69408-1

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NO. 69408-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL SMITH,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This case concerns Michael Smith's failure to timely serve either the Department of Labor and Industries (Department) or the Board of Industrial Insurance Appeals (Board) with a copy of his notice of appeal from a decision and order of the Board. Under RCW 51.52.110, Smith had 30 days from the date he received the order to perfect his appeal by filing a notice of appeal in superior court and serving a copy of the notice of appeal on the Board and the Department. Smith filed his appeal on the thirtieth day but did not serve the Board or Department until at least the thirty-third day. Because Smith did not perfect his appeal, the superior court properly dismissed it.

Smith does not dispute that he failed to timely serve the Board or Department, as RCW 51.52.110 requires. But he argues that because the superior court had subject matter jurisdiction over his appeal, the court should have fashioned a remedy short of dismissal to address his failure to comply with the plain requirements of the statute.

This Court should apply well-established precedent that RCW 51.52.110 requires both timely filing and timely service of the notice of appeal in order to avoid dismissal, and, therefore, should affirm.

II. COUNTERSTATEMENT OF THE ISSUE

1. Did the superior court properly dismiss Smith's appeal for failure to timely serve his notice of appeal on the necessary parties where RCW 51.52.110 requires both timely filing and timely service in order for an appellant to perfect an appeal and where it is a verity on appeal that Smith failed to timely serve his notice of appeal on either the Department or the Board?

III. COUNTERSTATEMENT OF THE CASE

A. Smith Timely Filed His Appeal But Did Not Timely Serve The Board Or The Department With The Notice Of Appeal

On December 19, 2011, the Board issued a decision and order concerning Michael Smith's application for workers' compensation benefits. CP 1, 48-51. Smith's attorney received a copy of the decision and order on December 21, 2011. CP 1. Smith's attorney filed a notice of appeal with the superior court on January 20, 2012, exactly thirty days after December 21, 2011. CP 1.

On January 23, Smith's attorney mailed copies of the notice of appeal to the Department, the Attorney General's Office, and the Board by U.S. mail. CP 67, 69, 75-87. The postmark on each of these envelopes, which was applied by a machine in Smith's attorney's office, was January 23. CP 67, 69, 75-87; VRP 61-63.

The superior court expressly found that Smith did not timely serve the Department or the Board with a copy of his notice of appeal, CP 245, and Smith stated that "[f]or the purposes of this appeal" he does not "challenge the Superior Court's finding that notice was mailed *after* January 20, 2013." App. Br. 3 n.2 (emphasis added). Thus, it is a verity on appeal that Smith did not timely serve either the Department or the Board with a copy of his appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980) ("unchallenged findings become verities on appeal").

B. The Superior Court Dismissed Smith's Appeal Because Of His Untimely Service

The Department filed a motion to dismiss Smith's appeal. CP 38-44. The Department argued that the superior court should dismiss the appeal because Smith failed to serve the notice of appeal on the Board and the Department within thirty days of communication of the decision, as RCW 51.52.110 requires. CP 38-44.

The superior court considered the motion and entered an order reserving judgment. CP 194-95. The superior court scheduled an evidentiary hearing on the issue of service. CP 194-95. Before the evidentiary hearing, Department's counsel clarified that the basis for its

motion was not the superior court's lack of subject matter jurisdiction but Smith's failure to comply with RCW 51.52.110's requirements. CP 200.

At the evidentiary hearing, the superior court heard testimony from employees at the Attorney General's Office, the Board, the employer, Eastside Glass, and the office of Smith's attorney. *See* VRP 9-69. The testimony generally concerned the date of mailing of the notice of appeal to the Attorney General's Office, the Board, and the employer. *See* VRP 9-69. For purposes of this appeal, Smith does not dispute that his service on the Attorney General's Office, the Board, and the Department was late. App. Br. 3 n.2.

Following testimony, the parties argued about the proper remedy when a party fails to comply with RCW 51.52.110's service requirements. VRP 73-79. The Department argued that dismissal was mandatory. *See* VRP 76. Smith argued that because the Department was not moving to dismiss the appeal on the basis of subject matter jurisdiction, but due to lack of compliance with RCW 51.52.110's requirements, the superior court had discretion to allow the appeal to proceed even though he had not complied with RCW 51.52.110's service requirements. VRP 71, 74-75.

The parties' arguments included a discussion about the impact of the Supreme Court's recent decision in *ZDI Gaming v. Gambling Commission*, 173 Wn.2d 608, 268 P.3d 929 (2012), a case involving the

Administrative Procedures Act (APA) and gambling rules. The trial court stated that it was aware of *ZDI Gaming* but was not under the impression that the decision was intended to strike statutory deadlines:

> I have a hard time believing that the intent of the Appellate Courts...was to strike deadline requirements. Otherwise you get appellant's appealing, you know, 30 days later and it is of no consequence. So where – where is the Court going to draw the line if anywhere?

VRP 73, 76-77.

The trial court also stated that the doctrine of substantial compliance did not apply to these facts: "I looked at the substantial compliance cases and it didn't fit here. Otherwise I would find that there [sic] substantial compliance. But it – substantial compliance cases simply don't fit here in this analysis." VRP 77.

At the trial court's invitation, the parties provided additional briefing on the impact of *ZDI Gaming*. VRP 76; CP 215-37. The trial court stated that it did not want briefing on the issue of equity. CP 78-79.

After considering the additional briefing, the superior court entered an order dismissing the appeal because Smith did not serve the proper parties within the thirty day appeal period as required by RCW 51.52.110. CP 244-46. Smith now appeals. CP 1-2.

IV. SUMMARY OF ARGUMENT

RCW 51.52.110 provides the exclusive method for obtaining judicial review of decisions of the Board. Under the statute, a party has thirty days from the date of receipt of an order to appeal. The statute provides that if a party fails to file the appeal within thirty days, the decision of the board shall become final. The statute further provides the process for perfecting the appeal: filing the notice of appeal with the superior court, and serving a copy of the notice on the Department and on the Board. Appellate courts have repeatedly held that both timely filing and service are required for an appellant to avoid dismissal of his or her appeal. Here, Smith served neither the Department nor the Board within the thirty day appeal period.

Smith argues that the supreme court's decision in *ZDI Gaming* renders prior case law interpreting RCW 51.52.110 no longer good law, and allows superior court judges discretion in allowing an appeal to proceed even if an appellant fails to comply with the explicit service provisions of RCW 51.52.110. *ZDI Gaming*, however, merely indicated that a defect in procedural requirements does not deprive a court of subject matter jurisdiction—*not* that compliance with such statutory procedural requirements is optional. *ZDI Gaming* does not render prior case law interpreting RCW 51.52.110 bad law, and it does not create a new avenue

for the court to exercise discretion. As such, this Court should follow existing case law, and affirm the superior court's dismissal of Smith's untimely appeal.

V. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This appeal presents questions of law and statutory construction that should be reviewed de novo. *See City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

VI. ARGUMENT

A. RCW 51.52.110 Requires Both Timely Filing And Timely Service Of A Notice Of Appeal In Order For An Appellant To Perfect An Appeal And Avoid Dismissal

RCW 51.52.110 provides the exclusive method for obtaining judicial review of the Board's decisions. Under RCW 51.52.110, an appealing party has thirty days from the date of receipt of the Board's final decision and order to file an appeal in superior court. The statute provides that "[s]uch 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.*" RCW 51.52.110 (emphasis added). If the

appealing party "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).

1. Appellate Courts Have Repeatedly Held That The Appellant's Failure to Perfect Its Appeal By Serving All Required Parties Within RCW 51.52.110's 30-Day Deadline Requires Dismissal Of The Appeal

Appellate courts have repeatedly held that dismissal is required where the appellant timely filed a notice of appeal of a Board order in superior court but did not timely serve the required parties with the notice of appeal. *See Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 199, 796 P.2d 412 (1990); *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 407, 842 P.2d 1006 (1992); *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 194, 26 P.3d 977 (2001). This Court should do the same.

In *Fay*, a worker timely filed her appeal with the superior court and timely served the notice of appeal on the Board and the self-insurer. *Fay*, 115 Wn.2d at 196. She failed, however, to serve the notice of appeal on the Department's director (a required party under RCW 51.52.110) within the thirty-day appeal period. *Id.* The Supreme Court affirmed the trial court's dismissal of the worker's appeal, noting that the worker had "failed to satisfy the requirements of the appeal statute when she neglected to

serve notice upon the *Director* of the Department within the required time period." *Fay*, 115 Wn.2d at 201 (emphasis in original).

Similarly, in *Petta*, the worker timely filed a notice of appeal in superior court. *Petta*, 68 Wn. App. at 407. The worker's attorney instructed a process server to serve the notice of appeal on the Board during the 30-day appeal period. *Id.* at 407-408. But the process server failed to do so, a fact that the attorney did not realize for several months. *Id.* This Court reversed the trial court's denial of the Department's motion to dismiss, observing that the notice of appeal was not served on the Board during the 30-day appeal period. *Id.* at 410-11. Thus, even though the worker's noncompliance with RCW 51.52.110's service requirements was "inadvertent," dismissal was required. *Id.* at 410-11.[1]

The *Petta* Court further rejected the worker's argument that his counsel had substantially complied with the service requirements by providing the process server with a copy of the notice of appeal to serve on the Board before the 30-day service deadline. *Petta*, 68 Wn. App. at 409. "Noncompliance with a statutory mandate is not substantial compliance." *Petta*, 68 Wn. App. at 409. As this Court explained,

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[1] In *Black v. Department of Labor & Industries*, 131 Wn.2d 547, 553, 933 P.2d 1025 (1997), the Supreme Court criticized *Petta* on other grounds relating to whether service on the attorney general constitutes service on the Director for purposes of RCW 51.52.110's service requirements. But *Petta* remains good law as to the effect of untimely service.

"notwithstanding what will clearly be an unfortunate blow to the claimant, a finding that there was substantial compliance on these facts would render the requirements of RCW 51.52.110 virtually meaningless." *Petta*, 68 Wn. App. at 411.

Finally, in *Hernandez*, the appellant timely filed a notice of appeal from a Board order and timely served the director and the employer's attorney. *Hernandez*, 107 Wn. App. at 196. But she did not timely serve the Board, a required party under RCW 51.52.110. *Id.* Accordingly, the court affirmed the trial court's order of dismissal. *Id.*

The rationale of *Fay*, *Petta*, and *Hernandez* applies equally here. Smith timely filed his notice of appeal but did not timely serve either the Department or the Board. Accordingly, as the superior court recognized, he failed to perfect his appeal under RCW 51.52.110. Therefore, under well-established precedent, the superior court properly dismissed his appeal. *See Fay*, 115 Wn.2d at 201; *Hernandez*, 107 Wn. App. at 196; *Petta*, 68 Wn. App. at 410.

Smith argues that although the failure to *file* a notice of appeal within 30 days is fatal under RCW 51.52.110, the failure to *perfect* the appeal by serving the required parties within 30 days is not fatal. App. Br. 12. To support this argument, he cites the last sentence of RCW 51.52.110's first paragraph, which reads: "If such worker . . . or other

person *fails to file* with the superior court *its appeal as provided in this section* within 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). App. Br. 12. Relying on this language, Smith asserts that "the statute on its face only requires dismissal for failing to file within thirty days." App. Br. 15. This argument fails.

Fay explicitly rejected this statutory argument. As *Fay* observed, the legislature added the last sentence of RCW 51.52.110's first paragraph to the statute in 1982 "to codify existing case law regarding the effect of failure to timely file an appeal with the superior court." *Fay*, 115 Wn.2d at 200. *Fay* recognized that the 1982 amendment "emphasizes the need to file in superior court within 30 days after the Board's decision but does not make any reference to serving notice on the parties to such an appeal." *Id.* But, as the *Fay* Court unequivocally stated, this codifying amendment "did not alter the requirement that an aggrieved party *both file and serve* notice of appeal within 30 days of receiving notice of the Board's decision." *Id.* (emphasis added). The *Fay* court concluded that dismissal was the required result in a case where the worker failed to perfect her appeal by serving all the parties listed in the statute. *Id.* at 201.

This Court should apply well-established precedent and affirm the superior court's dismissal of Smith's appeal. Because he failed to perfect his appeal under RCW 51.52.110 by timely serving the Board and the Department's director, dismissal is required. *See Fay*, 115 Wn.2d at 201; *Hernandez*, 107 Wn. App. at 196; *Petta*, 68 Wn. App. at 410.

2. The Failure to Timely Appeal A Board Order Turns That Order Into A Final And Binding Adjudication

In order to timely appeal a Board order, a party must timely file and serve the notice of appeal. *Fay*, 115 Wn.2d at 199-201. Failure to timely appeal an order renders that order final and binding. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 544, 886 P.2d 189 (1994) (the failure to appeal Department order turns that decision into a final adjudication); *see also Magee v. Rite Aid*, 167 Wn. App. 60, 75, 277 P.3d 1 (2012) (failure to challenge conclusion of law in Board order renders that decision final and binding). Because the Board order here became final and binding, the superior court properly dismissed the untimely appeal of it.

B. *ZDI Gaming* And *Dougherty* Do Not Alter The Well-Established Rule That Dismissal Is Required When An Appellant Fails To Perfect The Appeal Under RCW 51.52.110

Smith argues that *ZDI Gaming* and *Dougherty v. Department of Labor & Industries*, 150 Wn.2d 310, 76 P.3d 1183 (2003), excuse his

untimely service here, and suggests they effectively overruled *Fay* and the other case law regarding the effects of an appellant's failure to timely serve necessary parties with a copy of the notice of appeal. *See* App. Br. 7, 10-15. Smith is incorrect. *ZDI Gaming* and *Dougherty* address what remedies an appellant may have if he or she files an appeal in the wrong venue, but do not stand for the broad proposition that a court has discretion as to whether, and how, it should enforce statutory procedural requirements.

1. *Dougherty*'s Holding That Dismissal Is Not Required When An Appellant Timely Perfects An Appeal Under RCW 51.52.110 But Files The Appeal In The Wrong Venue Does Not Excuse Smith's Noncompliance With RCW 51.52.110's Service Requirements

Smith argues that *Dougherty* supports his assertion that RCW 51.52.110 does not require dismissal when a party fails to comply with its service provisions. *See* App. Br. 10-15. He is incorrect.

In *Dougherty*, the worker timely filed and served a notice of appeal from a Board order. *Dougherty*, 150 Wn.2d at 313. Under the venue provisions of RCW 51.52.110, the worker should have filed the notice in Whatcom County; instead, he filed it in Skagit County. *Dougherty*, 150 Wn.2d at 313.[2] When the worker filed a motion for a change of venue to

[2] RCW 51.52.110's venue provision reads as follows:

Whatcom County, the Department moved to dismiss for lack of subject matter jurisdiction. *Dougherty*, 150 Wn.2d at 313. The trial court granted the Department's motion. *Id.*

The narrow question before the Supreme Court was "whether RCW 51.52.110's designation of the proper county for filing workers' compensation appeals is a grant of jurisdiction or whether it identifies venue." *Dougherty*, 150 Wn.2d at 313. The Court noted that RCW 51.52.110 both "establishes the appellate jurisdiction of the superior courts and . . . designates the proper venue for those appeals." *Id.* at 317. Specifically, the language in RCW 51.52.110 stating that a worker or aggrieved party "may appeal to superior court" established the superior courts' appellate jurisdiction while RCW 51.52.110's reference to "the location of the superior courts where the appeals are to be heard" designated venue. *Id.* Thus, the court held that "RCW 51.52.110's requirements regarding location relate to venue, not jurisdiction." *Id.* at 313.

> 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.

The *Dougherty* Court went on to conclude that RCW 51.52.110 did not require the worker's appeal to be dismissed merely because he had filed it in the wrong venue. *Dougherty*, 150 Wn.2d. at 319. The Court explained that there was a cure to filing in the wrong venue. *Id.* at 320. Specifically, "many change of venue rules expressly provide for transfer of a case filed in the wrong county." *Id.* (citing RALJ 2.3(b); CAR 21(a); RAP 4.4). The Court explained that "[i]t is incongruous to interpret RCW 51.52.110 as denying a superior court's jurisdiction to grant a transfer of venue under the civil rules to the proper court when an industrial insurance appellant files the appeal in a county superior court not listed in the statute." *Id.*

Dougherty does not apply to this case because it centered on whether a superior court must dismiss a case under RCW 51.52.110 if the appellant has timely filed and served it but filed it in the wrong venue. In *Dougherty*, the Court focused on a recognized, available, and appropriate remedy for filing in the wrong county—the superior court may transfer the case to the correct venue under the applicable court rules. *Dougherty*, 150 Wn.2d at 319.

No similar cure exists for late *service*, however. The legislature specifically provided in RCW 51.52.110 that an appeal is not perfected until the appellant files a notice of appeal in superior court *and* serves the

director and Board. *See City of Spokane v. Dep't of Labor & Indus.*, 34 Wn. App. 581, 589, 663 P.2d 843 (1983) (noting that "[t]he Legislature provide[d] the specific method of instituting an appeal" in RCW 51.52.110 and that courts "should adhere to the statutory requirements."). As *Petta* recognized, allowing an appellant to serve a notice of appeal late would render RCW 51.52.110's language meaningless. *Petta*, 68 Wn. App. at 411.

Where an appeal is filed in the wrong county, allowing the case to be transferred to the correct county does not render RCW 51.52.110's venue requirement meaningless, as transferring the appeal to the correct county ultimately ensures compliance with the statute's venue requirement. In contrast, there is no procedural device that can transform a late appeal into a timely one.

This has been recognized by the courts through development of the doctrine of substantial compliance. The doctrine of substantial compliance may be available if a party serves the wrong person at a particular required entity. *See In re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980) (service on the Director of the Department is proper if the Director received actual notice of appeal *or* if the notice of appeal was served in a manner reasonably calculated to give notice to the Director). However, the doctrine of substantial compliance does sanction noncompliance—

meaning a complete failure to file or failure to timely serve. *See Fay*, 115 Wn.2d at 199 (failure to serve the Department until after the thirty day appeal period could not constitute substantial compliance); *Sprint Spectrum LP v. Dep't of Revenue*, 156 Wn. App. 949, 958, 235 P.3d 849 (2010) ("substantial compliance does not encompass noncompliance").

In *City of Seattle v. Public Employment Relations Commission*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991), the Supreme Court emphasized that late service is not compliance with the statute, stating:

> It is impossible to substantially comply with a statutory time limit . . . . It is either complied with or not. Service after the time limit cannot be considered to have been actual service within the time limit. We therefore hold that failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.

City of Seattle v. Pub. Emp't Relations Comm'n, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991) (holding that substantial compliance did not apply where the appellant served the notice of appeal on a required party under the APA three days late). Through the doctrine of substantial compliance, it is evident there has been a long-standing recognition that there is no readily available cure for a failure to timely file or serve as there may be for other procedural defects such as filing in the wrong venue or serving the wrong person at the agency. Therefore, that *Dougherty* declined to dismiss the appeal for failure to comply with the statutory venue provision

because there was an available cure does not mean the other provisions of the statute should be treated as optional.

Smith further asserts that the *Dougherty* Court "interpreted the word 'shall' within the Act as a directory procedural guide, rather than an imperative demand." App. Br. 9. This mischaracterizes *Dougherty*'s holding and analysis. Accordingly, this Court should reject his request to interpret the "shall" in RCW 51.52.110's service provision as a "directory procedural guide."

Dougherty held that "RCW 51.52.110's requirements regarding location relate to venue, not jurisdiction." *Dougherty*, 150 Wn.2d at 313. The court did not engage in any interpretation of the phrase "shall" in RCW 51.52.110. The court simply recognized that, in the case of venue, court rules allowed for transfer if the appellant timely perfected the appeal in the wrong county. *Id.* Thus, the *Dougherty* court's decision that dismissal was not required was not, as Smith asserts, based on its interpretation of the word "shall" as non-mandatory. Rather, it was rooted in the court's recognition that a cure existed in the event of filing a timely appeal in the incorrect venue. *Id.* at 320. There is no basis for Smith's assertion that *Dougherty* interpreted the "shall" in RCW 51.52.110 to be a "directory procedural guide."

2. *ZDI Gaming*'s Recognition That Procedural Requirements Do Not Relate To Subject Matter Jurisdiction Does Not Convert Mandatory Procedural Requirements, Such As RCW 51.52.110's Service Requirements, Into Optional Requirements

Smith suggests that *ZDI Gaming*'s recognition that "the existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules" should somehow dictate a different outcome for the Department's motion to dismiss in what is otherwise a garden-variety case of untimely service. *See* App Br. at 13-14; *ZDI Gaming*, 173 Wn.2d at 617. This argument fails.

ZDI Gaming involved a petition for review challenging the Gambling Commission's rules under the APA.[3] *ZDI Gaming*, 173 Wn.2d at 614-15. The appellant filed the petition in a different county than required by statute. *Id.* at 611, 614-15. The Court held that whether the appeal should be dismissed due to this procedural defect was a question of venue, not of subject matter jurisdiction. *Id.* at 614-15. The Court went on to explain that "the existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules." *Id.* at 617.

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[3] It should be noted that *ZDI Gaming* did not deal with a statute that related solely to the superior court's *appellate* jurisdiction as is this case here. *ZDI Gaming* dealt with RCW 9.46.095 which applied to both original actions filed in superior court and the superior court acting in its appellate capacity in reviewing administrative decisions. *See* RCW 9.46.095.

This statement concerning subject matter jurisdiction does not stand for the proposition that compliance with statutory requirements is optional. Simply because a court has jurisdiction to hear the subject matter of an appeal does not mean that it has authority to ignore a legislative mandate. Whether a court has discretion to excuse a party's noncompliance with statutory requirements is answered by looking at the particular appeal statute. Contrary to Smith's implication here, *ZDI Gaming* did not create an avenue for discretion into all statutes with statutory appeal requirements and deadlines.

The Court of Appeals' decision in *Sprint Spectrum* is particularly instructive. The case concerned an appeal under the APA and presented a nearly identical issue as this case: timely filing, but untimely service. Sprint timely filed its petition for review under the APA and timely served the Department of Revenue and the Office of Attorney General, but it failed to timely serve the Board of Tax Appeals, the agency whose final order was the subject of the petition for review. *Sprint Spectrum*, 156 Wn. App. at 952, 963. The statute explicitly required service on the agency:

> A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

RCW 34.05.542(2). This Court held that the "noncompliance with the service requirements of the statute supports the superior court's dismissal of the petition." *Sprint Spectrum*, 156 Wn. App. at 961. Thus, the *Sprint Spectrum* court affirmed dismissal on the basis of statutory noncompliance, just as the Department requested here, and *not* due to the lack of subject matter jurisdiction.

Sprint also raised a similar argument as Smith raises here. Sprint argued that RCW 34.05.542(2) was ambiguous and the trial court erred when it dismissed its petition. *Sprint Spectrum*, 156 Wn. App. at 953. Notably, RCW 34.05.542(2) does not even refer to *dismissal* and, yet, the court found the language was not ambiguous and that the superior court correctly dismissed Sprint's appeal for failure to comply with RCW 34.05.542(2)'s service requirements. *Id.* at 954.

Finally, in reaching its decision, *Sprint Spectrum* also recognized the importance of complying with service provisions that require service on the agency that rendered the final decision, stating that where

> the legislature has specified that service on the agency whose order is the subject of a petition is required...[w]e will not substitute our judgment for that of the legislature on the proper method of ensuring timely transmittal of the administrative record to a court for judicial review.

Sprint Spectrum, 156 Wn. App. at 957.

This Court should follow the approach in *Sprint Spectrum* and dismiss Smith's appeal for failure to timely serve the parties as required by RCW 51.52.110. Neither *ZDI Gaming* nor *Dougherty* stand for the proposition that compliance with RCW 51.52.110's service requirements is optional. These cases determined held that the respective appeals should not be dismissed for filing in the wrong venue because there was an available and appropriate remedy for such defect under the court rules: transfer of venue. *ZDI Gaming*, 173 Wn.2d at 622; *Dougherty*, 150 Wn.2d at 320. Both courts also held that such a defect in venue does not deprive the court of subject matter jurisdiction. *ZDI Gaming*, 173 Wn.2d at 622; *Dougherty*, 150 Wn.2d at 320. These decisions, however, do not hold that a court has discretion in enforcing statutory procedural requirements. *See ZDI Gaming*, 173 Wn.2d at 622; *Dougherty*, 150 Wn.2d at 320.

Thus, contrary to Smith's implication, neither *ZDI Gaming* nor *Dougherty* overruled *Fay*. *Fay's* holding that RCW 51.52.110 requires a party to both timely file and timely serve a notice of appeal to perfect an appeal and the failure to do so mandates dismissal must be followed. *Fay's* holding that both service and filing are required for the court to properly invoke subject matter jurisdiction has also not been overruled. *See Fay*, 115 Wn.2d at 201. But in any event, *Fay* also held that the

statute required both timely service and filing. *Fay*, 115 Wn.2d at 200. *Fay* must be followed. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("Further, once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court.").

C. There Is No Available Remedy That Cures Smith's Failure To Comply With The Requirement Of RCW 51.52.110 To Timely Serve The Notice Of Appeal On All Required Parties

Smith argues that because the superior court had jurisdiction over the appeal, the superior court should have had "discretion" to allow his appeal to proceed despite untimely service. App. Br. 7. He further argues that this superior court may exercise this discretion where untimely service "resulted in no prejudice and was excusable." App. Br. 7; *see also* App. Br. 15-21. These arguments lack merit.

Smith fails to cite to any authority for a recognized and appropriate remedy that the superior court should have applied, and instead he argues that *ZDI Gaming* created a new avenue for discretion. *See* App. Br. 13-15. However, as discussed above, this is not the holding or effect of *ZDI Gaming*. *ZDI Gaming* held that filing in the wrong county was a question of venue, not of subject matter jurisdiction. *ZDI Gaming*, 173 Wn.2d at 614-15.

Smith further argues that the standard for when an exercise of discretion is appropriate is whether the late service "resulted in no prejudice and was excusable." App. Br. 7. This is not the standard, however, under RCW 51.52.110. As discussed previously, the courts recognize the doctrine of substantial compliance when there is a defect in service under RCW 51.52.110. *See In re Saltis*, 94 Wn.2d at 895-96; *Petta,* 68 Wn. App. at 409. The doctrine of substantial compliance, however, does not encompass noncompliance, as was the case here as Smith did not comply with the statutory requirement to serve within the 30 day deadline. *See Fay*, 115 Wn.2d at 199; *Petta*, 68 Wn. App. at 409-10. Notably, Smith does not argue that he substantially complied with the requirements of RCW 51.52.110, perhaps because he recognizes that such an argument would be unsupportable under the established case law. Allowing an appeal to proceed under RCW 51.52.110 that does not comply with the statutory requirements simply because it "resulted in no prejudice and was excusable" would render the line the courts have drawn through the substantial compliance doctrine meaningless.

However, even if the standard is that the late service was "excusable," Smith has not established a factual record to support that the late service in his case was actually excusable. Smith repeatedly suggests that the bad weather *may* have caused his untimely service. *See* App. Br.

17, 20. He states that the trial court "attributed the delay to weather" and determined that "any delay here was likely unintended and due to the weather." App Br. 17, 20 (citing VRP 70). However, the trial court made no finding of fact to this effect, and the portion of the record that Smith cites for these propositions underscores that the weather's impact on the untimely service is simply speculative:

> I don't know what happened here, I can only – I – I hate to say that it would only be speculative on my part, except for the fact that when there's 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 with a nearly three o'clock filing, things were probably brought back to the office and it wasn't completed until Monday.

VRP 70. The testimony presented by Smith does no more than make reference to a snow storm during the week of January 20. VRP 41, 49, 59. Further, neither witness that Smith presented actually testified that the weather impacted service of the appeal and, in fact, both witnesses indicated they recalled having no difficulty driving in the weather. VRP 41, 49, 59. Assuming for argument's sake only that the issue of whether the late service was excusable is relevant, the findings and record do not support Smith's claim that his late service was excusable.

Smith is also incorrect that the standard is whether there was prejudice. Contrary to Smith's arguments, *Dougherty* does not create a

rule that the statutory requirements in RCW 51.52.110 are only followed if prejudice has been established. *See* App. Br. 17. Rather *Dougherty* established that RCW 51.52.110's location of filing was a venue requirement not a jurisdictional requirement. *Dougherty*, 150 Wn.2d at 313. And, because the civil rules allowed for transfer of venue, and because there was no prejudice, the court did not dismiss the case for filing in the wrong venue. *Id.* at 320. It was not the lack of prejudice *alone* that saved the appeal from dismissal.

Smith also cites *Davidson v. Thomas*, 55 Wn. App. 794, 780 P.2d 910 (1989), to support his argument that the trial court should have allowed the appeal to proceed. App. Br. 18-20. *Davidson* involved an attempt by a towing company to appeal a decision of a county board that removed the company from a list of approved towing firms. *Davidson*, 55 Wn. App. at 795. The company timely filed its notice of appeal, but did not timely serve the notice on all required parties. *Id.* CRLJ 73(b) governed the filing of the appeal. *Id.* at 796. The language of CRLJ 73(b) stated that "[f]iling 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 . . . ." CRLJ 73(b). To determine whether both filing *and* service were required, the court analogized to the complementary RALJ rules.

Davidson, 55 Wn. App. at 798. A court interpreting the RALJ rules found that untimely service was not fatal to the appeal provided there was no prejudice. *Id.* at 799. Thus, the *Davidson* Court held that "[i]n the absence of prejudice, late service in the circumstances of this case does not warrant dismissal." *Id.* at 799.

Smith's reliance on *Davidson* is misguided. First, the fact that the CRLJ in *Davidson* specifically stated that the filing of the notice of appeal is the *only* jurisdictional requirement signifies that rule intended only a late filing to trigger dismissal as that rule would have been written in a time when statutory procedural appeal requirements were seen as jurisdictional. Second, the issue before the *Davidson* court was the proper interpretation of CRLJ 73(b) to determine the procedural appeal requirements. In the present case, the question of whether RCW 51.52.110 requires *both* filing and service has been definitively answered. *See Fay*, 115 Wn.2d at 200. In addition, the RALJ rules, to which the court analogized to for guidance, only provided the parties "immediately serve" notice on all parties—instead of providing a specific timeframe. *See Davidson*, 55 Wn. App. at 798. Thus, *Davidson* does not establish any grounds on which a superior court judge could exercise discretion in applying the requirements of RCW 51.52.110.

Smith also cites *City of Goldendale v. Graves*, 88 Wn.2d 417, 562 P.2d 1272 (1977), for the proposition that the proper standard is that of excusable neglect. App. Br. at 20-21. Smith, however, fails to recognize that the application of the standard of excusable neglect in that case came from the local court rules specifically applicable to that appeal. *City of Goldendale* concerned the failure of a defense attorney in a criminal matter to note a case for trial within the specified timeframe. *City of Goldendale*, 88 Wn.2d at 419. It did not concern the timeliness of filing or serving the appeal. *Id.* The court applied the standard of excusable neglect to the attorney's failure to timely note the case, relying on the applicable Criminal Rules for Justice Court 10.01, finding that it

> expressly provides in subsection (b): Whenever by these Rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court, for good cause shown, may at any time in its discretion . . . (2) upon motion and notice permit the act to be done after the expiration of the specified period where the failure to act was the result of *excusable neglect*; but the court may not enlarge the period for taking an appeal as provided for in these Rules.

Id. at 422 (emphasis added). Hence, *City of Goldendale* centered on whether noting the case was a step in the taking of the appeal and, thus, the court would not have discretion under the rule to enlarge the time period, or, whether, it did not concern the taking of the appeal, and, thus, the court could apply the excusable neglect standard from the rule. *City of*

Goldendale, 88 Wn.2d at 421-22. The court determined noting the case for trial did not concern the taking of the appeal and applied the excusable neglect standard. *Id.* at 421-23.

City of Goldendale, thus, does not stand for the proposition that the standard of excusable neglect is always available. Rather, it concerned the application of a specific local court rule. With respect to RCW 51.52.110, the legislature could have provided an alternative remedy to dismissal in the statute, such as the court did with the local rules in *City of Goldendale*, but it failed to do so.[4] *City of Goldendale* is, thus, distinguishable. Also, contrary to Smith's implication, neither CR 60(b) nor RAP 18.8(b) apply to determine whether there has been a timely appeal under RCW 51.52.110. *See* App. Br. 20. Rather, *Fay* establishes that both the service and filing requirements of RCW 51.52.110 must be followed. *Fay*, 115 Wn.2d at 200.

RCW 51.52.110 simply does not contain a "good faith" or "excusable neglect" remedy, and this Court cannot invade the province of the legislature in creating such a remedy. Instead, this Court should effectuate the legislature's decision to draw a firm timeline for appeals

[4] Similarly, under the unemployment compensation scheme, the legislature provided for a waiver of the time for appeal if "good cause" was established. *See* RCW 50.32.075 ("For good cause shown the appeal tribunal or the commissioner may waive the time limitations for administrative appeals or petitions set forth in the provisions of this title."). No such language exists under the Industrial Insurance Act.

under the Industrial Insurance Act. Smith failed to comply with the statutory requirements and, thus, his appeal was properly dismissed.

VII. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court affirm the superior court's dismissal of Smith's appeal of the December 19, 2011 decision and order.

RESPECTFULLY SUBMITTED this 3rd day of April, 2013.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL SMITH, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on April 3, 2013, she caused to be served the Brief of the Respondent Department of Labor and Industries and this Certificate of Service in the below-described manner:

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