# Carey, Gwen

## TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

### Calculation of time

The one-year time limitation for filing claims under RCW 51.28.050 begins to run on the day of injury, not the day after. **….*In re Gwen Carey*, BIIA Dec., 03 13790 (2005)**
[*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 05-2-08212-5. *Reversed, Kouvacs v. Dep't of Labor & Indus*., 186 Wn.2d 95 (2016). The one-year statute of limitations begins to run on the day after the injury.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS**
**STATE OF WASHINGTON**

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| **IN RE: GWEN R. CAREY** | ) | **DOCKET NOS. 03 13790 & 03 21396** |
| | ) | |
| **CLAIM NOS. W-700337 & W-700310** | ) | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Gwen R. Carey, by
Law Office of Robert M. Keefe, per
Robert M. Keefe

Self-Insured Employer, Edmonds School District No. 15, by
Reeve Shima, P.C., per
Mary E. Shima

Docket No. 03 13790 is an appeal filed by the claimant, Gwen R. Carey, with the Board of Industrial Insurance Appeals on March 26, 2003, from an order of the Department of Labor and Industries dated March 6, 2003, under Claim No. W-700337. In this order, the Department affirmed its order of January 7, 2003, in which it denied the claim because the worker's condition was not the result of the injury alleged. The Department order is **REVERSED AND REMANDED**.

Docket No. 03 21396 is an appeal filed by the claimant, Gwen R. Carey, with the Board of Industrial Insurance Appeals on September 29, 2003, from an order of the Department of Labor and Industries dated September 19, 2003, under Claim No. W-700310. In this order, the Department affirmed its order of September 23, 2002, in which it allowed the claim for right elbow strain and found that the self-insured employer was not responsible for cervical, thoracic, and/or lumbar strains. The Department order is **REVERSED AND REMANDED**.

## DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on September 8, 2004, in which the industrial appeals judge affirmed the Department order dated March 6, 2003, issued under Claim No. W-700337, and the Department order dated September 19, 2003, issued under Claim No. W-700310.

We have granted review in order to do the following: (1) Change the evidentiary rulings listed below. (2) Reverse and remand the Department order wherein the Department rejected Claim No. W-700337 because the Department rejected the claim on its merits rather than for the failure to file the claim within the one-year limitation period specified by RCW 51.28.050. Although we need not provide a discussion of the merits of the question of whether Ms. Carey sustained an

industrial injury on November 20, 2001, because of the jurisdictional bar to allowance of the claim, we include such a discussion of that issue in our decision as an aid to the courts should further review be sought. (3) Reverse the Department's September 19, 2003 order issued under Claim No. W-700310 only as to the provision segregating the cervical strain. We conclude that the claimant sustained a cervical strain during treatment of the accepted arm condition and therefore that strain should be covered under this claim. We affirm the provisions of that order wherein the Department allows that claim for a right elbow strain and segregate thoracic and lumbar strains. We remand the order to the Department to direct the self-insured employer to accept responsibility for the cervical strain that occurred during physical therapy on or about June 26, 2002, and to segregate the pre-existing cervical degenerative disc disease.

**EVIDENTIARY RULINGS**

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed except as follows.

Dr. Jeff L. Summe's treatment records, renumbered and admitted in the Proposed Decision and Order as Exhibit No. 9, are rejected. These records are inadmissible on a number of grounds, all of which were expressed by the timely objection of the employer's attorney. Much of what is contained in these records is irrelevant to the issues under appeal. Those portions of the records that are relevant are cumulative to the testimony of Dr. Summe, which is the best evidence regarding the subject matter. In addition, the records contain the opinions of non-testifying physicians, such as Dr. Kohler, that constitute inadmissible hearsay.

We reject in its entirety the deposition of Dr. Bradley I. Billington as cumulative, as well as for other reasons stated below. The self-insured employer presented the testimony of one doctor each from three separate independent medical examinations (IMEs). The issues in these appeals are allowance and segregation of conditions with disputes over conditions and events that occurred or were alleged to have occurred no later than July 2002. These appeals do not raise issues of permanent disability or involve entitlement to other forms of benefits that would necessitate testimony directed to the dates in 2003 when the orders under appeal were issued. All three of the IMEs took place after July 2002, but Dr. Billington's IME of the claimant occurred in December 2003, more than one year after the other IMEs and after these appeals were filed. The subject matter of these depositions is essentially the same. In fact, the deposition of Dr. William Stump, when compared with that of Dr. Billington, reveals that the testimony in them is identical, with only a couple of exceptions that we note below. Dr. Billington's deposition included references

to opinions of other doctors, most notably Dr. Park, that were without foundation and constituted inadmissible hearsay. Dr. Billington's deposition also included historical information about household problems between the claimant and her spouse, which our industrial appeals judge correctly rejected.

## DISCUSSION

W-700337: Timeliness of the Application for Benefits

Ms. Carey testified that on November 20, 2001, she sustained an industrial injury while working in the dish room at Mountlake Terrace High School when a stack of large pans fell from a rack and struck her on the head. She testified that she made an oral report of injury. In October 2002, she went into the school district's main office and obtained an application for benefits, but lost it. She obtained another form the next month. On November 20, 2002, the claimant and Dr. Summe, her attending osteopathic physician, filled out a physician's initial report in which she wrote that her industrial injury occurred on November 20, 2001, at 11:50 a.m. That same day, the claimant filled out a "Supervisor's Report of Accident" and she hand delivered the SIF-2 or application for benefits to her employer at its main office. These documents reiterated the date and time of injury as being November 20, 2001, at 11:50 a.m. The application for benefits was date and time stamped as received by "Human Resources/Payroll" at the employer's office on November 20, 2002, (a Wednesday), at 3:38 p.m.

The statute of limitations for filing a claim for an industrial injury is found in RCW 51.28.050. It states:

> 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.

RCW 51.28.050 does not specify where and to whom the application for benefits (a form also referred to as an SIF-2) must be presented in order for it to be legally "filed." We conclude that Ms. Carey's delivery of the completed SIF-2 form at the office of the self-insured employer was sufficient to constitute the "filing" of that document within the meaning of that statute. It was not necessary for her to deliver that form directly to the Department. RCW 51.28.020(1)(b).

The dispositive question in this appeal is whether Ms. Carey filed her application for benefits within the one-year limitation period. The Proposed Decision and Order adopts dictum contained in *Wilbur v. Department of Labor & Indus.*, 38 Wn. App 553 (1984) as the basis for its conclusion that her application for benefits was timely filed. The *Wilbur* dictum contradicts a rule set forth in a

series of Supreme Court cases, including *Nelson v. Department of Labor & Indus.*, 9 Wn.2d 621 (1941). We conclude we must follow the rule set forth by the Supreme Court.

In order to determine if Ms. Carey's application for benefits was timely, we must determine the date the one-year limitation period began to run. If this date was November 20, 2001, the date the alleged injury occurred, then the limitation period ran at the end of November 19, 2002. 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. It follows, therefore, that in order for an application filed on November 20, 2002, to be timely, the one-year limitation period could not have begun to run until November 21, 2001, the day **after** the alleged injury.

In the series of decisions culminating with *Nelson*, our Supreme Court adopted the interpretation that the RCW 51.28.050 limitation period begins to run on the day of injury. As stated in *Nelson*, at 632, "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." This rule was stated and accepted by the Supreme Court in *Read v. Department of Labor & Indus.*, 163 Wash. 251 (1931); *Ferguson v. Department of Labor & Indus.*, 168 Wash. 677 (1932); *Sandahl v. Department of Labor & Indus.*, *170 Wash. 380 (1932); Crabb v. Department of Labor & Indus.*, 186 Wash. 505 (1936). The application of this rule to this case would mean that the one-year limitation period began to run on November 20, 2001, the date of the alleged work-related injury.

The language in *Wilbur*, at 566, suggests that the one-year limitation period begins to run the day after the industrial injury. The cited language was mere obiter dictum, a characterization of that language that we noted in *In re Freda King*, BIIA Dec., 69,935 (1985). The *Wilbur* dictum has never since been adopted by the courts. In fact subsequent to the publication of *Wilbur*, Division I of the Court of Appeals reiterated the rule set forth in *Nelson*. *Rector v. Department of Labor & Indus.*, 61 Wn. App. 385 (1991).

We acknowledge that in other legal contexts, rules have developed either through statute or court decision wherein the time calculation of a limitation period begins to run on the day succeeding a triggering event. The only such "rule" that could apply to this case is RCW 1.12.040, a statute that was first enacted in 1854, that currently 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.

This statute was originally included within acts regulating civil actions. It has since been held to be a statute of general application. See, *e.g.*, *State ex rel. Early v. Batchelor*, 15 Wn.2d 149 (1942). Its application to this appeal would support Ms. Carey's position that the one-year limitation period should not begin to run until November 21, 2001. 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.

Rules of statutory construction favor the application of RCW 51.28.050 over that of RCW 1.12.040 in setting the date upon which the limitation period to file a claim for industrial injury begins to run. RCW 1.12.040 and RCW 51.28.050 both appear to apply in setting the date upon which the one-year limitation period for filing an industrial injury claim begins to run. However, our Supreme Court's interpretation of RCW 51.28.050 leads to an irreconcilable conflict between that statute's language and the language of RCW 1.12.040. When such a conflict between applicable statutes occurs, the rule is that the specific statute supersedes the general statute. *Johnson v. Central Valley School Dist. No. 356*, 97 Wn.2d 419 (1982) [*cert. denied*, 103 S. Ct. 732, 459 U.S. 1107, 74 L. Ed. 2d 955]; *Waste Management of Seattle, Inc. v. Utilities & Transp. Com'n.*, 123 Wn.2d 621 (1994) [reconsideration denied]; *Medical Consultants NW, Inc. v. State*, 89 Wn. App. 39 (1997) [review denied, 136 Wn.2d 1002]. This rule of statutory construction is even stronger when the specific statute was enacted later than the general statute. *Muije v. Department of Social & Health Serv.*, 97 Wn.2d 451 (1982). The predecessor statute to RCW 51.28.050 was first enacted by Laws of 1911, ch. 74, §12.

Having noted the near-unanimity of the court decisions in our state, we admit that in past decisions we have favored the interpretation found in the *Wilbur* dictum. In *In re Stan Hall*, BIIA Dec. 36,628 (1971), the worker sustained an injury at work on March 3, 1969. His doctor mailed the application for benefits on March 2, 1970, but the Department did not receive it until March 5, 1970. We found the application for benefits was not timely, but in dictum of our own we cited RCW 51.28.050 for the proposition that had the Department received the application for benefits on March 3, 1970, it would have been timely. In *Freda King*, the worker sustained an injury on October 6, 1983. She filed her application for benefits on Monday, October 8, 1984. We stated that October 6, 1984, a Saturday, was the last day of the one-year filing period and cited WAC 296-08-070 and *Wilbur*, as support for extending the filing period to the next Monday, when the last day of the filing period fell on a weekend. The *Nelson* rule was not discussed in either of these decisions.

WAC 296-08-070, cited by *Freda King*, states, in part:

> In computing any period of time prescribed or allowed by the rules or by the order of the department or any division, board, commission or council thereof or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included.

The application of this regulation would support Ms. Carey's position that the limitation period for her claim should not begin to run until November 21, 2001, the day after her industrial injury. However, applying this regulation in that manner clearly conflicts with the language of RCW 51.28.050, as interpreted by the *Nelson* line of cases. The Department does not have the power to revise a validly enacted statute, nor can it overturn the interpretation of a statute by the Supreme Court through rule making absent a legislative enactment giving it that authority. The Legislature itself has amended RCW 51.28.050 on two occasions since the *Nelson* line of cases were decided. Yet it has not changed the language in the statute that is applicable to this controversy. Such legislative inaction tends to show its tacit approval of the Supreme Court's interpretation of the statutory language.

There are factual differences between the previously cited Supreme Court cases and the one before us today. In those cases the applications for benefits were either filed months or years late or were attempts to file a second claim in order to bring new conditions into an earlier, timely claim. In Ms. Carey's case, the issue involves alleged untimeliness of filing the application for benefits of only a few hours to one day. However, any claim for which an application for benefits is filed that is one day late (*Wilbur*) or two days late (*Stan Hall*) is still jurisdictionally barred; whether it is one day late or one year late makes no difference.

Therefore, we conclude that Ms. Carey's application for benefits under Claim No. W-700337 was filed one day late.[1] To the extent that language within *Freda King* and *Stan Hall* conflicts with this decision, such language is overruled. We reverse the Department's January 7, 2003 order in Claim No. W-700337 because it rejected the claim for an incorrect reason. This claim should have been rejected because the application for benefits was not filed within the time limit specified by RCW 51.28.050.

[1] One unusual aspect of this appeal is that the record includes the exact hour and minute that the alleged injury occurred (11:50 a.m. on November 20, 2001) and the application for benefits was filed (3:38 p.m. on November 20, 2002). Even if the RCW 51.28.050 limitation period was interpreted to begin running at the exact moment of the injury, as opposed to the day the injury occurred, the application for benefits still was filed late, by 3 hours and 48 minutes.

Did Ms. Carey Sustain an Industrial Injury on November 20, 2001?

Because we have determined that Claim No. W-700337 should be rejected since no application for benefits was filed within the time limit specified by RCW 51.28.050, it is not necessary for us to determine whether Ms. Carey sustained an industrial injury on November 20, 2001. Therefore, we are including neither findings of fact nor conclusions of law regarding that issue with this decision. However, we include the discussion below as a guide for the courts should further review be sought and granted by them. It is our conclusion that Ms. Carey did not sustain any injury on that date during the course of her employment with the Edmonds School District.

Ms. Carey testified that she sustained an industrial injury on November 20, 2001, when large pans she was stacking on a rack next to an institutional dishwasher, fell and struck her on the head. Ms. Carey's application for benefits and the Supervisor's Report of Accident she filled out on November 20, 2002, listed the only witness as a "dishroom attendant." All three of the other employees who worked in the Mountlake Terrace High School dish room that day testified that they did not hear or see the accident and that the claimant did not tell them about it that day or any other day. She sought treatment from Dr. Summe on December 5, 2001, for right elbow pain, but not neck pain. On the intake form the claimant filled out that day she did not endorse neck or back complaints. She checked both "yes" and "no" in answer to the question about whether she was being seen for an on-the-job injury, but she did not fill out the information that form requested about date of injury, claim number, etc.

Dr. Zimmerman, who did not testify, treated Ms. Carey throughout the spring of 2002. She did not inform him of a November 2001 injury at work. On May 7, 2002, the claimant sustained an industrial injury to her right elbow, for which she filed the appropriate claim form on May 20, 2002. On July 3, 2002, Ms. Carey reported to Dr. Summe that she had developed neck pain on June 26, 2002, while doing exercises under the direction of a physical therapist. The first time Ms. Carey mentioned the alleged November 20, 2001 injury at work was during the independent medical examination conducted by Dr. Richard E. Marks on August 13, 2002. Dr. Summe treated the claimant's neck on multiple occasions between July and November 20, 2002, before the claimant told him of the alleged November 20, 2001 injury at work.

Based on the evidence above, we conclude that Ms. Carey's latter-day history of an industrial injury occurring on November 20, 2001, is not believable. Even if some incident at work involving falling pans actually occurred, there is no evidence Ms. Carey sustained any neck or other condition or disability from such an incident. She did not seek treatment for any neck condition until

almost nine months afterwards and then only after she had an onset of symptoms during a physical therapy appointment.

Segregation of Cervical, Thoracic, and Lumbar Strains Under Claim No. W-700310

Ms. Carey sustained right arm strain or extensor tendonitis of the right elbow as a result of her May 7, 2002 industrial injury. She made no complaints of spinal problems and received no treatment for any such condition until she saw Dr. Summe almost two months later, at which time she gave a history of an onset of neck symptoms during a session of physical therapy. Ms. Carey reiterated this history to a consulting physician, Dr. Murphy, who saw her on July 31, 2002. Dr. Summe testified that this physical therapy session had been prescribed by Dr Zimmerman as treatment for the claimant's right arm condition, proximately caused by the May 7, 2002 industrial injury.

Conditions or disabilities sustained while undergoing treatment for a covered condition or injury are also covered by the same claim under which the treatment was authorized. *In re Arvid Anderson*, BIIA Dec., 65,170 (1986); *In re Iris Vandorn*, BIIA Dec., 02 11466 (2003). This is true whether the condition newly arose or was an aggravation of a prior condition. In Ms. Carey's case, the conditions at issue are cervical strain and cervical degenerative disc disease. We conclude that Ms. Carey's cervical strain should be covered under the claim for the May 7, 2002 right elbow injury because the cervical condition was sustained during treatment for the elbow injury.

The medical evidence in the record supports a conclusion that Ms. Carey's cervical strain was caused by the injury she sustained during that therapy session. As explained by the doctors who testified, a cervical strain is a soft tissue condition, *i.e.*, muscular or ligamentous, in contrast to an arthritic or disc condition. Dr. Summe diagnosed a cervical strain among other conditions, and attributed her neck condition to that injury (as well as to other injuries). He believed that the physical therapy incident aggravated cervical problems that were already present. Dr. Marks was very skeptical of any neck condition Ms. Carey described; however, he acknowledged that she could have sustained some neck discomfort due to the activities she performed as part of her therapy. Dr. Stump testified that Ms. Carey's complaints were primarily muscular and could have been anticipated in someone who was initiating an exercise program. He noted that while her examination findings were non-dermatomal, her neck pain followed a muscular distribution.

An MRI study taken on July 12, 2002, showed that Ms. Carey had minor degenerative disc disease at the C5-6 and C6-7 levels consistent with her age. There is no credible medical evidence

that these conditions were caused or aggravated by either the May 7, 2002 industrial injury or the physical therapy the claimant underwent on June 26, 2002. The claimant's description of that injury clearly shows that it was limited to muscles and tendons attached to her right elbow. While Dr. Summe believed that the industrial injury caused a flare-up in a pre-existing neck condition, he did not explain the mechanism by which an elbow tendonitis could have aggravated a disc condition in the neck. We accept the conclusion of Dr. Marks and Dr. Stump, that there was no causal connection between the MRI findings and the May 7, 2002 industrial injury and treatment therefor.

Even though Dr. Summe diagnosed thoracic and lumbar strains that he attributed to the May 7, 2002 industrial injury or the physical therapy Ms. Carey received for that injury, we do not find any factual foundation to support such a causal connection. There was no foundation from the claimant, either in her testimony or in the multiple medical histories she provided to the doctors that suggests she had any thoracic or lumbar problems until late in July 2002. She certainly did not mention that she experienced any mid or low back symptoms after undergoing the physical therapy.

We reverse the September 19, 2003 order issued under Claim No. W-700310 and direct the Department to issue an order in which it allows the claim for the right elbow strain and a cervical strain and segregates as unrelated to this claim the conditions of thoracic and lumbar strains and cervical degenerative disc disease. The segregation of this latter condition is within the scope of our review in this appeal because acceptance/segregation of spinal conditions in general was at issue in the appeal.

## FINDINGS OF FACT

1. At 3:38 p.m. on Wednesday, November 20, 2002, Gwen R. Carey filed an application for benefits in Claim No. W-700337 (Docket No. 03 13790) with Edmonds School District No. 15, the self-insured employer. Ms. Carey alleged she sustained an industrial injury to her back and neck at 11:50 a.m. on November 20, 2001, during the course of her employment with the self-insured employer.

   On January 7, 2003, the claim was denied because the worker's condition was not the result of the injury alleged.

   On January 27, 2003, the claimant filed a Protest and Request for Reconsideration of the January 7, 2003 Department order.

   On March 6, 2003, the January 7, 2003 Department order was affirmed.

   On March 26, 2003, the claimant filed an appeal of the March 6, 2003 Department order with the Board of Industrial Insurance Appeals.

On April 7, 2003, the Board granted the appeal and assigned it Docket No. 03 13790.

2. On June 5, 2002, Gwen R. Carey filed an application for benefits in Claim No. W-700310 (Docket No. 03 21396), in which she alleged she suffered an injury to her right arm on May 7, 2002, while in the course of her employment with Edmonds School District No. 15.

On June 13, 2002, the claim was allowed.

On September 23, 2003, the Department issued an order in which it allowed the claim for a right elbow strain and found the self-insured employer is not responsible for cervical, thoracic, and/or lumbar strain.

On October 29, 2002, the claimant filed an appeal of the September 23, 2002 Department order, which was received at the Board of Industrial Insurance Appeals and forwarded to the Department of Labor and Industries as a Protest and Request for Reconsideration and returned to the Board with the request to treat it as a direct appeal.

On December 19, 2002, the Board denied the appeal.

On September 19, 2003, the September 23, 2002 Department order was affirmed.

On September 29, 2003, the claimant filed an appeal of the September 19, 2003 Department order with the Board of Industrial Insurance Appeals.

On October 15, 2003, the Board granted the appeal and assigned it Docket No. 03 21396.

3. On May 7, 2002, while in the course of her employment as a food service worker for Edmonds School District No. 15, Gwen R. Carey injured her right arm while chopping fruit. She felt a sudden popping sensation in the arm that required medical treatment.

4. On June 26, 2002, Gwen R. Carey was involved in a physical therapy program authorized under Claim No. W-700310, and while performing prescribed exercises, sustained a cervical strain that required medical treatment.

5. Prior to May 7, 2002, Gwen R. Carey was suffering from degenerative changes in her cervical spine, including a disc protrusion at C5-6 and a dorsal annular tear at C6-7; those conditions were neither caused by nor aggravated by the industrial injury of May 7, 2002.

6. Prior to May 7, 2002, Ms. Carey's degenerative disc disease of the cervical spine was symptomatic.

7. Ms. Carey's pre-existing disc protrusion at C5-6 and dorsal annular tear at C6-7 were not aggravated by physical therapy activities engaged in by Ms. Carey in June 2002.

8. Ms. Carey did not suffer any injury to her thoracic or lumbar spine that was proximately caused by physical therapy activities engaged in by Ms. Carey under the auspices of Claim No. W-700310 during the month of June 2002.

## CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. Gwen R. Carey's application for benefits in Claim W-700337 is not valid nor is that claim for benefits enforceable due to her failure to file the application within the one-year limitation period prescribed in RCW 51.28.050.

3. Docket No. 03 13790: The order of the Department of Labor and Industries dated March 6, 2003, in Claim W-700337, is incorrect and is reversed. The claim is remanded to the Department to reject the claim because the application for benefits was not filed within the one-year limitation period prescribed by RCW 51.28.050.

4. Docket No. 03 21396: The order of the Department of Labor and Industries dated September 19, 2003, in Claim No. W-700310, is incorrect and is reversed. The claim is remanded to the Department to allow the claim for right elbow and cervical strains and segregate as unrelated to this claim the conditions of thoracic and lumbar strains and cervical degenerative disc disease.

It is so **ORDERED**.

Dated this 30th day of March, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member