NO. 92122-9

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN D. KOVACS,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

LYNN M. MOUNSEY
Assistant Attorney General
WSBA No. 17702
Office Id. No. 91106
1116 W. Riverside Avenue
Spokane, WA 99201
(509) 456-3123

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

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. When the Department of Labor and Industries (L&I) receives an application for benefits on the three hundred and sixty-sixth day following the occurrence of an alleged industrial injury, it must reject the application as untimely under the statute and under this Court's decision in *Nelson v. Dep't of Labor & Industries*, 9 Wn.2d 621, 632, 115 P. 2d 1014 (1941) which holds that counting commences on the day of the injury.

Applying this long-standing principle to the facts of this case, the Court of Appeals reversed the superior court decision finding that Kovacs' application for benefits was timely. No issue of substantial public interest is raised by construing the plain language of the statute to mean what it says, namely that an application must be filed "within one year" of the injury as confirmed by this Court's decisions. This Court's decisions control over any Court of Appeals decision, and contrary to Kovacs's assertion, no Court of Appeals case has held that a worker may file an application for benefits on the 366th day. This Court should deny review.

II. ISSUE

The Supreme Court decided more than seventy years ago that the statute of limitations in RCW 51.28.050 commences on the day of the industrial injury. 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." Does the one-year statute of limitations under RCW 51.28.050 bar Kovacs' claim for benefits when it is undisputed that he filed his claim one day after the year expired?

III. STATEMENT OF THE CASE

A. Kovacs Filed His Claim for Benefits One Year and One Day after He Alleges He Was Injured at Work

Kovacs alleged he was injured while working for his employer on September 29, 2010. Certified Appeal Board Record (BR) 12, 33, 38, 42, 48. He filed an application for workers' compensation benefits with L&I on September 29, 2011. BR 12, 33, 38, 42, 48. L&I rejected it as untimely under RCW 51.28.050's statute of limitations. BR 21. The Board of Industrial Insurance Appeals affirmed L&I's order. BR 1. It relied upon *In re Gwen Carey*, Nos. 03 13790 and 03 21396, 2005 WL 1658424 (Bd. Ind. Ins. Appeals Mar. 30, 2005); BR 11-13. *Carey* followed the Supreme Court's *Nelson* decision that the statute of limitation commences on the day of the injury. BR 11-12. Applying *Nelson*, the Board decided,

Kovacs's application should have been filed on September 28, 2011, not September 29, 2011. BR 12.

B. The Court of Appeals Agreed the Appeal Was Untimely

Kovacs appealed to the superior court, which reversed the Board. CP 1, 20-23. The Court of Appeals reversed the superior court. *Kovacs v. Dep't of Labor & Indus.*, __ Wn. App. __, __P.3d ___, 2015 WL 4457461 (July 21, 2015) (hereinafter "slip op."). Following *Nelson*, the Court of Appeals held that the plain language of RCW 51.28.050 requires an application be filed "within one year," with counting commencing on the day of injury. Slip op. at 3-5, 8. Thus, the general counting statute in RCW 1.12.040 does not apply because it conflicts with the specific requirements of RCW 51.28.050. Slip op. at 7.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Kovacs presents no valid reason warranting Supreme Court review of the decision that Kovacs did not comply with RCW 51.28.050. This statute requires a worker to file an industrial insurance application "within one year" after the injury:

> No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055 and 51.28.025(5).

As this Court explained in *Nelson*, the Legislature decided that if a worker fails to file his or her initial application for benefits for an industrial injury within one year commencing from the date of the injury, he or she may not receive workers' compensation benefits. RCW 51.28.050; *Nelson*, 9 Wn.2d at 632. The Legislature has not disturbed that interpretation in the 74 years since *Nelson*. Kovacs effectively seeks to overturn *Nelson*, asking for a ruling that commencement does not begin on the date of the injury, but rather the day after the injury's occurrence such as the counting method used under the default civil counting statute, RCW 1.12.040. Pet. 10.

The Court of Appeals adhered to *Nelson* and held that under RCW 51.28.050 counting begins on the day of the injury, and the general civil counting statute does not supersede the specific provision in RCW 51.28.050. Slip op. at 7. Kovacs shows no conflict or issue of substantial public interest supporting a rejection of the long-applied holding in the *Nelson* decision. RAP 13.4(b). Nor does he demonstrate that the *Nelson* decision is incorrect and harmful. *See Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011) ("We will not overrule a precedent unless there is a clear showing that an established rule is incorrect and harmful.") (Internal quotations and citation omitted).

A. No Review Is Necessary of a Court of Appeals Decision That Follows Supreme Court Precedent

The Court of Appeals properly followed this Court's decision requiring commencement of the statute of limitations period on the day of the injury. Kovacs is incorrect when he argues that none of the cases cited by the Court of Appeals discussed the commencement date for RCW 51.28.050's statute of limitations. Pet. 8-9. In *Nelson*, this Court specifically directed that "This 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." *See Nelson*, 9 Wn.2d at 632; BR 11.

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. Kovacs asks this Court to "accept review to resolve conflicting dicta" regarding RCW 51.28.050, meaning he claims that the Supreme Court precedent conflicts with Court of Appeals decision in *Wilbur v. Dep't of Labor & Industries*, 38 Wn. App. 553, 556, 686 P.2d 509 (1984). Pet. 8. There is no basis to review a petition on an asserted dicta conflict between a Supreme Court case and a Court of Appeals case. Instead, the Court of Appeals is required to follow the Supreme Court. In any event, *Wilbur* does not conflict with *Nelson* because it did not analyze RCW 51.28.050 to determine what the statute

means. *Wilbur* did not cite *Nelson* or distinguish it or disagree with it. But even if it had disagreed with *Nelson*, this Court's decision in *Nelson* unambiguously controls: "the one year period in which the claim must be filed commences to run on the day of the accident." *See Nelson*, 9 Wn.2d at 632; BR 11.

It is significant that the Legislature has not chosen to amend the statute to change its plain language meaning in the years since *Nelson*, thus showing that the Legislature has adopted 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) (Legislature's failure to amend a statute in the 17 years since the Court's decision interpreting that statute convinced Court that the Legislature concurred in that interpretation.). Review is not warranted to review the time-tested and Legislature-approved rule in *Nelson.*

B. No Issue of Substantial Public Interest Is Raised by the Court of Appeals Following the Plain Language of the Statute

Kovacs presents no issue of substantial public interest. Kovacs understands that the period is a "year" in RCW 51.28.050 and indeed says there is a public interest in recognizing that a year is a year. Pet. 10. But, contrary to Kovacs representation, "Each calendar year begins on January 1 and ends on December 31, not at the end of the succeeding January 1."

Slip op. at 7-8 n. 2 (citing *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 end of the year. Kovacs instead wishes the Court to follow an anniversary date approach (Pet. 7, 10-11), but the Legislature provided that counting should commence on the day of the injury and rejected this approach. By crafting the specific language of "within one year" in RCW 51.28.050, the Legislature also rejected use of the general counting provision in RCW 1.12.040. *See Kustura v. Dep't of Labor &Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010) (specific statute prevails over general one if consistent with legislative intent).

Kovacs misapprehended the plain language of the statute. His failure to follow it does not create an issue of substantial public interest meriting review. Rather, the interest in a consistent rule is served by leaving in place an interpretation of RCW 51.28.050 that has been in place for seven decades. Seventy-four years of consistent interpretation of this statute benefits workers precisely because of its long-time consistency. The fact that Kovacs missed the deadline does not demonstrate that the *Nelson* rule is antagonistic to workers; it indicates only that this worker missed the deadline. It would be no different if the statute of limitations had ended a day later; if Kovacs missed that deadline, it also would not demonstrate that the statute of limitations is counter to workers.

V. CONCLUSION

The Court of Appeals correctly applied the long-established rule that the statute of limitations commencement date for an injured worker's initial application for benefits is the day of his or her injury. No conflict or issue of substantial public interest merits review.

RESPECTFULLY SUBMITTED this 15th day of September, 2015.

ROBERT W. FERGUSON
Attorney General

LYNN M. MOUNSEY
Assistant Attorney General
WSBA No. 17702
Office Id. No. 91106
1116 W. Riverside Avenue
Spokane, WA 99201
(509) 456-3123

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

☒US Mail Postage Prepaid

THOMAS DORAN
LAW OFFICES OF THOMAS L DORAN
PO BOX 74
SPOKANE WA 99210

JULIE SUND NICHOLS
WHITEHOUSE & NICHOLS, LLP
PO BOX 1273
SHELTON WA 98584

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15 day of September, 2015, at Spokane, WA.

MARCIE W. BERGMAN

OFFICE RECEPTIONIST, CLERK

To: Bergman, Marcie (ATG)
Cc: Mounsey, Lynn (ATG); Sandstrom, Anastasia (ATG); Scharber, Wendy R. (ATG); Tod Doran; juliesund@comcast.net
Subject: RE: John Kovacs v. Dept. of Labor & Industries 92122-9

Received on 09-15-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Bergman, Marcie (ATG) [mailto:MarcieT@ATG.WA.GOV]
Sent: Tuesday, September 15, 2015 2:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Mounsey, Lynn (ATG) <LynnM@ATG.WA.GOV>; Sandstrom, Anastasia (ATG) <AnaS@ATG.WA.GOV>; Scharber, Wendy R. (ATG) <WendyO@ATG.WA.GOV>; Tod Doran <Tod@tdoranlaw.com>; juliesund@comcast.net
Subject: John Kovacs v. Dept. of Labor & Industries 92122-9

Attached for filing is the Department of Labor and Industries Answer re: John Kovacs v. Dept. of Labor & Industries, Supreme Court No. 92122-9, from Lynn M. Mounsey, AAG, Phone (509) 456-6390, WSBA 17702, LynnM@atg.wa.gov.

Marcie W. Bergman
Legal Assistant 4 Supervisor
Office of the Attorney General
Spokane Division - Labor & Industries
(509) 458-3547
Marcie.Bergman@atg.wa.gov