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SUPREME COURT OF THE STATE OF WASHINGTON

John D. Kovacs,

Petitioner,

v.

Department of Labor & Industries,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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I. Introduction

John Kovacs timely filed an application for benefits under the Industrial Insurance Act. The Department of Labor & Industries ("Department" hereafter) allowed his claim. An employer protest resulted in the Department rejecting his claim on the basis that it was not timely filed. The Board of Industrial Insurance Appeals, constrained by an erroneous prior decision, affirmed the Department. The Superior Court for the County of Spokane reversed, finding Mr. Kovacs claim filing to have been timely. After an appeal by the Department, the Court of Appeals reversed the Superior Court. In a dissent, Judge Fearing noted that the Department

"ignores a critical word in the controlling statute, snubs a companion statute, promotes old bad dicta rather than new good dicta, and shuns the liberality intended for worker compensation statutes."

Mr. Kovacs' Petition for Review was granted by this Court on January 6, 2016. (*John D. Kovacs v. Department of Labor & Industries*, Number 324737, ___ Wn.App ___, ___ P.3d. ___, (2015), dissent, p.

1.)

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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. His claim, to be timely, must be filed "within one year **after** the injury." He complied, and his claim was timely.

IV. Argument

1. The Court of Appeals majority and the Department ignore a critical word in RCW 51.28.050.

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 . . . (Emphasis supplied.)

The Department repeatedly stated that the application need be filed within one year of the injury. (Department's COA brief, pages "i" and 1.) This ignores the word "after." The law requires that ALL the language in a statute be given effect. Cornu-Labat v. Hosp. Dist. No.

2, 177 Wn.2d 221, 231, 298 P.3d 741 (2013). "After" is defined as "subsequent to in time or order." (Merriam Webster's Collegiate Dictionary.) Thus, an application for benefits needs to be filed within one year subsequent to the date of the injury. Petitioner's claim was timely.

2. The Court of Appeals majority and the Department snub a companion statute.

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.)

When read together, RCW 51.28.050 and 1.12.040 are consistent.

Both clearly state that counting begins **after** the event. The Court of Appeals majority finds that 51.28.050 is ambiguous, and thus goes on to interpret it. In fact, the statute is **unambiguous**: within one year **after** means you start counting **after** the date of injury. Thus, two statutes can be read together. The Department's strained interpretation, ignoring the word **after**, belies the principle of statutory construction that requires giving effect to all the language

used. Cornu-Labat v. Hospital Dist. No. 2, supra.

3. The Court of Appeals majority and the Department promote old bad dicta rather than new good dicta.

The majority states it is bound by Nelson v. Department of Labor & Industries, 9 Wn.2d 621, 115 P.2d 1014 (1941). It cites dicta which is supportive of the Department's position in this matter. However, Nelson is inapposite here, as there was no issue regarding the commencement of the one year statute of limitations for claim filing. 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 allegedly 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. The Department also cites them for support of its position in this matter. The problem is that **not**

one of the cases cited state what they are purported to say!

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. Again, there is **NO** discussion that the one year begins on the day of the injury.

The undersigned is cognizant of the fact that the decision of the Board of Industrial Insurance Appeals is not under scrutiny herein. However, some brief discussion is appropriate. 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.

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. 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!

After dismissing the analysis of Wilbur as mere dictum, the Board focused its attention on Nelson v. Department of Labor & Industries, 9 Wn.2d 621, 115 P.2d 1014 (1941). The Board relied on pure dictum in Nelson.

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).

V. Conclusion

The majority opinion in the Court of Appeals is incorrect. It relies on Nelson, which is not only NOT on point herein, but itself is based on a very shaky foundation. The majority below does not preserve the public policy of sure and certain relief to injured workers. It muddies the waters of computation of time, creating a narrow exception to the general counting statute when none is needed. The Court of Appeals should be reversed.

VI. Attorney's Fees and Costs

Petitioner requests attorneys fees and costs pursuant to RCW 52.52.130.

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RESPECTFULLY SUBMITTED THIS 29th day of January, 2016.

Law Offices of Thomas L. Doran, PLLC

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 "T".

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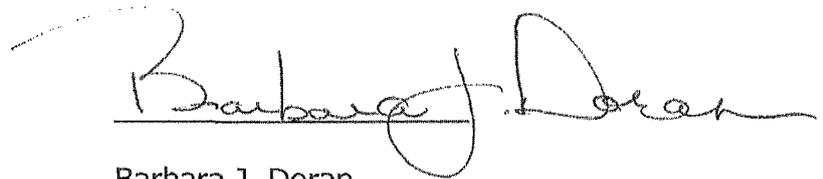
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is correct.

Dated this 29th day of January, 2016, at Spokane, WA.

A handwritten signature in black ink that reads "Barbara J. Doran". The signature is written in a cursive style with a horizontal line underneath the name.

Barbara J. Doran

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Dear Sir or Madam:

Attached is the Petitioner's Supplemental Brief regarding:

John Kovacs v. Department of Labor & Industries
92122-9

Thank you.

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