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SUPREME COURT OF THE STATE OF WASHINGTON

JOHN D. KOVACS,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**DEPARTMENT OF LABOR & INDUSTRIES'
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

The Legislature provided that a worker seeking workers' compensation benefits must file his or her claim "within one year after the day upon which the injury occurred." RCW 51.28.050 (emphasis added). Applying the plain language of the statute, this Court said that the clock starts running to file an application for benefits on the day the industrial injury occurs. *Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 632, 115 P.2d 1014 (1941).

John Kovacs filed one year and one day after his alleged workplace injury occurred—one day too late. To allow his late claim would contravene the plain language of the statute and seven decades of consistent application. Because RCW 51.28.050 starts counting on the "day upon which the injury occurred," this specific statutory directive is not overridden by the counting provisions of RCW 1.12.040—a statute of general application that starts counting the day after the event.

The Department, Board, and Court of Appeals all correctly decided that Kovacs filed his application late. This Court should confirm its longstanding reading of RCW 51.28.050 and deny Kovacs's untimely application for benefits.

II. ISSUES PRESENTED FOR REVIEW

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’s claim for benefits when 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 Claims He Was Injured at Work

Kovacs alleged he was injured while working for Pro Heating & Air Conditioning on September 29, 2010. Certified Appeal Board Record (BR) 12, 33, 38, 42, 46, 48. He filed an application for workers’ compensation benefits with the Department on September 29, 2011—one year and a day after his alleged injury. BR 12, 33, 38, 42, 48. The Department rejected his claim as untimely under RCW 51.28.050’s statute of limitations. BR 21.

B. Relying on *Nelson* and Its Own Significant Decisions, the Board Found Kovacs’s Application Untimely

The Board of Industrial Insurance Appeals affirmed the Department’s order. BR 1. It relied upon *In re Gwen Carey*, Nos. 03 13790 and 03 21396, 2005 WL 1658424 (Wash. Bd. of Indus. Ins. Appeals Mar. 30, 2005); BR 11-13. *Carey* followed this Court’s *Nelson* decision that the statute of limitations commences on the day of the injury.

BR 11-12. Applying *Nelson*, the Board concluded Kovacs's application should have been filed on September 28, 2011, not September 29, 2011.

BR 12.

C. The Court of Appeals Agreed the Application for Benefits Was Untimely

Kovacs appealed to the superior court, which reversed the Board. CP 1, 20-23.¹ The Court of Appeals reversed the superior court. *Kovacs v. Dep't of Labor & Indus.*, 188 Wn. App. 933, 355 P.3d 1192 (2015), review granted, ___ Wn.2d ___ (2016). 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. *Kovacs*, 188 Wn. App. at 934. The Court held the general counting statute in RCW 1.12.040 does not apply because it conflicts with the specific requirements of RCW 51.28.050. *Id.* at 938-39.

IV. ARGUMENT

This Court should not overrule *Nelson* and other longstanding precedent to create a new rule to extend the statute of limitations for filing workers' compensation claims by one day. *Nelson* is neither incorrect nor harmful. The plain language of RCW 51.28.050 requires that the

¹ Under the superior court's decision, Kovacs would then have to show that he is entitled to benefits, as the Department did not adjudicate that issue. For example, on remand to the Department he would have to show he was injured in the course of employment. RCW 51.32.010.

application for benefits be filed no later than the last day *within* the year of the injury. Commencement of the statute of limitations begins on the day of the injury itself. The period to file a workers' compensation claim then runs to the last day *within* that year. Unlike RCW 51.28.050, RCW 1.12.040 plainly provides that the time of commencement is the day following the event. Because the commencement date under RCW 51.28.050 and RCW 1.12.040 conflict, and RCW 51.28.050 is a statute that specifically provides that the day of commencement is the industrial injury, the rule of commencement from RCW 51.28.050 applies. Kovacs's failure to comply with that deadline does not demonstrate that this 70-year history of consistent interpretation is harmful.

A. Kovacs's Claim Was Untimely Because the Plain Language of the One-Year Statute of Limitations Provided in RCW 51.28.050 Requires Workers' Compensation Claims To Be Filed Within the Year Commencing Upon the Day of Injury

Kovacs failed to file his claim *within* the one year time period allowed under RCW Title 51 and therefore his claim is barred as a matter of law. 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's authority to accept his or her claim. *Wheaton v. Dep't of Labor & Indus.*, 40 Wn.2d 56, 58, 240 P.2d 567 (1952). Accordingly, "[t]he 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 v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 923, 185 P.2d 113 (1947). The statute of limitations that governs timeliness of filing applications for benefits under the Industrial Insurance Act is set forth in RCW 51.28.050.

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”² This Court described this filing language as inflexible and “deliberately absolute in terms.” *See Leschner*, 27 Wn.2d at 923. And in *Nelson*, this Court stated unequivocally that this one year period commences to run on the day of injury. *Nelson*, 9 Wn.2d at 632.

1. The Statute of Limitations Under RCW 51.28.050 Commenced on September 29, 2010—the Day of the Alleged Industrial Injury

The year provided under RCW 51.28.050 began the day Kovacs’s industrial injury allegedly occurred and ran until the year expired. 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.” *Nelson*, 9 Wn.2d at 632 (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

² RCW 51.28.055 and RCW 51.28.025(5) provide exclusions for occupational diseases and circumstances of claim suppression. Neither is an issue here.

P.2d 39 (1932); *Sandahl v. Dep't of Labor & Indus.*, 170 Wash. 380, 16 P.2d 623 (1932)).

Under the Act, “[i]njury’ means *a sudden tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.*”

RCW 51.08.100 (emphasis added). Relying on language nearly identical to RCW 51.08.100, this Court held that the claimant’s injury occurred, and the statute of limitations began to run when the claimant fell and injured his shin, the time of the accident. *See Sandahl*, 170 Wash. at 383-84. This Court emphasized that it was the Legislature’s intent that the statute of limitations begins to run when the injury occurs:

[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. The Courts of Appeals have followed this Court’s direction. *Rector v. Dep’t Labor & Indus.*, 61 Wn. App. 385, 388, 390 810 P.2d 1363 (1991) (the time limit begins to run “on the day of accident” rather than on the day the worker discovered the injury); *Elliott v. Dep’t of Labor & Indus.*, 151 Wn. App. 442, 448, 213 P.3d 44 (2009) (“when the physical effects of the injury become manifest, the injury

occurs and the one-year statute of limitations begins to run”) (citation omitted).³ As Kovacs alleges he was injured on September 29, 2010, under the plain language of RCW 51.28.050, the statute of limitations to file his claim began to run on that day, not on the day following the alleged injury.

2. Because the Plain Language of RCW 51.28.050 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) (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). 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. *Id.* at 76.

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).

Because RCW 51.28.050 provides that no claim exists “unless filed within one year after the day upon which the injury occurred[,]” the plain

³ *But see Wilbur v. Dep’t of Labor & Indus.*, 38 Wn. App. 553, 556, 686 P.2d 509; see discussion Part V.B *infra*.

language of the statute requires that Kovacs file his injury claim *inside* the year following the injury including “the day upon which the injury occurred.”

Kovacs is incorrect that the word “after” in the “within a year after the day upon which the injury occurred” language of the statute means that the year does not begin to run until the day “after” the injury. Pet. 6-7. This reading fails to follow the rules of plain reading because such a reading would render meaningless the Legislature’s inclusion of the word “within” in RCW 51.28.050. And “[t]he 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. The Court of Appeals correctly declined to read “within” out of the statute. *See Kovacs*, 188 Wn. App. at 939.

Kovacs’s reading also defies common sense. The phrase “after the day upon which the injury occurred” modifies “within a year”; it is not an independent clause that can be read without it. Kovacs inaccurately suggests that the preposition “after” begins the clause describing the time to file. Pet. at 6. In fact, the clause begins with the preposition “within”

because that is the preposition that directly follows the verb “filed.” That entire clause, beginning with “within,” describes when the action must be taken—“within one year after the day upon which the injury occurred.” Kovacs’s effort to parse the clause into pieces effectively reads out the preposition that starts the clause.

Here, the Court of Appeals correctly applied the same approach the Department, the Board, and other appellate courts have used for decades based on *Nelson. Kovacs*, 188 Wn. App. at 939 (“If we were to accept Mr. Kovacs’s argument, we would have to ignore the meaning of ‘within’ found in RCW 51.28.050 and accept a strained interpretation.”). Under 70 years of precedent, Kovacs filed his claim late when he filed it a year and a day after the injury.

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 solely determines when the statute of limitations commences for filing an industrial insurance claim. The commencement date of the statute of limitations for filing an application for benefits for industrial injuries is on the day of the injury rather than the day after the event. Contrary to Kovacs’s claims (Pet. at 10), RCW 1.12.040 and RCW 51.28.050 conflict; because the workers’ 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, 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 plain language 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.” *See also Nelson*, 9 Wn.2d at 632; *Sandahl*, 170 Wash. at 383-84; *Leschner*, 27 Wn.2d at 923-24; *Rector*, 61 Wn. App. at 388, 390; *Elliott*, 151 Wn. App. at 448; *Carey*, 2005 WL 1658424, at *5.

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); *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146-47, 18 P.3d 540 (2001). 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*, 143 Wn.2d at 146-47.

This Court has refused to harmonize RCW 1.12.040 with a conflicting 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 CR 6(a) supersedes RCW 1.12.040). The same logic should apply here: RCW 1.12.040 does not apply when a more specific statute fixes a specific period of time, such as RCW 51.28.050's "within one year" requirement. See *Donohoe v. Shearer*, 53 Wn.2d 27, 32, 330 P.2d 316 (1958); see also *State v. Wooten*, 178 Wn.2d 890, 906, 312 P.3d 41 (2013) ("If the legislature provides a specific definition in one statute and a general definition in another, we must assume that the legislature meant to apply the specific statute only.") (citation omitted).

Kovacs urges this Court to adopt the interpretation of *Wilbur*, despite the absence of any explanation or rationale in that decision. Pet. 9 (quoting *Wilbur*, 38 Wn. App. at 556). But *Wilbur*'s unexplained approach contradicts this Court's precedent and the plain language of RCW 51.28.050 by presuming the last day of the statute of limitations was August 7, 1978, while one year after the injury was actually August 4, 1978. *Wilbur*, 38 Wn. App. at 556. 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.

This Court should not rely on 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 counting on “the day upon which the injury occurred.” To do so is contrary to both the plain language of the statute and long-standing case law.

C. The Analysis and Application of RCW 51.28.050 in *Nelson* Is Not Dictum

Kovacs is simply incorrect that “there was no issue in *Nelson* regarding the statute of limitations for claim filing.” Pet. 8. Rather, the Department specifically raised the worker’s failure to file within one year. *Nelson*, 9 Wn.2d at 632. After applying the one-year statute of limitations to the circumstances of the worker there, the *Nelson* Court concluded that an exception applied to his circumstances. *Id.* at 632-33 (citing *Crabb v. Dep’t of Labor & Indus.*, 186 Wash. 505, 506-07, 58 P.2d 1025 (1936)). The Court concluded that because Nelson had already filed for an industrial injury and was unaware that the industrial injury in question also caused his low back condition, he was not barred from raising this new condition as part of his existing claim. *Id.* at 633-36. In other words, while the *Nelson* Court was not called on specifically to address whether the worker had filed *within* one year or *within* one year and one day as is the case with Kovacs, it did have to determine when the one-year time period started when it applied the established one-year rule for filing before

considering an exception to that rule. *Id.* at 632.⁴

Likewise, in *Sandahl*, the Court was asked to determine whether a claim was timely filed *within* the one-year statute of limitations. *Sandahl*, 170 Wash. at 382-83. The statutory language in question here is identical to the statute of limitations as it existed at the time of *Sandahl*. *Id.* at 382 (at the time of *Sandahl*, the statute read, “No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued.”). The *Sandahl* Court determined that the time for filing under the plain language of the statute began running as of the date of the injury, rather than when the injury became disabling, and therefore the worker was too late. *Id.* at 383-84. The Court specifically held that the trigger was the injury itself: the “time [of the limitation statute] 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.’” *Id.* To reach that question, the Court had to conclude that “it was necessary that the claim be filed *within* one year thereafter.” *Id.* at 384 (emphasis added).

⁴ Even if the examination of RCW 51.28.050 in *Nelson* could be considered dictum, this Court has stated that “‘a deliberate expression of the court upon the meaning of the statute’ should not be disregarded” even if dicta. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 53 n.7, 959 P.2d 1091 (1998) (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925)).

D. This Court Should Follow *Nelson*, Because *Nelson* Is Neither Incorrect Nor Harmful

This Court should follow *Nelson*, with its correct reliance on *Sandahl* and other authority. In interpreting RCW 51.28.050 in *Nelson*, this Court specifically explained that “[t]his 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 632.⁵ That precedent has remained unchanged from 1941 to the present, and this Court has heard no complaint about that precedent until now.

This Court does not overrule precedent lightly. It does not do so unless there is “a clear showing that an established rule is incorrect and harmful.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (quotation marks and citation omitted). Kovacs has failed to show that the *Nelson* decision is incorrect and harmful and should be overruled on that basis. As discussed above, *Nelson* is correct under the plain language of RCW 51.28.050. *See* Part IV.A *supra*. But there is also no harm to workers by maintaining a longstanding rule that they must file

⁵ *See also Leschner*, 27 Wn.2d at 923-24 (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.”); *Crabb*, 186 Wash. at 513 (stating the issue was whether reporting a fall that resulted in a sprained ankle complied with RCW 51.28.040 such that an additional application after the lapse of one year “from the date of injury” for other injuries from the same fall were permitted); *Sandahl*, 170 Wash. at 383-84 (in determining whether a claim was filed in time, the Legislature intended the claim be filed “within one year after the date of the injury”); *Read v. Dep’t of Labor & Indus.*, 163 Wash. at 252 (finding a claim untimely when not presented “within one year from the date of the accident”); *see also Elliott*, 151 Wn. App. at 448; *Rector*, 61 Wn. App. at 388; *Carey*, 2005 WL 1658424.

within a year. This period of time is sufficiently generous to ensure that an injured worker may file his or her claim after being injured. Because an industrial injury is “a sudden tangible happening . . . producing an immediate or prompt result,” a worker is immediately aware that an injury has occurred. RCW 51.08.100. The worker has an entire year from the time of the injury to file his or her claim.⁶ Kovacs has not demonstrated that the deadline, as interpreted by *Nelson*, is harmful to workers generally or that any such harm to workers would be removed by adding the day he requests. Nor has he demonstrated any “uncertainty for injured persons in this state regarding the method of calculating one year.” Pet. at 10. The methodology has been well-established by this Court’s decisions and Board significant decisions for decades. It is only Kovacs’s uncertainty that is before the Court.

Kovacs suggests that the principle of liberal construction should be applied to his case to provide him an extra day in which to file his application. Pet. 11; *see also* 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

⁶ The Legislature has provided a less stringent requirement for occupational diseases because the nature of an occupational disease does not provide a worker with such notice. *See* RCW 51.28.055. The Legislature has also allowed the Department the discretion to extend the deadline when an employer’s bad acts prevent a timely claim. *See* RCW 51.28.025(5).

Wn.2d 461, 474, 843 P.2d 1056 (1993); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). Neither *Nelson* nor *Sandahl* considered the statutory language to be ambiguous, and Kovacs does not contend that it is ambiguous.⁷ “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 155 n.28 (quoting *DeLong v. Parmelee*, 157 Wn. App. 119, 146, 236 P.3d 936 (2010)). And the rule of liberal construction does not allow the Department to expand a statutory time limit to permit consideration of an untimely claim. *Leschner*, 27 Wn.2d at 926.

The Legislature enacts statutes of limitations such as 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 limitations as “a legislative declaration of public policy which the courts can do no less than respect.” *Cost Mgmt. Serv., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) (quoting *J.M. Arthur & Co. v. Burke*, 83 Wn. 690, 693, 145 P. 974 (1915)).

⁷ Kovacs agrees the meaning is clear. Pet. at 6. But he ascribes a different “clear meaning” by leaving out words, as explained in Section IV.A, above.

RCW 51.28.050 provides certainty as to when claims for benefits should be filed for both employers and workers. The provision establishing a date certain for filing a claim is consistent with the spirit of the Industrial Insurance Act, which represents a compromise between business and labor. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Both workers and employers 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 (citation omitted). Such sure and certain relief, however, can be obtained only if there is a strict deadline to apply for benefits as contemplated by the plain language of RCW 51.08.050 and applied by the Department, the Board, and the courts for decades.

V. CONCLUSION

Kovacs failed to file his workers’ compensation claim within one year of his injury. Under the plain language of the statute and this Court’s precedent interpreting it, he filed his claim too late. The Department asks this Court to confirm its analysis in *Nelson* and earlier cases and apply the

statute of limitations to Kovacs's untimely claim.

RESPECTFULLY SUBMITTED this 3rd day of February,
2016.

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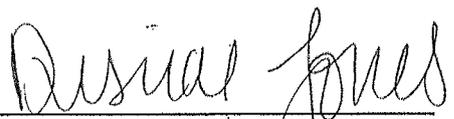
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Good Afternoon,

Attached for filing with the court please find the Department of Labor & Industries' Supplemental Brief.

Thank you,

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