact which, if true, is no doubt because neither the oral argument nor the briefing in that case addressed the last injurious exposure rule except in passing, or even demonstrate the *Gorman* Court was aware of the Department's policy. Brief of Appellant 19; Brief of Respondent 40. *Gorman* was not even a workers' compensation case. The Department does not even bother to deny its previous understanding of RCW 51.12.102 is completely contrary to the conclusion reached in *Gorman*. *Id.*

Courts may not insert extra words into statutes, despite good cause to do so. *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981); *State v. Taylor*, 97 Wn.2d 724, 730, 649 P.2d 633 (1982). The legislative history demonstrates neither the legislature nor the Department understood RCW 51.12.102 to involve so-called "temporary" benefits for workers last exposed to asbestos in employment covered by the IIA.

E. The Plain Language of RCW 51.12.102 Does Not Authorize the Department's Use of Temporary Benefits.

The Department's interpretation of RCW 51.12102 renders clear statutory language superfluous. By the plain language of RCW 51.12.102(1), as written by the Washington State Legislature, the Department must provide Title 51 benefits if a claimant's work history shows asbestos exposure while employed by an employer covered by the Industrial Insurance Act (IIA), and *then* determine the liable insurer. RCW 51.12.102(1). After the Department has first initiated benefits, and *then* determined liability, the Department is to "continue" paying benefits until the liable insurer initiates payments or benefits are otherwise properly terminated. *Id.* This is the process set by statute.

The Department alleges the statute does not require it to proceed in the sequence outlined by the language of the statute, as written by the legislature, but when a statute's meaning is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Brief of Respondent 12; *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The legislature created an order in the plain meaning of its language. The Dep't must follow this sequence.

If the Department is free to determine liability before any benefits have been paid, the first part of the statute is rendered meaningless. The

Department can simply make a finding regarding liability and move on to the third part of the process outlined in RCW 51.12.102(1), as it did in Mrs. Olsen's case. CABR 34.

The Department's interpretation would also render superfluous RCW 51.12.102(3). RCW 51.12.102(3) begins with the statement, "If the department determines that the benefits paid under subsection (1) of this section are owed to the worker or beneficiary by a self-insurer or the state fund..." and continues on to direct the Department to take certain actions if an IIA-covered employer is found liable. If no benefits are paid under subsection (1) before a determination is made regarding liability, the entire first sentence of RCW 51.12.102(3) is meaningless.

The Department appears to argue it may or may not follow the first part of the statutory process outlined in RCW 51.12.102(1), at its discretion. Brief of Respondent 14. Statutes are not discretionary. All the language in a statute is to be given effect and no portion is to be rendered meaningless. *Judd v. American Tel. and Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). The Department is not authorized to pick and choose which parts of the law to enforce and which to ignore.

F. The Liberal Mandate of the Industrial Insurance Act Requires the Benefit of the Doubt Be Given to the Injured Worker.

Where statutory language is susceptible to more than one interpretation, it is considered ambiguous. *Harmon v. Dep't of Social Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998). “Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker...” *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009); RCW 51.12.010. This is the legislatively mandated and primary canon of interpretation for Title 51 RCW.

Both the Department and Mrs. Olsen have argued the plain language of the statute favors their position (despite the fact at one time the Department clearly held the opinion now advocated by the Mrs. Olsen). Brief of Respondent 10 and 24. It is precisely in this situation, “[w]here reasonable minds can differ over what Title 51 RCW provisions mean,” that the benefit of the doubt belongs to the injured worker. *Harry*, 166 Wn.2d at 8; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

Other canons of interpretation, like the canon against superfluity cited in *Gorman*,¹ are important, and they can be harmonized with the overarching mandate of liberal construction in a way that meets the *Gorman*

¹ *Gorman* did not specifically address RCW 51.12.010.

Court's concerns over double recovery. By allowing a worker to recover under RCW 51.12.102 until a claim is allowed under the LHWCA, double recovery is avoided. This way, if a worker last exposed to hazardous substances by an IIA-covered employer files for benefits and is awarded such benefits under the IIA, the worker would then be precluded from seeking benefits under the LHWCA by 33 U.S.C. §933's exclusivity provision. It follows logically that if an injured worker last exposed to hazardous substances by an LHWCA-covered employer files for benefits and is awarded such benefits under the LHWCA, the worker would then be precluded from seeking benefits under the IIA by the exclusivity prohibition of RCW 51.12.100, or would be required to credit the IIA-insured entity the amount of LHWCA benefits received per RCW 51.12.102(4). Thus, the sole purpose of RCW 51.12.100, preventing double recovery by workers, is served.

In addition to preventing double recovery, this would avoid superfluity by giving effect to both statutes, and resolve any conflict between the statutes by giving preference to RCW 51.12.102 over RCW 51.12.100 as the more specific and recently enacted statute. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000). More importantly, it would effectuate the IIA's purpose of reducing "to a minimum the suffering and economic

loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010.

Since Mrs. Olsen is claiming widow’s benefits under Washington’s workers’ compensation statute, the statutory presumption favoring the claimant still binds this Court. RCW 51.12.010; *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009). *Gorman* completely failed to address the mandate of RCW 51.12.010; as such, this Court should review the issues in this case to resolve all “doubts and ambiguities” in Mrs. Olsen’s favor.

CONCLUSION

Where reasonable minds may differ over the interpretation of Title 51, in keeping with the Act’s fundamental purpose, the benefit of the doubt belongs to the injured worker. *Harry*, 166 Wn.2d at 8; *Cockle*, 142 Wn.2d at 811. Here, the benefit of any doubt or ambiguity regarding the interpretation of RCW 51.12.102 and *Fankhauser* belongs to Mrs. Olsen.

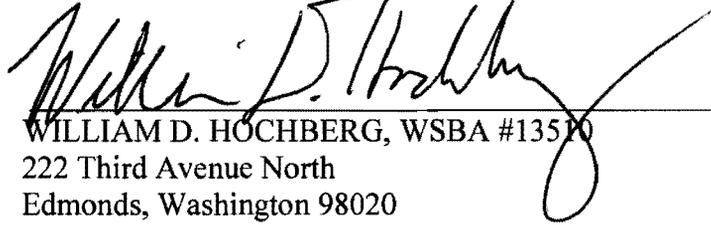
As such, *Fankhauser* and RCW 51.12.102 do not require workers exposed to asbestos under both state-covered and longshore-covered employment to file for benefits just under the Longshore & Harbor Workers’ Compensation Act. Nothing in RCW 51.12.102 or its legislative history permit the Department to limit benefits in occupational disease claims to temporary benefits. Furthermore, *Fankhauser* guarantees benefits to

claimants whose work history shows both IIA-covered and non-covered employment, as long as some exposure occurred in IIA-covered employment. *Fankhauser*, 121 Wn.2d at 315. Therefore, the Department impermissibly found a federal insurer liable and improperly limited Mrs. Olsen's benefits. In the alternative, if the Department can determine the liable insurer is a federal insurer, before the federal Office of Workers' Compensation Programs allows a claim, the Department should abide by *Fankhauser* and the last injurious exposure rule and grant Mrs. Olsen's claim for Title 51 benefits.

Accordingly, this Court should reverse the Superior Court's decision, award Mrs. Olsen costs and attorney's fees which have not been challenged by the Department if Mrs. Olsen prevails, and remand the case with instructions to grant her full benefits under the Washington Industrial Insurance Act.

RESPECTFULLY SUBMITTED this 15th day of December, 2010.

THE LAW OFFICE OF WILLIAM D. HOCHBERG

A handwritten signature in black ink, appearing to read "William D. Hochberg", written over a horizontal line.

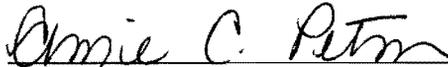
WILLIAM D. HOCHBERG, WSBA #13510

222 Third Avenue North

Edmonds, Washington 98020

(425) 744-1220

Attorney for Appellant

A handwritten signature in black ink, appearing to read "Amie C. Peters", written over a horizontal line.

AMIE C. PETERS, WSBA #37393

222 Third Avenue North

Edmonds, Washington 98020

(425) 744-1220

Attorney for Appellant

CERTIFICATE OF MAILING

Elizabeth A. Olsen v. Dep't of Labor & Indus.

Cause No. 09-2-04095-7

DLI Claim No. AD-66348

BIIA Docket No. 08-20855

Court of Appeals No. 291251

ORIGINAL PETITIONER'S REPLY BRIEF AND COPY TO:

Renee S. Townsley
Clerk of the Court
Washington State Court of Appeals, Division III
500 N Cedar St.
Spokane, WA 99201-1905

COPY OF PETITIONER'S REPLY BRIEF TO:

Steve Vinyard, AAG
Office of the Attorney General
PO BOX 40121
Olympia, WA 98504-0121

Elizabeth "Betty" Olsen
PO Box 1135
Naches, WA 98937

I certify that a copy of the document(s) attached hereto was mailed,
to the parties referenced above this 15th day of December, 2010.

BY: Annie C. Peters