NO. 45776-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIA KRAWIEC,

Appellant,

v.

RED DOT CORPORATION AND DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

DEPARTMENT OF LABOR & INDUSTRIES BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

I. INTRODUCTION

Maria Krawiec failed to meet the explicit statutory requirements for perfecting an appeal of a Board of Industrial Insurance Appeals (Board) decision within 30 days. The trial court thus properly dismissed her workers' compensation appeal as untimely.

Under RCW 51.52.110, a party must both file and serve a superior court appeal on the director of the Department of Labor & Industries and on the Board within 30 days of communication of the Board's order. The Supreme Court and Court of Appeals have recognized such service is necessary to perfect an appeal, and failure to comply necessitates dismissal.

Krawiec does not dispute that she failed to timely serve the Board, as RCW 51.52.110 requires. Rather she argues because the superior court had subject matter jurisdiction over her appeal, the court should have fashioned a remedy short of dismissal to address her failure to comply with the statute. But the fact that a court has subject matter jurisdiction over an appeal does not mean that filing and service requirements are optional. Since Krawiec failed to perfect her appeal by serving the Board, this Court must affirm the dismissal.

II. STATEMENT OF THE ISSUES

Did the superior court properly dismiss Krawiec's appeal for failure to timely serve her notice of appeal on all required 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 Krawiec failed to timely serve her notice of appeal on the Board?

III. STATEMENT OF THE CASE

A. Krawiec Did Not Serve the Board When She Appealed the Board Order

Krawiec sustained an industrial injury during her employment with self-insured employer Red Dot Corporation. CP 56, 158-59. She received benefits under the claim. CP 56, 160. At the Board, Krawiec contested the Department order closing her claim. CP 46.

The Board issued its final decision regarding her appeal on October 29, 2012. CP 24; Finding of Fact (FF) 1.1. Krawiec received the order on October 31, 2012. CP 1; FF 1.2. RCW 51.52.110 requires that an appealing party file and serve a notice of appeal within 30 days of receipt of the order. The 30th day was November 30, 2012. She filed her appeal of the Board's decision on November 19, 2012, mailing copies to the Department's attorney, Red Dot, and Red Dot's attorney on that date. CP 1, 13-14; FF 1.3, 1.4. But she did not serve the Board as required by RCW 51.52.110. CP 13-14; FF 1.3, 1.4.

Five months later, on April 19, 2013, Krawiec completed an amended affidavit of service indicating that she served the Board on April 19, 2013. CP 17; FF 1.4. Krawiec does not dispute these facts and has not assigned error to the findings of fact. App. Br. 1, 4.

B. Because Krawiec Did Not Comply with RCW 51.52.110's Appeal Perfection Mandate, the Superior Court Dismissed Her Appeal

Because Krawiec did not perfect her appeal, Red Dot moved to dismiss in superior court. CP 447. The superior court granted the motion, concluding that because Krawiec did not comply with RCW 51.52.110's requirement to serve the Board, she did not perfect her appeal. CP 504-06.

IV. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision, the ordinary civil standard of review applies. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. Reviewing the superior court decision, not the Board's decision, this Court reviews the superior court's factual findings for substantial evidence. *Rogers*, 151 Wn. App. at 180. Krawiec has not assigned error to the superior court's findings of fact and they are ver-

ities on appeal. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).[1]

The court reviews legal issues de novo, according deference to the agency's interpretation of the Industrial Insurance Act. *Allen*, 100 Wn. App. at 530.

V. ARGUMENT

The Legislature has specified who a party must serve in order to perfect an appeal of a Board decision in a workers' compensation matter. Ample case law holds that the failure to serve the Board as required by RCW 51.52.110 necessitates dismissal of the action. That the requirement to serve a party is not a jurisdictional requirement does not mean it is an optional requirement, as posited by Krawiec. Consistent with the power to shape access to appellate review of an administrative decision, the Legislature may specify how to perfect such an appeal and a party must follow such requirements.

Timely notifying the Board allows it to carry out its statutory obligations regarding interest, the record, and adjudication of appeals.

A. RCW 51.52.110 Mandates that an Appealing Party Must Both Timely File and Serve an Appeal

[1] The trial court heard this case on a motion to dismiss. The judge necessarily made factual findings about the perfection question and based these findings on the undisputed facts.

Krawiec did not perfect her appeal by following the express requirements of RCW 51.52.110, and the trial court properly dismissed her appeal. RCW 51.52.110 provides the exclusive method for obtaining judicial review of the Board's decisions. It provides that an appealing party has 30 days from the date of receipt of the Board's final decision to file an appeal in superior court. To perfect an appeal, a party must serve the Board:

> 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.

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.

Appellate courts have repeatedly held that dismissal is required where the appellant timely filed a notice of appeal in superior court but did not timely serve the notice of appeal. *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 199-201, 796 P.2d 412 (1992); *Corona v. Boeing Co.*, 111 Wn. App. 1, 8, 46 P.3d 253 (2002); *Hernandez v. Dep't of Labor & Indus.*,

107 Wn. App. 190, 193, 196, 26 P.3d 977 (2001); *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 410-11, 842 P.2d 1006 (1992). As discussed below, these cases involved a subject matter jurisdiction question, but as a separate holding the courts construed RCW 51.52.110 as containing a mandatory requirement of timely service. *Fay*, 115 Wn.2d at 201; *Hernandez*, 107 Wn. App. at 196; *Petta*, 68 Wn. App. at 410; *see* Part V.B.1.

The Supreme Court in *Fay* required timely service to perfect an appeal. In *Fay*, a worker failed 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. 115 Wn.2d at 196. 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 omitted).

The *Fay* Court considered the very argument raised by Krawiec as to whether RCW 51.52.110 only requires dismissal for a late filed appeal, not a late served appeal, because the statute provides that 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 . . . shall become final." *Fay*, 115 Wn.2d at 119-200; App. Br. 9, 14, 17. *Fay* rejected the argument that RCW 51.52.110 does not require service because this sen-

tence discusses only the failure to file. This provision "[does] 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." *Fay*, 115 Wn.2d at 200 (emphasis added).

Fay requires service on those named in RCW 51.52.110. Krawiec seeks to distinguish *Fay* because it involved a late served appeal to the director, not to the Board. App. Br. 15. She argues there need only be service on "interested parties," which she claims does not include the Board. *See* App. Br. 15, 19. She is incorrect that the Board is not an interested party, as the court in *Hernandez* specifically identified the Board as a "required party." *Hernandez*, 107 Wn. App. at 196. In any event, RCW 51.52.110 requires service "on the director and on the board" and does not distinguish between them. And the courts have squarely considered whether a party must serve the Board and have held that RCW 51.52.110 requires it. *Hernandez*, 107 Wn. App. at 196; *Petta*, 68 Wn. App. at 410-11; *see also Sprint Spectrum LP v. Dep't of Revenue*, 156 Wn. App. 949, 951, 961, 235 P.3d 849 (2010) (affirming dismissal when party did not serve Board of Tax Appeals as required under the Administrative Procedures Act), *discussed infra* Part V.B.1.

Krawiec is incorrect when she asserts that most decisions with similar fact patterns at the Court of Appeals do not involve service on the

Board as *Petta* and *Hernandez* dealt with this issue. *See* App. Br. 15. The *Petta* Court held that the Board and the Department are separate entities and RCW 51.52.110 requires service on both. 68 Wn. App. at 410. In *Petta*, the worker timely filed a notice of appeal in superior court. 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 407-08. But the process server failed to do so, a fact that the attorney did not realize for several months. *Id.* The 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 or the director during the 30-day appeal period. *Id.* at 410-11. The court said that even accepting that there had been proper service upon the director by serving the Attorney General's Office, this would not have constituted service on the Board because the Board and the Department "are separate entities" and RCW 51.52.110 required service upon both. *Id.* at 410. Even though the worker's noncompliance with RCW 51.52.110's service requirements was "inadvertent," dismissal was required. *Id.* at 410-11.[2]

[2] 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 on the Board.

In *Hernandez*, the worker timely filed a notice of appeal from a Board order and timely served the director and the employer's attorney. 107 Wn. App. at 194. But she did not timely serve the Board. *Id.* In order to perfect the appeal, the court held that the appealing party must serve the Board: the "second paragraph of the statute . . . sets out how the appeal is perfected, i.e., by filing with the clerk and service on the required parties, including the Board." *Id.* at 196. The court affirmed the trial court's order of dismissal. *Id.* at 199.

Hernandez and *Petta* are not distinguishable. Krawiec argues that *Hernandez* is distinguishable because in *Hernandez* the Board had not been served at the time of the motion to dismiss. Appellant's Br. at 19-20. But the key in *Hernandez*, like here, is that the 30-day service requirement was not followed. Because Krawiec did not timely serve within 30 days as required by RCW 51.52.110, she did not comply with the statute, and it does not matter that she belatedly served the Board. This was the result in *Petta*, where the worker served the Board almost seven months late and the Department filed a motion to dismiss after the Board was served. 68 Wn. App. at 407-08. Petta's late service was untimely because the 30-day time period had run. *Id.* at 410-11.

Here Krawiec timely filed her notice of appeal but did not timely serve the Board. She failed to perfect her appeal under RCW 51.52.110.

Therefore, this Court should dismiss her appeal. *Fay*, 115 Wn.2d at 199, 201; *Hernandez*, 107 Wn. App. at 196; *Petta*, 68 Wn. App. at 410; *accord Sprint Spectrum*, 156 Wn. App. at 951, 961.

B. Appealing Parties Must Follow the Statutory Requirements to Perfect an Appeal

1. The Court Enforces the Filing and Service Requirements Not Because They Are Jurisdictional, But Because They Are the Law

A party must follow the filing and service requirements of RCW 51.52.110, not because they are jurisdictional, but because they are mandatory statutory requirements. Pointing to *ZDI Gaming* and *MHM & F*, Krawiec argues that deadlines imposed by the Legislature are not mandatory because they are not a matter of subject matter jurisdiction. App. Br. 8 (citing *ZDI Gaming, Inc. v. Gambling Comm'n*, 173 Wn.2d 608, 268 P.3d 929 (2012); *MHM & F, L.L.C. v. Pryor*, 168 Wn. App. 451, 277 P.3d 62 (2012)). She argues that the Court need not follow Supreme Court and Court of Appeals precedent in *Fay* and other cases because of those cases' statements regarding jurisdiction. App. Br. 17.

It is correct that the existence of subject matter jurisdiction does not depend on compliance with procedural rules. *ZDI Gaming*, 173 Wn.2d at 617; *see also Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d

310, 316-17, 76 P.3d 1183 (2003); *MHM & F*, 168 Wn. App. 459-61.[3] The critical component in determining subject matter jurisdiction is whether the court has the authority to hear the "type of controversy" before it. *Dougherty*, 150 Wn.2d at 316. No one disputes that the superior court has the authority to consider appeals of Board decisions in workers' compensation appeals.

But *Fay* is not limited to the jurisdictional context, contrary to Krawiec's suggestion. *See* App. Br. 17. The *Fay* Court examined the statute to determine whether RCW 51.52.110 required timely service, and it concluded 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 omitted). *Fay* was first and foremost interpreting statutory language in determining whether service was required to perfect an appeal, and interpretation of the statute in terms of whether service is required does not depend on whether subject matter jurisdiction exists or not.

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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 the 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. *ZDI Gaming* recognized that a party could fail to invoke the court's appellate jurisdiction and thus not have a court review the administrative decision. *See ZDI Gaming*, 173 Wn.2d at 625. "Because an appeal from an administrative body invokes the superior court's appellate jurisdiction, all statutory requirements must be met before jurisdiction is properly invoked." *Id.* at 625 (citations omitted).

Although *Fay*, consistent with contemporaneous terminology by the courts, dismissed for lack of jurisdiction, the same result applies here because the statutory requirement for perfecting an appeal remains, and failing to perfect the appeal requires dismissal on statutory, not jurisdictional grounds. Contrary to Krawiec's implication, no case has overruled the mandatory statutory requirement to perfect an appeal by serving the director, the Board, and the self-insured employer. *Fay* holds that RCW 51.52.110 requires a party to both timely file and timely serve a notice of appeal to perfect an appeal—the failure to do so mandates a dismissal. *Fay*, 115 Wn.2d at 199, 201. Similarly, the court in *Hernandez* held that RCW 51.52.110 required timely service on the Board as a matter of statutory construction. *Hernandez*, 107 Wn. App. at 196; *see also Petta*, 68 Wn. App. at 410.

Krawiec has confused the concept of jurisdiction with statutory deadlines for perfecting appeals of administrative decisions. She argues that when the court has jurisdiction over an appeal, "it should also have the discretion to fashion remedies short of dismissal." App. Br. 8. She assumes that just because a court has subject matter jurisdiction, it can then ignore statutory requirements. To the contrary, the Legislature can specify what conditions it wants an appellant to satisfy to perfect an administrative appeal, and the superior court follows such standards not be-

cause of jurisdictional concerns, but because they are the law. Otherwise, there would be no filing and service deadlines, no statutes of limitations, and no governance of appeals from administrative orders.

The Legislature may specify the conditions necessary to perfect an appeal, and, in many contexts, the Legislature shapes a party's ability to bring an action. For example, courts routinely apply statutes of limitations. *E.g.*, *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997) (statute of limitations is a legislative policy to shield defendants and the judicial system from stale claims). The Legislature may require claims to be filed with government agencies before commencing suit. *E.g.*, RCW 4.92.100; RCW 4.96.020; *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002). The Legislature may also require taxpayers to pay the full amount of an assessment before bringing a challenge, and the courts apply such a requirement. *E.g.*, RCW 82.32.150; *Kirkland v. Dep't of Revenue*, 45 Wn. App. 720, 723, 727 P.2d 254 (1986). Krawiec provides no authority, and the Department is aware of none, that the Legislature cannot require certain prerequisites to appeal an administrative order.[4]

[4] Per *Dougherty*, "[t]he Washington Constitution directs that appellate jurisdiction in the superior courts exists 'as may be prescribed by law.'" 150 Wn.2d at 314 (quoting Const. art. IV, § 6).

In a recent case that did not have a subject matter jurisdiction component, the court held that a party must comply with a statutory requirement to serve a board in order to perfect an appeal. *See Sprint Spectrum*, 156 Wn. App. at 951. *Sprint Spectrum* addressed an appeal from the Board of Tax Appeals, where the statute stated that a copy of the appeal shall be served on the agency (the tax board), and the Court held that the failure to serve the tax board warranted dismissal. *Id.* at 953.

Here the trial court properly dismissed Krawiec's case because, like the party in *Sprint Spectrum*, "the failure to comply with [the statute's] terms for service of a copy of the petition required dismissal of the petition." *Sprint Spectrum*, 156 Wn. App. at 953. The *Sprint Spectrum* Court reviewed the trial court's decision to dismiss the appeal based on the failure to follow the statutory service requirements. 156 Wn. App. at 953. The court concluded that, under the plain language of the statute, dismissal was warranted when a party failed to comply with the service requirements of the statute, namely failure to serve the tax board. *Sprint Spectrum*, 156 Wn. App. at 953, 961, 963. Although it did not expressly discuss whether a court has "discretion" to overlook a party's failure to comply with the service requirements of a statute, *Sprint Spectrum*'s holding logically precludes the possibility that a court could decide, on a discretionary basis, to allow the appeal to go forward: the appeal could go

forward only by ignoring the appellant's failure to comply with the statute. Under *Sprint Spectrum*, the trial court properly dismissed Krawiec's appeal.

2. Unlike Filing in the Wrong County as in *Dougherty*, There Is No Cure for Late Service

Krawiec served the Board late and there is no cure for her late service, when the statute requires such service in 30 days. Krawiec argues that *Dougherty* supports her assertion that RCW 51.52.110 does not require dismissal when a party fails to comply with its service provisions. *E.g.*, App. Br. 13, 17. The Supreme Court in *Dougherty* decided how to approach a workers' compensation appeal filed in the wrong county; it did not limit *Fay*'s and other decisions' requirements that a party timely file and serve an appeal. *See Dougherty*, 150 Wn.2d at 313. *Dougherty* did not address or purport to say that failure to comply with the statutory filing and service perfection requirements of RCW 51.52.110 do not merit dismissal. In *Dougherty*, there was no dispute that the party had not timely filed and served his appeal; rather he filed in the wrong county. The narrow question before the Supreme Court in *Dougherty* 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 (emphasis added).

The *Dougherty* Court noted that RCW 51.52.110 "establishes the appellate jurisdiction of the superior courts and also designates the proper venue for those appeals." *Id.* at 316. 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. *Dougherty*, 150 Wn.2d at 316-17. Thus, the Court held that "RCW 51.52.110's requirements regarding location relate to venue, not jurisdiction." *Id.* at 313. The cure then for filing in the wrong county is to transfer venue. *Id.* at 320.

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, the Board, and the self-insured employer. 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. Conversely, allowing a party to cure a venue error by transferring the case to the proper venue does not render the venue requirement meaningless, since the statute still has the effect of mandating that the case be heard in the correct venue.

RCW 51.52.110 contains mandatory language requiring a party to perfect his or her appeal by serving the required parties within the time limit. The language that a party "shall" perfect an appeal by serving the director and the Board imposes a mandatory obligation to serve the notice of appeal within the 30-day time limit. *See Fay*, 115 Wn.2d at 199; *Hernandez*, 107 Wn. App. at 196. In contrast, the venue requirement is not included in the sentence that specifies how an appeal is perfected: "[s]uch appeal shall be perfected *by filing* with the clerk of the court a notice of appeal *by serving* a copy . . . on the director and on the board." RCW 51.52.110 (emphasis added). Showing that they are mandatory requirements, the statute couples perfection by service with perfection by filing, and venue is not included in these perfection requirements.

The *Dougherty* opinion nowhere states that "shall" is a "directory procedural guide" in RCW 51.52.110, contrary to Krawiec's argument. *Dougherty*, 150 Wn.2d 310; App. Br. 12. Although *Dougherty* concluded that dismissal of the appeal was not warranted in that case, it did not do so based on the notion that the statute's use of the word "shall" was merely permissive. Rather, it concluded that although the statute requires filing an appeal in a given county, the requirement is one of venue rather than jurisdiction. *Dougherty*, 150 Wn.2d at 316-17. Krawiec notes the statutory construction principle that the court presumes that terms used in the

same enactment have the same meaning. App. Br. 13. Her premise that *Dougherty* opined on the meaning of shall is incorrect, but in any event, the court reads the term "shall" in the perfection requirement in the context of what the Legislature is accomplishing in this provision. *See Sprint Spectrum*, 156 Wn.2d at 959 (language must be read in context of entire statute and construed in manner consistent with general purposes of statute).

Here the Legislature specified how to "perfect[]" an appeal. To perfect means "[t]o take all legal steps needed to complete, secure, or record (a claim, right, or interest)." *Black's Law Dictionary* (9th ed. 2009). To accomplish perfection, the Legislature intended "shall" to be mandatory. It is well-established that "shall" imposes a mandatory requirement unless a contrary legislative intent is apparent. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 894, 176 P.3d 577 (2008). The intent is to establish a service deadline as determined by *Fay*. 115 Wn.2d at 199, 201. This distinguishes this case from *Niichel v. Lancaster* where the Court decided that the Legislature did not intend for "shall" to be mandatory under the terms of that distinctive statute. 97 Wn.2d 620, 623, 647 P.2d 1021 (1982), *cited at* App. Br. 13. As determined in *Fay*, the Legislature intended mandatory perfection requirements and *Dougherty* did not hold otherwise.

3. A Prejudice Standard Does Not Apply

RCW 51.52.110 does not give the trial court authority to alter the terms of perfection of an appeal as Krawiec would have. It does not contemplate that there would be another remedy or an analysis of whether there was prejudice unlike other statutory schemes where the Legislature specifically provides for a potential remedy for late service. *See* RCW 50.32.075.[5]

Krawiec is incorrect that the standard is whether there was prejudice. App. Br. 18. Contrary to Krawiec'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. 18. 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. RCW 51.52.110's filing and

[5] 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.

service provision does not provide a prejudice standard; rather it requires perfection of an appeal.

Liberal construction also does not provide for a different remedy as Krawiec argues. App. Br. 8-9. The *Sprint Spectrum* Court considered and rejected this argument when it considered whether liberal construction applied to a service deadline, and correctly concluded that it did not when faced with unambiguous statutory requirements. 156 Wn. App. at 963. Similarly, this Court has no reason to apply liberal construction when faced with an unambiguous requirement. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (the liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act); *Fay*, 115 Wn.2d at 198-201 (interpreting RCW 51.52.110 to require service within 30 days of the Board's decision and order being communicated to the appellant). Following this rule effectuates the Legislature's intent under the unambiguous terms of RCW 51.52.110.

C. Krawiec Did Not Substantially Comply With RCW 51.52.110

1. Noncompliance With a Deadline Is Not Substantial Compliance

Krawiec did not substantially comply with the requirements of RCW 51.52.110. It is well-established that strict compliance with service requirements is not required if a party substantially complies with the stat-

ute. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025 (1997) (service upon attorney was sufficient to serve director). The key to substantial compliance is *actual* compliance with the reasonable objective of the statute. *Id.*; *see Humphrey Indus., Ltd. v. Clay St. Assocs., L.L.C.*, 170 Wn.2d 495, 504, 242 P.3d 846 (2010) (substantial compliance requires actual compliance with respect to the substance essential to the statute's reasonable objectives).

Either one complies with a deadline or one does not. *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 occur where the appellant served the notice of appeal on a required party three days late); *see also Humphrey*, 170 Wn.2d at 505. Noncompliance with a deadline is not substantial compliance. *See Petta*, 68 Wn. App. at 409-10.

The doctrine of substantial compliance allows an appeal by a party who has complied with a statute's objective, albeit with minor defects. *Black*, 131 Wn.2d at 552. 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. *Compare Sprint Spectrum*, 156 Wn. App. at 958 ("substantial compliance does not encompass noncompliance" and

failure to serve tax board is noncompliance with statute) *with Black*, 131 Wn.2d at 553 (serving wrong person at agency is substantial compliance because agency was timely served). Krawiec did not actually comply with the objectives of the statute as she did not serve the Board within 30 days; therefore, she did not substantially comply.

The substantial compliance doctrine only applies when a party has complied with the requirements of the statute. Krawiec quotes *Black* and *Dougherty* for the proposition that "[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." App. Br. 18 (quoting *Doughtery*, 150 Wn.2d at 319-20 (citing *Black*, 131 Wn.2d at 552) (quotation marks omitted)). To further this preference, the Court has developed the substantial compliance doctrine. *See Black*, 131 Wn.2d at 552-53. But as *Black* recognizes, there must be actual compliance with statutory objectives for this doctrine to apply. *Id.* at 552. *Black* does not stand for the proposition that the Legislature cannot specify that a party must perfect his or her appeal through timely filing and service.

2. Timely Notifying the Board Allows for It to Carry Out Its Statutory Obligations Regarding the Record, Interest, and Adjudication of Appeals

Krawiec did not comply with the reasonable objectives of RCW 51.52.110 because she did not timely perfect her appeal by serving the

Board. She argues that she substantially complied with the statute because she served the Board late and the Board filed a certified appeal board record. App. Br. 22. She argues that the "reasonable objective" of the statute is to allow the Board to file the certified appeal board record before trial. App. Br. 22. She is correct that one of the objectives of the statute is to ensure that the record is transmitted, but she is incorrect that the statute provides an optional time frame in serving the Board.

In *Sprint Spectrum*, the court recognized that the purpose of serving the board in that case was to ensure that the agency transmitted the record for review. 156 Wn. App. at 957. The statute required that such notice be given to the agency within 30 days of the agency order. *Id.* at 954. Failure to follow that deadline was noncompliance with the statute, and substantial compliance did not apply. *Id.* at 958. The *Sprint Spectrum* Court said it "would 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.

Here the Legislature accomplished the goal of transmitting the record by specifying the service on the Board in RCW 51.52.110, which must occur within 30 days. Many more equally important reasons exist to timely notify the Board.

First, the Board needs to know if there is a final Board decision in order to calculate interest under RCW 51.52.135 and WAC 263-12-160. *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 925, 91 P.3d 903 (2004). RCW 51.52.135 charges the Board to fix interest when a worker prevails in certain claims. As decided in *Cena*, the Board does not fix interest until the superior court appeal of a Board is resolved. *Cena*, 121 Wn. App. at 925; WAC 263-12-160. The Board must know as soon as possible after the 30-day deadline whether to fix interest because workers may be entitled to interest if there was no appeal. If the Board does not receive a notice of an appeal within 30 days, it knows that it can fix interest. This allows for workers to timely receive their interest, which advances the Industrial Insurance Act's purpose to reduce economic loss. RCW 51.12.010. It also means that further interest does not accrue, which advances the purpose of protecting the state fund and also reducing costs for self-insured employers. *See Parks v. Dep't of Labor & Indus.*, 46 Wn.2d 895, 897, 286 P.2d 104 (1955) (noting role of Department as trustee of industrial insurance funds). Enforcing the thirty-day deadline to serve the Board gives effect to the Legislature's intent to have interest handled expeditiously.

Second, the Board also needs to know when its orders are final when considering related Department orders in the claim. *E.g.*, *Reid v.*

Dep't of Labor & Indus., 1 Wn.2d 430, 436, 96 P.2d 492 (1939); *In re Jason Honsowetz*, No. 08 18940, 2009 WL 6268512 (Wash. Bd. Ind. Ins. Appeals Dec. 4, 2009). For example, the Board cannot consider a case involving reopening when a superior court appeal on a closing order is being considered by the superior court. *Reid*, 1 Wn.2d at 436.

Finally, the Board would decline to consider a CR 60 motion if a party has filed a superior court appeal. In short, providing notice to the Board within 30 days allows the Board to carry out its statutory responsibilities.

Furthermore, the objective of the statute is to have timely service to perfect the appeal. *See Fay*, 115 Wn.2d at 199; *Corona*, 111 Wn. App. at 9; *Hernandez*, 107 Wn. App. at 196-97; *Petta*, 68 Wn. App. at 409. In *Petta* and *Hernandez*, the court rejected the substantial compliance argument because the Board was not properly served. *See Hernandez*, 107 Wn. App. at 196-97; *Petta*, 68 Wn. App. at 409-10. Krawiec admits she did not timely serve the Board and non-compliance is not substantial compliance. *See Hernandez*, 107 Wn. App. at 196-97; *Petta*, 68 Wn. App. at 409-10.

3. Krawiec's Garden Variety Neglect Is Not Excusable

Krawiec seeks to have the Court overlook her failure to comply with the Legislature's perfection requirements. What Krawiec is really

attempting is a backdoor request for equitable tolling of the filing and service deadline. Even if the doctrine is available in this setting, Krawiec makes no claim that equity should apply, and in any event, she could not meet its requirements. *See* App. Br. 1. Equitable tolling provides a method for relief from filing and service deadlines if the individual case warrants its application. "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

Courts typically permit equitable tolling to occur only sparingly, and "should not extend it to a garden variety claim of excusable neglect." *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008) (citations omitted). Here, Krawiec cannot meet the requirements necessary to obtain equitable tolling, and her attempt to circumvent this by arguing the superior court had "discretion" to overlook her failure to comply with the filing and service perfection deadline should be rejected.

D. Krawiec Is Not Entitled to Attorney Fees

Krawiec requests attorney fees, citing RCW 51.52.130. App. Br. 23. She is not entitled to attorney fees as she should not prevail.

RCW 51.52.130(1) provides for attorney fees for a worker who prevails in court under certain circumstances. The Department is liable for

attorney fees only if the worker prevails in the action *and* "the accident fund or medical aid fund is affected by the litigation." RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). This self-insured case does not involve the state funds and if Krawiec prevails and fees are awardable, the self-insured employer Red Dot would be responsible for them. RCW 51.52.130(1) ("attorney fees . . . shall be payable directly by self-insured employer.").

Attorney fees are payable by Red Dot only if (1) the superior court decision is "reversed and modified" and (2) "additional relief is granted to" Krawiec. RCW 51.52.130(1); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180 (2008). The court has held a remand is not additional relief. *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 28-29, 288 P.3d 675 (2012) (remand to director to consider additional information insufficient to trigger fee requirement), *review denied*, 177 Wn. 2d 1021 (2013). Here if Krawiec succeeds she would receive a remand for a trial, which appears not to be additional relief under *Knapp*. The Department will defer to Red Dot as to whether Krawiec is entitled to fees under these circumstances.

VI. CONCLUSION

As recognized by the courts, RCW 51.52.110 imposes a mandatory 30-day deadline to file and serve a notice of appeal. Because Krawiec

failed to comply with this requirement, the trial court properly dismissed her appeal. The Departments asks this Court to affirm.

RESPECTFULLY SUBMITTED this 23rd day of July, 2014.

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NO. 45776-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIA KRAWIEC,

Appellant,

v.

RED DOT CORPORATION AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below described manner:

Via E-File to:

Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division Two
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Via First Class United States Mail, Postage Prepaid to:

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DATED this 23rd day of July, 2014.

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WASHINGTON STATE ATTORNEY GENERAL

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