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NO. 32473-7--III

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

COURT REPORTERS
AND
TRANSCRIBERS
ASSOCIATION
OF WASHINGTON

John D. Kovacs,

Respondent,

v.

Department of Labor & Industries,

Appellant.

BRIEF OF RESPONDENT

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I. Introduction

John Kovacs timely filed an application for benefits under the Industrial Insurance Act. The Department of Labor & Industries allowed his claim. His employer protested the allowance, and the Department affirmed the allowance. His employer protested yet again, and the Department rejected his claim on the basis that it was not timely filed. The Board of Industrial Insurance Appeals affirmed the Department. The Superior Court for the County of Spokane reversed, finding Mr. Kovacs claim filing to have been timely. The Department of Labor & Industries appealed to this Court.

II. Issue

Is September 29, 2011 within one year **after** September 29, 2010?

III. Statement of the Case

Mr. Kovacs sustained an industrial injury on September 29, 2010. He filed an application for benefits on September 29, 2011. (BR 10) The claim was allowed by Order of the Department dated

March 2, 2012. The employer timely protested that Order, alleging that the application for benefits was not timely filed pursuant to RCW 51.28.050. (BR 10) The Department affirmed the Order. The employer protested an "appealable only" Order, and the Department, on June 28, 2012, reversed its decision, rejecting the claim. Plaintiff timely appealed this Order to the Board of Industrial Insurance Appeals. (BR 10) No testimony was adduced at the Board, given that this is an issue of law, not of fact. The Board, relying on its significant decision, *In Re Gwen Carey*, No. 03 13790, 2005 WL 1658424 (Board of Industrial Insurance Appeals, 2005), affirmed the Department's decision rejecting the claim.

The Superior Court reversed, having reviewed all of the pleadings, the oral argument both at the Board and the Court, and having reviewed all relevant case law including *In Re Gwen Carey*. The Court also reviewed the relevant statutes, RCW 51.28.050 and RCW 1.12.040.

The two relevant statutes are consistent with one another,

and support Mr. Kovacs' claim. The Department of Labor & Industries erroneously and repeatedly states that Mr. Kovacs' application must be filed "within one year of the injury." That is not the case. His claim, to be timely, must be filed "within one year **after** the injury." He complied, and his claim was timely.

IV. Argument

The biggest flaw in the Department's argument is reflected in the introduction to its brief:

The specific language of RCW 51.28.050 that starts counting the day of the injury trumps RCW 1.12.040's provision that starts counting the day after the event.

There are two very glaring errors in this statement. First, the specific language of RCW 51.28.050 states that the one year begins **AFTER** the injury.

RCW 51.28.050 states, in relevant part:

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. (Emphasis supplied.)

RCW 1.12.040 states:

The time within which an act is to be done, as herein provided, 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. (Emphasis supplied.)

The second problem with the Department's argument is that RCW 51.28.050 does not *trump* RCW 1.12.040. They are consistent with one another. Both clearly state that counting begins **after** the event.

The undersigned is cognizant of the fact that it is the Superior Court's decision which is under review. However, in order to understand (and discern the error) in the Department's argument, the decision of the Board of Industrial Insurance Appeals must be dissected.

The only reason the Board of Insurance Appeals found against Mr. Kovacs is because of its significant decision *In Re Gwen Carey*.

Even the Industrial Appeals Judge questioned whether that was a proper decision. However, she was constrained to follow it. The Industrial Appeals Judge who heard the oral argument of the parties and who issued the Decision which became the final decision of the Board, stated:

While I am concerned about the "after" language in RCW 51.28.050 and the fact that the Board's interpretation of the statute does not resolve ambiguities in favor of the injured worker as required by RCW 51.12.010, I am bound by the Board's previous significant decision in *In Re Gwen Carey*. (BR 11-12)

The *Carey* decision is wrong. Had the Board of Industrial Insurance Appeals in *Carey* read these statutes together, this matter would have been resolved in favor of Mr. Kovacs. What the Board *has* done is to ignore the latter statute and misinterpret the former statute. An analysis of the faults in *Carey* also resolves the conflicting dicta in the Courts.

The Board, in its decision in *Carey*, apparently ignores the word "after" in RCW 51.28.050. It also dances around RCW

1.12.040, which states:

The time within which an act is to be done, as herein provided, 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.

The Board discounts this statutory provision, stating it is a statute of general application. It then stretches the meaning of RCW 51.28.050 to be in conflict with that statute, concluding that the provision of the Industrial Insurance Act is "specific" and thus trumps the "general" statute. That analysis would be relevant if there were a conflict between the statutes. However, the statutes are NOT in conflict. Each clearly states that the one year limitation period begins **after** the date of the injury.

The Board, in *Carey*, admits that

Neither we nor the courts have ever mentioned RCW 1.12.040, or its predecessor statute, Rem. Rev. Stat #150, in any decision regarding when the one-year limitation period of RCW 51.28.050 begins to run. (Emphasis supplied.)

In *Carey*, the Board effectively ignores the case of *Wilbur v. Department of Labor & Industries*, 38 Wn.App 553, (1984), dismissing its opinion on this subject as mere dictum. However, a close reading of the opinion clearly reveals that the instant case would be deemed timely if that opinion is applied herein. *Wilbur*, p. 556. In *Wilbur*, the claimant sustained an industrial injury on August 5, 1977. The Court held that

Wilbur's claim had to be filed on or before Monday, August 7, 1978 (**August 5, 1978, 1 year after the injury**, fell on a Saturday). (Emphasis supplied.)

Clearly, the Court states that August 5, 1978 is one year after August 5, 1977, and that a filing on August 5, 1978 for an injury occurring on August 5, 1977 would be timely. That is exactly the scenario in the case at bench. Kovacs filed his claim for injury on September 29, 2011. His injury was September 29, 2010. Thus, using *Wilbur* as precedent, Kovacs' claim was timely filed!

The Board's decision in *Carey*, which gave *Wilbur* short shrift,

contains a flawed analysis. The Board, in Carey, finds the analysis in Wilbur to be dictum. In fact, the Wilbur case is directly on point with the matter herein, and the court's finding that the one year statute begins to run the day after the injury is the basis for its ruling. How that can be construed as dictum, by any stretch of the imagination, is beyond reason.

After dismissing the analysis of Wilbur as mere dictum, the Board focuses its attention on Nelson v. Department of Labor & Industries, 9 Wn.2d 621, 115 P.2d 1014 (1941). The Board relies on pure dictum in Nelson. The facts of the Nelson case are nowhere near the facts of the case at bench. In Nelson, the claimant was injured on May 1, 1933. He filed his claim on May 12, 1933. The primary issue in Nelson was a medical condition which was discovered after one year from the date of the injury. There was **no issue** regarding the commencement of the one year statute of limitations for claim filing. The dictum in Nelson was apparently based on several previous cases, all cited in the Department's brief.

None of these cases are on point, and **none** state what they are purported to state by the Department or the *Nelson* court. These cases will be discussed separately.

In *Read v. Department of Labor & Industries*, 163 Wash. 251, 1 P.2D 234 (1931), the claimant was injured on September 17, 1924. He filed his claim on January 19, 1929. There is **NO** discussion of when the statute begins to run!

In *Ferguson v. Department of Labor & Industries*, 168 Wash. 677, 13 P.2d 39 (1932), the issue was aggravation of an injury. The case hinged on whether an application to reopen a claim was filed within three years of the original injury. Again, there is **NO** discussion of when the statute begins to run!

In *Sandahl v. Department of Labor & Industries*, 170 Wash. 380, 16 P.2d 623 (1932), the claimant was injured on July 3, 1929. His claim for injury was filed January 30, 1931. The claim was rejected because it was not timely filed.

It is interesting that each of these cases are cited by the

Nelson court as a basis for concluding that the one year statute commences on the day of the accident. However, these cases do NOT state that. Thus, not only is the Nelson dictum on shaky ground, it is also inapposite herein.

The Department argues that great weight and deference should be given to the Department's interpretation of the Industrial Insurance Act. (Appellant's brief, page 6.) This is interesting. On **two** occasions *in this case* the Department found Mr. Kovac's claim to be timely. So do we defer to the *two* decisions in Mr. Kovac's favor, or to the *one* decision which denied his claim? If we follow the Department's argument to its logical conclusion, we should eliminate the Board and the Courts because the Department is always right. In this case, the majority of the Department's decisions favor Mr. Kovacs.

This Court is obviously cognizant of the beneficial purpose of the Industrial Insurance Act. It was designed to provide "sure and certain relief" to injured workers while limiting employer liability for

industrial injuries. RCW 51.04.010; Dennis v. Dep't of Labor & Indus., 109 Wash.2d 467, 470, 745 P.2d 1295 (1987). Any doubts and ambiguities in the language of the IIA **must be resolved in favor of the injured worker** in order to minimize "the suffering and economic loss" that may result from work-related injuries. RCW 51.12.010; McIndoe v. Dep't of Labor & Indus., 144 Wash.2d 252, 256, 26 P.3d 903 (2001); Cockle v. Dep't of Labor & Indus., 142 Wash.2d 801, 811, 16 P.3d 583 (2001) ("[W]here reasonable minds can differ over what Title 51 RCW provisions mean..., the benefit of the doubt belongs to the injured worker.") Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1; 201 P.3d 1011 (2009). Even the Industrial Appeals Judge who wrote the Board's decision herein questioned the whether the Board in Carey truly resolved doubt in favor of the injured worker. She thus questioned the Board's reasoning in Carey, and thus her constrained decision in Kovacs.

The Department would have us focus on the word "within" in

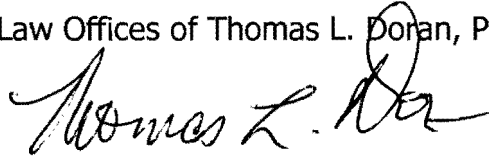
the statute (Appellant's brief, page 10.) It also would have us ignore the word "after" in that same statute. (Appellant's brief, pages "i" and 1.) The word "after" is an important word in the statute: just as important as "within." "After" is defined as "following in time or place" and "subsequent to in time or order." *Webster's Collegiate Dictionary*, page 21 (1994). Thus, if one reads the WHOLE statute, and not just part, the Superior Court was correct.

Conclusion

The Superior Court got it right. Kovacs complied with the statute. He filed his claim within one year after his industrial injury. The Board's decision in Carey was binding on the Industrial Appeals Judge who wrote the decision in this matter. It was obviously not binding on the Superior Court, nor is it binding on this Court. In fact, it is high time that decision is forever rendered incorrect. The Courts who have dealt with the issue head on have found it to be wrong. The Superior Court found it to be wrong. This Court should also do so, and affirm the Superior Court's proper analysis.

RESPECTFULLY SUBMITTED THIS 7th day of November, 2014.

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A handwritten signature in black ink, appearing to read "Thomas L. Doran". The signature is written in a cursive style with a large, stylized initial 'D'.

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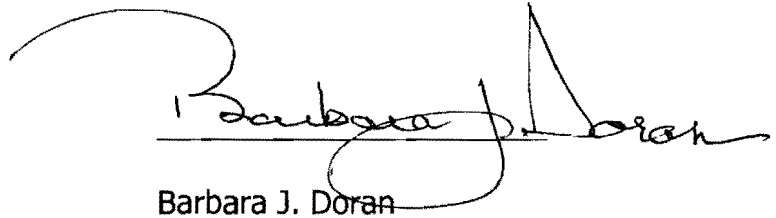
I certify that I served a copy of this document on all parties or their counsel of record via US Mail, postage prepaid on the date below as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is correct.

Dated this 7th day of November, 2014, at Spokane, WA.



Barbara J. Doran