69408-1

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No. 69408-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

MICHAEL SMITH,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES, and
EASTSIDE GLASS & SEALANTS,
Respondent.

BRIEF OF APPELLANT

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I. Introduction

The Industrial Insurance Act ("Act") is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment. *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citations omitted), *See also* RCW 51.12.010. In accordance with the Act, the Appellant, Michael Smith sought judicial review of a Board of Industrial Insurance Appeals ("Board") decision that denied him workers' compensation benefits. [1]

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[1] The Specific section of the Act at issue in this case is RCW 51.52.110,which states, in pertinent part:

> Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.
>
> In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer.

He filed his appeal in Superior Court within thirty days of receiving the Board's decision. However, the Department of Labor and Industries ("Department") contends that he served his notice of appeal upon the Board, Attorney General's Office, and Department thirty-three days after the decision. The Department sought dismissal based on late service. Finding it had no discretion to do otherwise, the Superior Court granted the Department's motion to dismiss.

Mr. Smith now appeals. Mr. Smith asserts that the Act does not require dismissal in this case. Rather, in cases of delayed service, the Act allows the Court discretion to fashion remedies short of dismissal. As such, Mr. Smith asks this Court to reverse the Superior Court's decision and remand for trial on the merits.

II. Assignments of Error

1. The Trial Court erred in dismissing Mr. Smith's appeal seeking workers' compensations benefits. (Order Granting Dismissal, Clerk's Paper ("CP") at 238 - 239).

2. The Trial Court erred in finding that Mr. Smith's time period to serve his notice of appeal expired on January 20, 2012. (Finding of Fact 1.2, CP at 239).

Attached to the notice was a Certificate of Service, signed by Terri Matson, legal assistant to Mr. Smith's attorney; the Certificate stated that Ms. Matson mailed notice to the appropriate parties on the same day. CP 158, 180. Ms. Matson, due to the volume of her practice, has no independent recollection of this case and does not remember whether she mailed the notice on January 20, 2012. CP 173 – 174. However, based on her office practices she believes she likely mailed the notice as stated in the Certificate of Service. *Id.*

On Monday, January 23, 2012, Mr. Smith, again through his representative, mailed the case scheduling order along with a copy of the notice to the Department, Board, and Attorney General's Office. CP 152, 162 – 164, 173.

The Department agrees that the notice of appeal was filed on January 20, 2012. CP 39. The Department also agrees that on January 25, 2012, it received the case scheduling order and a copy of the notice in an envelope post marked January 23, 2012. *Id.* But, it argues that it did not receive any notice postmarked January 20, 2012. CP 41. Because it did not receive a notice of appeal postmarked within thirty days of the Board's order, the Department filed a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1), on July 26, 2012. CP 38, 199 – 200, 201 – 202.

After receiving Mr. Smith's response, the Department withdrew its 12(b)(1) argument and conceded that the Superior Court did have subject matter jurisdiction to hear the case. Verbatim Report of the Proceedings (VRP) 6 -7 ll. 74 – 76, CP 199 – 200. It recharacterized its motion and maintained that Mr. Smith served the parties more than thirty days after he received the Board's order and, under the Act, the Superior Court has no discretion, and is required to dismiss the claim. CP 199 – 200.

The Superior Court held an evidentiary hearing on August 16, 2012. CP 208, 238 – 239. The Department presented three witnesses; Michi Tolmie, Support Supervisor for the Docketing Unit at the Attorney General's Office in Seattle (VRP 9, ll. 12 – 24, 10, ll. 2 – 4), Roxanne Yaconetti, Secretary Correspondence Liaison at the Department (VRP 17, ll. 9 – 10), and Sherry Ison, Legal Assistant at the Board (VRP 28, ll. 4 -19). All three testified that they did not receive a notice post marked January 20, 2012. VRP 14, ll. 17 – 22; VRP 22, ll. 9 – 10; VRP 28, ll. 17 – 24. Hence, the Court found that Mr. Smith served the opposing parties more than thirty days after he received the Board's denial order. CP 238 – 239. Judge Erlick also heard from Mr. Smith's attorney and paralegal. *See generally* VRP 37 – 42, 49 – 54. The Judge stated the delay in service was unintended and likely due to bad weather, "when there is a storm in Seattle people want to leave the office and I think that's probably what occurred here. I think everything

was set up probably to get done that day, but . . . it wasn't completed until Monday."[3] VRP 70, ll. 18 – 23.

The Trial Court agreed with the Department that it had no discretion to hear the case, "if it's discretionary with the Court I have to say I'm very empathetic here with the . . . plaintiff. But I don't think that that's the authority of this court." VRP 77, ll. 7 – 10. Subsequently, it dismissed Mr. Smith's appeal for workers' compensation benefits. CP 238 – 239.

V. Argument

A. UNDER THE ACT, THE COURT HAS DISCRETION TO ALLOW A TIMELY FILED APPEAL TO PROCEED ON THE MERITS WHEN A MINOR SERVICE DELAY RESULTED IN NO PREJUDICE AND WAS EXCUSABLE

Whether the Superior Court had discretion in this case to deny the Department's motion to dismiss is a question of law, this Court reviews questions of law, including questions of statutory construction, de novo. *AOL, LLC v. Washington State Dep't of Revenue*, 149 Wn. App. 533, 541-42, 205 P.3d 159, 163 (2009) (citations omitted).

In this case, the Superior Court believed it lacked discretion to fashion remedies short of dismissal. Its reasoning likely stems from the long held notion that the Superior Court lacked jurisdiction to hear Industrial Insurance Appeals unless the claimant complied exactly with all

[3] Judge Erlick is referring to the severe snow and ice storm that occurred the week of January 20, 2012. *See* CP 166 – 171.

statutory procedural steps. Recently, however, the higher courts have clarified that the Superior Court does retain its jurisdiction to hear such appeals. *See ZDI Gaming Inc.*, v. State, 173 Wn.2d 608, 268 P.3d 929 (2012), *See also MHM&F, LLC v. Pryor*, 168 Wn. App. 451, 277 P.3d 62 (2012).

Because the Court has jurisdiction to hear the case, it should also have discretion to fashion remedies short of dismissal and should have done so here.

First, the Act allows for less severe remedies in cases of delayed service, for three reasons. To begin, as a whole, the Act is remedial in nature and is to be liberally construed in the worker's favor. Next, in *Daugherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003), the Supreme Court reviewed the venue requirement within the statute at issue, and it determined that the Court had jurisdiction to allow the claimant to cure his procedural error. Finally, the statute specifies that dismissal is only required when the claimant fails to timely file.

Second, under the facts of this case, it is unreasonable to dismiss Mr. Smith's appeal. Here, Mr. Smith timely filed his appeal, no party asserts any prejudice due to the delay, and any delay was excusable.

1. The Act Allows a Timely Filed Appeal to Proceed on the Merits

a. The Act is to be liberally construed in favor of the worker

First, the Industrial Insurance Act ("Act") differs substantially from other administrative laws. The Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572 - 573, 141 P.3d 1 (2006) (citations omitted). As such, "the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis*, 109 Wn.2d at 470. *See also* RCW 51.12.010. Additionally, "where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

b. Noncompliance with the Act's venue requirement, a non-jurisdictional procedural step, does not require dismissal

Consistent with the Act's liberal construction and remedial nature, the Supreme Court in *Dougherty* interpreted the Act's venue requirement as a non-jurisdictional procedural step. *Dougherty*, 150 Wn.2d at 319-320 (overruling *Tennyson v. Dep't of Labor & Indus.*, 189 Wash. 616, 66 P.2d 314 (1937)(holding that failure to comply with the venue requirement deprived the Superior Court of jurisdiction)). Therefore, it held that noncompliance with the Act's procedural directive did not require dismissal. *Id.* By so doing, the Court interpreted the word "shall" within the Act as a directory procedural guide, rather than an imperative demand. *See Id.* The statute provides, in part:

> Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, . . . or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, . . . or other person *fails to file* with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board *shall become final.*

RCW 51.52.110 (emphasis added). The next paragraph of the statute identifies the appropriate counties in which the appeal is to be filed:

> In cases involving injured workers, an appeal to the superior court *shall* be to the superior court of the county of residence of the worker . . . or to the superior court of the county wherein the injury

> occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county.

RCW 51.52.110, (emphasis added).

Under *Dougherty*, a failure to file in the county as designated by the statute "can be cured by a change of venue." *Dougherty*, 150 Wn.2d at 320. Being so, the Supreme Court has recognized that "shall" under the Act is directory rather than imperative. The court in *Dougherty* recognized the "distinct preference" to allow appeals to proceed absent "substantial prejudice." *Id.* at 319 – 320.

The Court "decline[d] to read RCW 51.52.110 as requiring dismissal of Dougherty's otherwise timely filing." *Id.* at 319. The Court clarified that its holding, "bring[s] our jurisprudence regarding RCW 51.52.110 into alignment with accepted principles of venue and jurisdiction, and consistent with the requirements of statutory construction." *Id.* at 320.

Although *Dougherty* did not involve the service provision of RCW 51.52.110, the Supreme Court's interpretation of the word "shall" as directory and not imperative is binding. "It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it." *Johnson v. Morris,* 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)

(citations omitted). (holding that the statute at issue was an amendment rather than a clarification and was effective on the date of its enactment, the application of the amendment to petitioner was a prohibited ex post facto law).

Moreover, "[w]hen the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning." *Medcalf v. State Dep't of Licensing,* 133 Wn.2d 290, 300 – 301, 944 P.2d 1014 (1997)(citations omitted)(reviewing a statutory scheme of implied consent regarding alcohol testing, the Court found that the word refuse had the same meaning in subsection four as it did in subsection seven).

Turning to this case, the service provision of the statute states that the, "appeal *shall* be perfected by . . . serving a copy thereof by mail, or personally, on the director and on the board." RCW 51.52.110. Consistent with *Dougherty* under RCW 51.52.110, the statutory service and venue provisions are procedural steps not to be ignored but at the same time not requiring dismissal, "although directory provisions are not intended by the legislature to be disregarded, yet the seriousness of noncompliance is not considered so great[.]" *Niichel v. Lancaster*, 97 Wn.2d 620, 623, 647 P.2d 1021 (1982) (*quoting Sutherlands*, 1A C. Sands, Statutory Construction §25.03, at 298 – 299 (4th Ed. 1972) (holding that the use of the term

"shall" in various tax provisions was discretionary and not mandatory). *Dougherty* makes clear that so long as an appeal is timely *filed,* it should not be dismissed for procedural defects absent substantial prejudice.

c. The Act only requires dismissal for late filing

The only dismissal requirement within the statute relates to filing:

> If such worker, . . . or other person *fails to file* with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board *shall* become final.

RCW 51.52.110, (emphasis added).

While leaving out any reference to service in the above provision, the statute later states, "such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail." *Id.* When the "Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred." *In re Sietz,* 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (citations omitted)(holding that the defendants' offenses should be merged, the court reviewed the legislative history of the statute at issue and found that the legislature intended different meaning by using different phrases).

The Legislature was aware that there were venue, service, and filing requirements outlined in RCW 51.52.110, but the only mandatory consequence for failing to comply is related to timely *filing* and not timely

service or *venue*. The Legislature could have easily added the word "and serve," but it did not, and a liberal construction of the Act precludes the Court from reading this into the statute.

In *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990) the Court considered a similar argument. In that case, like this one, the claimant filed her workers' compensation appeal to superior court within thirty days of the Board's order denying benefits. *Fay*, 115 Wn.2d at 196. But, she served the Department notice more than thirty days after receiving the Board's order. *Id.* Fay argued that the statute did not require both filing *and* service within thirty days to perfect her appeal. *Id.* at 197. The Court held that Fay, by failing to serve within thirty days, failed to secure the Court's subject matter jurisdiction and dismissed her appeal. *Id.* at 197 – 198.

However, the Supreme Court has recently affirmed the broad constitutional original jurisdiction of the superior court and held that the superior court's subject matter jurisdiction is irreducible by statute. *ZDI Gaming*, 173 Wn.2d at 616 – 617. "Jurisdiction is the power of the courts to act. Subject matter jurisdiction is a particular type of jurisdiction, and it critically turns on the type of controversy." *Id.* at 617 (internal quotation marks omitted)(*quoting Dougherty,* 150 Wn.2d at 316)(*quoting Marley v. Dep't of Labor & Indus.,* 125 Wn.2d 533, 539, 886 P.2d 189 (1994)). "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Id.* at 618 (*quoting Marley* 125 Wn.2d at 539)(*quoting*

Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse,* 1988 BYU L. Rev. 1, 28 (1988)). Although *ZDI* was not an appeal under the Act, the court recognized that the superior court was sitting in its appellate capacity on an administrative appeal under the APA. *Id.* at 619-20.

In May 2012, the Court of Appeals, Division 1, began to apply the *ZDI* holding. *MHM & F, LLC*, 168 Wn. App. at 459. Citing several workers compensation cases, Division 1 recognized that the *ZDI* decision overruled precedents that erroneously classify the Superior Court's jurisdiction as statutory. *Id.* at 459 – 460.

The *MHM & F* Court clarified that, "it is incorrect to say that the court acquires subject matter jurisdiction from an action taken by a party or that it loses subject matter jurisdiction as the result of a party's failure to act." *Id.* at 460.

In this case, the Department originally moved under CR 12(b)(1), citing to *Fay*, and sought dismissal for lack of subject matter jurisdiction. However, before the hearing it retracted its original basis, CR 12(b)(1), and conceded that the Court did maintain jurisdiction.

Rather, the Department, still citing to *Fay*, maintained that the Court should dismiss the case due to failing to perfect the appeal. As made clear in *ZDI Gaming* and *MHM& F, LLC*, and as accepted by the Department, the Superior Court's jurisdiction is not at issue. As such, *Fay*, which is based in jurisdictional principals, is not instructive.

Rather, the statute on its face only requires dismissal for failing to file within thirty days. This reading is consistent with appellate authority which has repeatedly instructed the Superior Courts to allow cases to be heard on the merits. "[T]he distinct preference of modern procedural rules is to allow appeals to proceed to a hearing on the merits in the absence of serious prejudice to other parties." *Black v. Dep't of Labor & Indus.,* 131 Wn.2d 547, 552, 933 P.2d 1025 (1997) (internal quotation marks omitted) (citations omitted).

Unless the Act specifically states, which it does not, that failure to comply with the service requirement of RCW 51.52.110 must result in dismissal of the appeal, then the Court should not read that into the statute. Instead, allowing the Court discretion to fashion remedies short of dismissal would be consistent with a liberal construction of the Act that resolves all doubts in favor of the worker.

Again, *Dougherty* is applicable, as the Court in that case, outside of jurisdictional arguments, "decline[d] to read RCW 51.52.110 as requiring dismissal of Dougherty's otherwise timely *filing.*" *Dougherty,* 150 Wn.2d at 319-20. (emphasis added).

2. Under the Facts of this Case, Allowing the Appeal to Proceed is a Reasonable Exercise of Discretion Because there is No Prejudice and any Delay is Excusable

As discussed above, the statute does not require dismissal based on untimely service. Absent an express statutory limitation, the Superior Court, exercising its jurisdiction, should have discretion to do as justice

requires and fashion remedies for noncompliance with a procedural step. "In the absence of special statutory direction as to the mode of exercise of jurisdiction, it may be exercised according to the rules of common law, or in the mode prescribed by the court, exercising sound discretion or conforming to the spirit of the constitution or code." 21 C.J.S. Courts § 67 (1990); *See also Daniel v. Daniel,* 116 Wash. 82, 84, 198 P. 728 (1921) (holding that the Court could appoint a 'referee' to apportion certain profits, the Court reasoned that it had the power to regulate the manner in which it exercised its jurisdiction). "The rule is that when a general power is given, but the mode of its exercise is not prescribed, the procedure is to be regulated by the court in the exercise of its sound discretion." *State v. Superior Court for Yakima Cy.,* 108 Wash. 636, 639, 185 P. 628 (1919). Because the Superior Court has jurisdiction to hear the case and the Act does not require dismissal, the Superior Court has the discretion to fashion remedies short of dismissal.

In this case, the Superior Court would have denied the Department's motion to dismiss if it believed it had discretion to do so. Here, after Mr. Smith filed his appeal with the Superior Court, his case proceeded in course. The attorneys for the Department and the Employer both appeared on February 14 and 15, 2012, respectively. CP 13, 16. On February 22, 2012, the Certified Appeal Board Record ("CABR") was

delivered to the Superior Court. *See* CABR sent in its entirety. Mr. Smith filed his jury demand on April 10, 2012. CP 19 – 21. Mr. Smith also filed his trial brief on July 9, 2012. CP 22 – 35. A notice of trial readiness was signed by all parties on July 31, 2012. CP 98. Yet, about four weeks before trial, the Department moved to dismiss for lack of subject matter jurisdiction. CP 38 – 43.

Further, the Department has never asserted that it suffered any prejudice. Any delay was minor; the envelope admittedly received by the Department is post marked Monday, January 23, 2011, rather than Friday, January 20, 2011. Moreover, the Court attributed the delay to weather, "when there is a storm in Seattle people want to leave the office and I think that's probably what occurred here. I think everything was set up probably to get done that day, but . . . it wasn't completed until Monday." VRP 70, ll. 18 – 24. The Court further stated:

> [I]f it's a [sic] equitable argument or if it's discretionary with the Court I have to say I'm very empathetic here with the -- with the Plaintiff. But I don't think that that's the authority of this Court.
> . . .
> Otherwise I would find that there [sic] substantial compliance.
> . . .
> [But] I don't think the Court has discretion[.]

VRP 77, ll. 7 – 15.

Because earlier cases have generally been dismissed for lack of subject matter jurisdiction, there is no case law directly on point regarding

how the Superior Court should utilize its discretion in cases of delayed service.

However, as stated above, *Daugherty* is precedential and indicates that the Court should look to the prejudice of the parties when determining remedies. The Court in *Daugherty* analyzed the Act's venue requirement, determined that the Court had jurisdiction, and found the claimant's misfiling could be cured. Despite the clear violation of the procedural directive under RCW 51.52.110, the Supreme Court held that rather than dismissing the claim, "[i]t is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties." *Dougherty*, 150 Wn.2d at 319 – 320 (*quoting Black*, 131 Wn.2d at 552).

Also instructive is *Davidson v. Thomas*, 55 Wn. App. 794, 780 P.2d 910 (1989). Davidson, doing business as Big B's Towing, appealed the Superior Court's dismissal of its petition for review of a King County Department of Public Safety decision that removed Big B's Towing from a county list of approved towing firms. *Davidson*, 55 Wn. App. at 795. The Court held that then applicable Civil Rules for Courts of Limited Jurisdiction ("CRLJ") 73(b) governed the filing and service requirements of reviews of quasi-judicial decision making agencies, such as the

Department of Public Safety. *Id.* at 796-797. At the time of the case CRLJ 73(b) had stated:

> When an appeal is permitted by law from a court of limited jurisdiction to a superior court such appeal shall be taken by filing in the court of limited jurisdiction a notice of appeal within 14 days after the judgment is rendered or decision made. Filing the notice of appeal is the only jurisdictional requirement for an appeal. A party filing a notice of appeal shall also, within the same 14 days, serve a copy of the notice of appeal on all other parties or their lawyers and file an acknowledgment or affidavit of service in the court of limited jurisdiction.

Id. at 796.

Big B's filed its petition for review within 14 days of the Department's decision, but served the county clerk more than 14 days later. *Id.* at 795. Reversing the lower court, the Court of Appeals held that because "the failure to serve the clerk within 14 days is not jurisdictional, then the petition should not have been dismissed." *Id.* at 798, *citing State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978); *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981). The Court went on to state that "in the absence of prejudice, late service in the circumstances of this case does not warrant dismissal. This result comports with the modern trend of the law to interpret court rules and statutes to allow decision on the merits of the case." *Id.* 799 (citations omitted).

Likewise, dismissal is not required here. As in both *Daugherty* and *Davidson*, it is agreed that the Court retains its jurisdiction and that neither party has suffered any prejudice. As such, the Superior Court has the discretion to, and should allow, the case to proceed on its merits.

In addition to the Department suffering no prejudice, the Superior Court stated that any delay here was likely unintended and due to the weather. VRP 70, ll. 18 – 24. As such it is appropriate for the Court, when determining remedies, to consider principals similar to those found in cases applying excusable neglect or extraordinary circumstances. Excusable neglect and extraordinary circumstances are well established principles. *See* CR 60(b) (the Court may provide relief from judgments and orders in cases of mistake, inadvertence, or excusable neglect); RAP 18.8(b) (the appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file certain pleadings).

For example, the facts of this case are analogous with the facts in *City of Goldendale v. Graves*, 88 Wn.2d 417, 562 P.2d 1272 (1977). In *City of Goldendale* excusable neglect was found when the criminal defendant's attorney in good faith made every effort to appeal his client's conviction from the County District Court to the Superior in a timely fashion, but a five day delay resulted from his clerk's inadvertence, the

delay however created no prejudice. *City of Goldendale*, 88 Wn.2d at 417. Where there was no showing of prejudice, "[d]oubts should be resolved in favor of protecting the right of appeal; we should be slow to deprive a litigant of that right." *Id.* at 424. The Court reasoned that "if a court is unable to correct an injustice where a defendant or his attorney was unable to comply with the rules through no intent or act of his own volition[,] [t]his is not reasonable . . . under the particular circumstances here, justice requires relief." *Id.* (internal quotations omitted).

Here, as in *City of Goldendale*, the late notice was an excusable minor delay that resulted in no prejudice. As such, it is not reasonable to dismiss Mr. Smith's appeal for workers' compensation benefits.

VI. CONCLUSION

Appellant respectfully requests that the Court REVERSE the trial court's dismissal and REMAND this case for trial on the merits.

DATED this 1 day of February 2013.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

MICHAEL SMITH,

Appellant,

Vs.

DEPARTMENT OF LABOR & INDUSTRIES and EASTSIDE GLASS & SEALANTS,

Respondents.

CAUSE NO. 69408-1

PROOF OF SERVICE

On February 1, 2013, I caused to be served upon counsel of record, at the address stated below, by legal messenger, a true and correct copy of the following documents:

Appellant's Brief, Verbatim Transcript, and Proof of Service

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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 at Kent, Washington, this 1st day of February, 2013.

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