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NO. 32473-7-III

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

JOHN D. KOVACS,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

John Kovacs filed a claim for benefits for industrial insurance benefits late. RCW 51.28.050 bars a claim for benefits unless the worker files an application “within” one year after the day upon which the injury occurred. Because a worker must apply “within” one year of the injury, the statute of limitations in RCW 51.28.050 for an injured worker’s filing of the claim commences on the day of the industrial injury. The Washington Supreme Court recognizes this rule in several cases.

John Kovacs filed one year and one day after he alleges that he was injured on the job, which was one day late. To allow his late claim would contravene the Legislature’s intent in RCW 51.28.050 to provide certainty and predictability in administering the Industrial Insurance Act and to protect against stale claims.

RCW 51.28.050 controls over the counting provisions of RCW 1.12.040, contrary to Kovacs’ arguments. 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. The Board of Industrial Insurance Appeals and the Department of Labor and Industries (L&I) correctly decided that Kovacs filed his application late. The Department asks this Court to reverse the superior court’s decision to the contrary.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering its order dated April 11, 2014; specifically it erred in concluding that Kovacs' claim was timely filed, and that the decision of the Board should be reversed.

2. The trial court erred by entering judgment dated April 25, 2014; specifically it erred in concluding that Kovacs timely filed his claim and in determining the Board's July 15, 2013 order was incorrect.

III. ISSUE

The Supreme Court has decided that RCW 51.28.050 commences on the day of the 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?

IV. STATEMENT OF THE CASE

A. Kovacs filed his Claim for Benefits One Year and One Day after he Alleges he was Injured While Working for Pro Heating & Air Conditioning.

Kovacs was employed by Pro Heating & Air Conditioning in September 2010. Certified Appellate Board Record (BR) 46. Kovacs alleges he sustained an industrial injury on September 29, 2010. BR 10, 12, 42. He filed an application for workers' compensation benefits on

September 29, 2011—one year and a day after he asserts he was injured while working for Pro Heating. BR 33, 38.

L&I initially allowed the claim on March 2, 2012. BR 18-19. Pro Heating protested the allowance of Kovacs' claim as untimely under RCW 51.28.050. BR 33, 42-44. After reconsideration, L&I issued an order rejecting Kovacs' claim because his claim for benefits was not timely filed within one year after the date of his alleged injury. BR 22. Kovacs appealed to the Board. BR 14-17.

B. The Board Found Kovacs' Application Untimely

For the sole purpose of enabling the Board to determine the threshold issue of timeliness on appeal, Kovacs, L&I, and Pro Heating stipulated to the Board's Jurisdictional History.¹ BR 33-35, 42, 48. The matter was treated as a summary judgment motion based upon the following stipulated facts: 1) Kovacs' alleged industrial injury date was September 29, 2010; and 2) Kovacs filed his application for benefits with L&I on September 29, 2011. BR 33-35, 38, 42, 48.

The industrial appeals judge issued a proposed decision finding Kovacs' claim was untimely because his claim was filed one year and one day after the day of his claimed industrial injury. BR 7-13. The industrial

¹ Here, the only issue on appeal was timeliness of the filing the application for benefits. CP 3, 6, 9, 15, 17, 21, 23; VRP 6,10; BR 4, 10, 12, 21, 22, 35, 39, 42, 45, 48, 50.

appeals judge relied upon *In Re Gwen Carey*, No. 03 13790, 2005 WL 1658424 (Bd. Ind. Ins. Appeals March 30, 2005)); BR 7-13. *Carey* followed the Supreme Court's decision that the statute of limitation commenced the day of the injury in *Nelson v. Department of Labor & Industries*, 9 Wn.2d 621, 632, 115 P.2d 1014 (1941).

Kovacs petitioned the Board for review of the proposed order. BR 3-6. The Board denied his petition for review, adopting the findings of the proposed decision. BR 1.

C. The Superior Court did not follow the Supreme Court's Decisions and Ruled that Kovacs' Application was Timely

Kovacs appealed to the superior court. CP 1. Kovacs argued that determination of the commencement date question under RCW 51.28.050 is determined by RCW 1.12.040 which excludes the day of an event from being counted, and would thus have made his application for benefits timely. CP 3-5.

L&I argued that the commencement of the statute of limitations for worker's compensation injuries is the day of the injury itself; it is not the day after the injury. CP 10-14. In support of this, L&I argued that the specific statute RCW 51.28.050 prevails over RCW 1.12.040 because the two conflict on the timing of the commencement and RCW 51.28.050 is more specific and therefore controls. CP 12, 14.

The superior court concluded Kovacs' claim "was and is timely within the meaning of RCW 51.28.050" and that his "claim for application of benefits was timely filed." CP 20-23. The superior court reversed the Board's decision denying Kovacs' claim as untimely. CP 21, 23.² This appeal follows.

V. STANDARD OF REVIEW

This matter was tried on stipulated facts. In an industrial insurance case, it is the decision of the superior court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). The court reviews the superior court's decision under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers*, 151 Wn. App. at 179-81. Statutory construction is an issue of law reviewed de novo. *Anderson v. Dussault*, ___ Wn.2d ___, 333 P.3d 395, 399 (2014). Here, because the parties tried this matter on stipulated facts, and the question of whether Kovacs timely filed his claim hinges upon statutory interpretation of RCW 51.28.050, the appellate court's inquiry is the same as the superior court's. *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445, 213 P.3d 44 (2009).

² Under the superior court's decision, Kovacs would then have to show that he is entitled to benefits, as L&I did not adjudicate that issue. For example, he would have to show he was injured in the course of employment. RCW 51.32.010.

Courts give great weight and deference to the Department's interpretation of the Industrial Insurance Act. *See Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

VI. ARGUMENT

A. **Kovacs' Claim was not Timely Filed 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 His Claim be filed within the Year**

Kovacs failed to file his claim *within* the one year time period allowed under Title 51 and therefore his claim is barred as a matter of law. Workers' compensation claims are "governed by explicit statutory directives and not the common law." *Elliott*, 151 Wn. App. at 447 (citations omitted). A claimant's timely filing is a statutorily imposed requirement upon not only his or her right to receive compensation but also upon the Department authority to accept his or her claim. *Wheaton v. Dep't of Labor and Indus.*, 40 Wn.2d 56, 58, 240 P.2d 567 (1952).

The statute of limitations that govern timeliness of filing applications for benefits under the Industrial Insurance Act is set forth in RCW 51.28.050. The Washington State Supreme Court has characterized the filing language in RCW 51.28.050 as inflexible and "deliberately absolute." *See Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 923, 185 P.2d 113 (1947).

RCW 51.28.050 states in pertinent 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”³ The parties stipulated for the purposes of this appeal that the work injury occurred on September 29, 2010, but that he did not file his claim until September 29, 2011. Kovacs’ claim was filed one day too late and L&I was correct in its determination it was untimely.

1. Commencement of the Statute of Limitations under RCW 51.28.050 is the Day of the Industrial Injury and Therefore the Year for Kovacs to File a Claim Commenced on September 29, 2010

The year provided under RCW 51.28.050 began to run the time of Kovacs’ injury. “The department has no power to make exceptions to the rule that claims must be filed within one year from the date of the accident.” *Leschner*, 27 Wn.2d at 923. The Washington courts have “established the rule that the one year period in which the claim must be filed commences to run on the day of the accident.” *Nelson v. Dep’t of Labor & Indus.*, 9 Wn.2d 621, 632, 115 P.2d 1014 (1941) (citing *Read v. Dep’t of Labor & Indus.*, 163 Wash. 251, 1 P.2d 234 (1931); *Ferguson v. Dep’t of Labor & Indus.*, 168 Wash. 677, 13 P.2d 39 (1932); *Sandahl v.*

³ Exclusions are found in RCW 51.28.055 and RCW 51.28.025(5) addressing occupational diseases and circumstances of claim suppression. Neither is an issue here.

Dep't of Labor & Indus., 170 Wash. 380, 16 P.2d 623 (1932)). In *Sandahl*, the Court held that the claimant's injury occurred and 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.

Similarly in *Rector v. Department Labor & Industries*, 61 Wn. App. 385, 388, 390 810 P.2d 1363 (1991), the court held that the time limit begins to run the day of the accident. In *Elliott*, the Court of Appeals reiterated that the one year statute of limitations for filing a claim for benefits for an industrial injury commences on the date of the injury. *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 448, 213 P.3d 44 (2009).⁴

⁴ *But see Wilbur v. Dep't of Labor & Indus.*, 38 Wn. App. 553, 556, 686 P.2d 509; see discussion Part V.B *infra*.

The Board has addressed this question in a significant decision. *Carey*, 2005 WL 1658424.⁵ The Board's interpretation of the Industrial Insurance Act is entitled to "great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). The worker in *Carey* also filed her application for benefits one year and one day after her injury. *Carey*, 2005 WL 1658424, *8. She claimed to have sustained an industrial injury on November 20, 2001 and filed her application for benefits on November 20, 2002. *Id.* at *8. Thus, the question addressed by the Board in *Carey* was whether that application was filed "within the one-year limitation period." *Id.* at *3. The Board in *Carey* relied upon *Nelson* in determining that Carey's application was untimely. *Id.* at *3-5. *Carey* held that based on the longstanding understanding that the one year statute of limitations commenced on the day of the accident, her claim for benefits was untimely. *Id.* at *5.⁶ Under 70 years of precedent, Kovacs filed his claim late when he filed it a year and a day after the injury.

⁵ The Board designates a decision significant when it considers it to have "an analysis or decision of substantial importance to the board in carrying out its duties." WAC 263-12-195.

⁶The Board revisited its *Carey* analysis in an occupational disease claim. *In re James Scales*, No. 09 10566, 2009 WL 6268490 (Bd. Ind. Ins. Appeals Dec. 1, 2009). In this significant decision, the Board applied the same commencement day (day of industrial injury) for the statute of limitations for occupational diseases (day of last injurious exposure), RCW 51.28.025. *Id.* at *2.

2. Because the Plain Language of the Statute requires that His Claim be Filed *Within* the Year, Kovacs Failed to Timely File when He Submitted His Application on September 30, 2011

The plain language of RCW 51.28.050 required Kovacs to file the claim *within* one year after the injury occurred. Courts construe statutes to ascertain and carry out the Legislature’s intent. *In re Estate of Haviland*, 177 Wn.2d 68, 75-76, 301 P.3d 31 (2013). If the meaning of a statute is plain on its face, as here, courts give effect to that meaning as an expression of legislative intent. *Haviland*, 177 Wn.2d at 76.

The statute speaks in terms of a year. “Consider the following self-evident statement: 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.

Moreover, the statute specifies that the application needs to be filed “*within* one year.” Dictionaries may supply the plain and ordinary meaning of a word. *See State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002). “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

including the day of the injury itself. RCW 51.28.050 provides that no claim exists “unless filed within one year after the day upon which the injury occurred.” Kovacs argued below that the word “after” in the “within a year after the day upon which the injury occurred” language meant that the year does not begin to run until the day “after” the injury. CP 2-6. But this interpretation would render entirely meaningless the Legislature’s inclusion of the word “within” in RCW 51.28.050. “The Legislature is presumed not to include unnecessary language when it enacts legislation.” *McGinnis v. State*, 152 Wn.2d 639, 645-46, 99 P.3d 1240 (2004). Giving “within” meaning dictates the conclusion that the plain language of the statute requires that the filing occur *inside* the year after the injury, including the day of the injury, rather than a year plus one day, as the trial court apparently concluded.

Contrary to Kovacs’ assertions, “after” must be read in conjunction with the rest of the phrase, “after the day upon which the injury occurred.” Before 1927, the courts had read the limitation statute to allow a discovery rule, but the Legislature acted to change that in 1927. *See Sandahl*, 170 Wash. at 382-84; *Elliott*, 151 Wn. App. at 447; *Rector*, 61 Wn. App. at 388. Since 1927, the day of the injury controls to commence the statute. *Elliott*, 151 Wn. App. at 447. The “after the day upon which the injury occurred” language cannot be read independently of “within” without

changing the Legislature's intent for the injury itself to trigger the commencement of the statute of limitation. *See Sandahl*, 170 Wash. at 383-84.

For decades, the courts have interpreted RCW 51.28.050 as commencing the day of the injury: *Sandahl* (1932), *Nelson* (1941), *Leschner* (1947), *Rector* (1991), *Elliott* (2009). *Sandahl*, 170 Wash. at 383-54; *Nelson*, 9 Wn.2d at 632; *Leschner*, 27 Wn.2d at 923; *Rector*, 61 Wn. App. at 388, 390; *Elliott*, 151 Wn. App. at 449; *see also Carey*, 2005 WL 1658424. The Legislature has amended RCW 51.28.050 one time since *Sandahl* and has never changed the “within” a year requirement, nor has it acted to contradict *Nelson*'s reiteration of the “rule that the one year period in which the claim must be filed commences to run on the day of the accident.” Laws of 2007, ch. 77, § 7; *Nelson*, 9 Wn.2d at 632.⁷ 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). It is the Legislature's intent that the date of injury commences the time period for the statute of limitations.

⁷ The Legislature also recodified the statute in 1961, leaving it unchanged. Laws of 1961, ch. 23 § RCW 51.28.050;

B. RCW 1.12.040 does not Apply Because RCW 51.28.050 is a More Specific Statute that Supersedes the General Civil Counting Statute

RCW 51.28.050 applies to determine when the statute of limitation commences, and RCW 1.12.040 does not apply contrary to Kovacs' arguments below. The commencement date of the statute of limitations for filing an application for benefits for industrial injuries under the worker's compensation statute of limitations for filing a claim is inconsistent with the commencement date of the general counting statute. Because the worker's compensation statute is more specific, it controls.

RCW 1.12.040 provides: "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 day, unless the last day is a holiday, Saturday, or Sunday, and then it is also excluded." This default counting approach excluding the first day is inconsistent with the established interpretation of RCW 51.28.050 that "the one year period in which the claim must be filed commences to run on the day of the accident." *Nelson*, 9 Wn.2d at 632; *see also Sandahl*, 170 Wash. at 383-54; *Leschner*, 27 Wn.2d at 923; *Rector*, 61 Wn. App. at 388, 390; *Elliott*, 151 Wn. App. at 449; *Carey*, 2005 WL 1658424.

Moreover, when more than one statute may apply, the specific statute will apply over a more general one. *In re Estate of Black*, 153

Wn.2d 152, 164, 102 P.3d 796 (2004); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn. App. 398, 407, n.2, 259 P.3d 190 (2011). It is a well-established principle that 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); *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). The Supreme Court has refused to harmonize the differences between RCW 1.12.040 and another computation methodology provided by a court rule. *Stikes Woods Neighborhood Ass'n v. City of Lacey*, 124 Wn.2d 459, 466, 880 P.2d 25 (1994) (holding that that CR 6(a) supersedes RCW 1.12.040). When a statute fixes a specific date, such as RCW 51.28.050's "within one year" requirement, RCW 1.12.040 is not applicable. *See Donohoe v. Shearer*, 53 Wn.2d 27, 32, 330 P.2d 316 (1958).

Likewise, in *Carey* the Board explained that RCW 51.28.050 supersedes RCW 1.12.040 when determining the statute of limitations commencement date for filing an industrial injury application for benefits. *Carey*, 2005 WL 1658424, at *4. *Carey* reviewed both statutes and the Supreme Court cases that have interpreted RCW 51.28.050 to require that the day of injury commences the running of the one-year statute of limitations. *Id.* at *3-5. *Carey* concluded that RCW 51.28.050

irreconcilably conflicted with RCW 1.12.040. *Id.* at *4. Accordingly, *Carey* rejected claimant's argument that the general counting rule of RCW 1.12.040 should apply to worker's compensation claim filing because RCW 51.28.050 supersedes the general statute. *Id.* at *4.

Carey's analysis included a discussion of *Wilbur* in which the Court of Appeals appears to suggest that counting would be commenced starting on the day after the injury, and not within one year. *Wilbur*, 38 Wn. App. at 556. In *Wilbur*, the worker sustained an injury on August 5, 1977. *Id.* at 554. His application for benefits was due on August 4, 1978. August 5, 1978, fell on a Saturday. *Id.* at 556. L&I received his report of accident on Tuesday, August 8, 1978. *Id.* at 554-55. The *Wilbur* Court stated that the period was extended to Monday, August 7, because the last day of the one-year period fell on a Saturday, apparently believing that August 5 was the due date. *Id.* at 554.

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 erred at the outset of its analysis because 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. In *Carey*, the Board declined to follow *Wilbur* and followed Supreme Court precedent and the plain language of RCW 51.28.050. See *Carey*, 2005 WL 1658424 at *6; see also BR 11.⁸

Because *Wilbur* filed the application for benefits several days after the deadline, *Wilbur*'s application for benefits would have been untimely regardless of whether Saturdays were counted.

Notably *Wilbur* has not been followed subsequently and the Court of Appeals in *Elliott* and *Rector* applied the plain language of RCW 51.28.050 that the statute of limitation commences on the day of the injury. *Rector*, 61 Wn. App. at 388, 390; *Elliott*, 151 Wn. App. at 449.

The superior court provided no explanation for diverging from *Sandahl*, *Nelson*, *Leschner*, *Rector*, and *Elliott*. CP 20-21. Reliance upon the general civil counting statute, RCW 1.12.040, which begins "counting" the day after an event rather than upon the specific worker's compensation statute of limitations, RCW 51.28.050, which starts

⁸ It is unclear what authority *Wilbur* was relying upon because it does not cite RCW 1.12.040 and the court did not follow the plain language of the RCW 1.12.040 in place at the time it was actually decided. The *Wilbur* Court concluded that Saturdays are not to be counted in order to arrive at its conclusion that the worker's claim was untimely, but at the time RCW 1.12.040 did not include a provision requiring that the final Saturday should not be counted. See *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 184, 983 P.2d 1127 (1999) ("[T]he Legislature, in 1997, amended RCW 1.12.040 (computation of time) adding Saturdays to the already excluded Sundays and holidays for the computation of time when the last day of the period falls on such day."); see also *Dando v. West Wind Corp.*, 67 Wash.2d 104, 406 P.2d 927 (1965) (holding that absent legislative intent to the contrary, Saturdays were not holidays within the contemplation of RCW 1.12.040 for the purposes of computing the 10-day filing requirement of the chattel mortgage statute).

counting “within one year,” is contrary to both the plain language of the statute and well-established case law.

C. RCW 51.28.050 carries out the Legislature’s Intent to Protect against Stale Claims and to Establish Certainty in Claim Filing

The Legislature intended RCW 51.28.050 to provide a date certain to apply for workers’ compensation benefits, namely a claim “within one year” of the injury. This provides certainty as to when claims for benefits should be filed. The provision establishing a date certain for filing a claim is consistent with the spirit of the Industrial Insurance Act. The Act represents a compromise between business and labor. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Each forfeited certain rights in exchange for the “sure and certain relief” provided by the Act. RCW 51.04.010; *Minton*, 146 Wn.2d at 390 (citing *West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976)). Such sure and certain relief, however, can be obtained only if there is deadline to apply for benefits as contemplated by the plain language of the statute.

The Legislature enacts statutes of limitations such RCW 51.28.050 as a legislative policy to shield defendants and the judicial system from stale claims. *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997). Legislatures enact statutes of limitation as “a legislative declaration of public policy which the courts can do no less than respect.”

Cost Management Services, Inc. v. City of Lakewood, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) (citing *Thomas v. Price*, 33 Wash. 459, 74 P.2d 563 (1903)). Below Kovacs argued that ambiguities under the Industrial Insurance Act must be resolved in favor of the injured worker to provide for an extra day in which to file his application. See BR 40. But the liberal construction rule under RCW 51.12.010 does not apply to unambiguous terms in the Industrial Insurance Act. 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 51.28.050 is unambiguous that a claim must be filed “within one year” of the injury. “It is a well-settled rule that ‘so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.’” *Raum*, 171 Wn. App. at n.28 (quoting *DeLong v. Parmelee*, 157 Wn. App. 119, 146, 236 P.3d 936 (2010) (quoting *State v. Miller*, 72 Wash. 154, 158, 129 P. 1100 (1913))), review denied, 176 Wn.2d 1024 (2013). The rule of liberal construction does not extend to allow L&I to permit consideration of an untimely claim. *Leschner*, 27 Wn.2d at 926.

Here, the Department and the Board correctly applied the appellate case law and the Board’s analysis from *Carey* to uphold the Department’s

order that rejected Kovacs' claim for benefits because it was untimely filed one year and one day after his claimed industrial injury. BR 1-2, 4, 9-13. The Board decided that Kovacs filed his application for benefits one day too late based on RCW 51.28.050. The superior court incorrectly decided to the contrary. L&I believes that the superior court's statement that "[p]laintiff's, John Kovacs', claim was and is timely filed" is an erroneous conclusion of law. CP 21, 23. However, if it is viewed as a finding of fact, it is not supported by substantial evidence. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (court reviews record to see whether substantial evidence supports the findings made after the superior court's de novo review and whether the court's conclusions of law flow from the findings). Kovacs' claim was filed on September 29, 2011, instead of September 28, 2011, one day too late. Substantial evidence does not support that his claim was timely filed.

Kovacs had one year to file his claim after he asserts he was injured. Statutory deadlines in Title 51 provide certainty for workers, employees, and the Department alike.

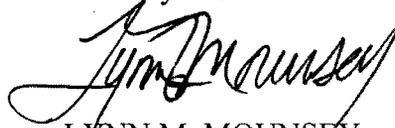
VII. CONCLUSION

Kovacs did not file his claim within one year of his injury. Under the plain language of the statute and the Supreme Court precedent interpreting it, he filed his claim too late. L&I asks this court reverse the

April 11 and April 25, 2014 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 9th day of October, 2014.

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

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


MARCIE W. BERGMAN