92218-7

Court of Appeals Cause No. 45776-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARIA KRAWIEC, Petitioner,

v.

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

Respondent.

PETITION FOR REVIEW

Cameron T. Riecan, WSBA# 46330
TACOMA INJURY LAW GROUP, INC., P.S.
A Professional Services Corporation
Attorneys at Law
3848 S. Junett St.
Tacoma, WA 98409
P.O. Box 1113
Tacoma, WA 98401
Ph: (253) 472-8566
Fax: (253) 475-1221
Cameron@tacomainjurylawgroup.com

Attorney for Petitioner, Maria Krawiec

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Rules & Regulations

Treatises

A. IDENTITY OF PETITIONER

Petitioner Maria Krawiec (Hereinafter "Krawiec"), the Appellant in the Court of Appeals proceeding below, hereby petitions the Supreme Court of the State of Washington and seeks review of the opinions, findings, and decisions designated in Section B, infra.

B. COURT OF APPEALS DECISIONS

Krawiec respectfully requests that this Court review the decision of the Court of Appeals of the State of Washington, Division Two, in *Krawiec v. Red Dot Corp. and Dep't of Labor and Indus.*, 45776-8-II, 2015 WL 2225438 (Wash. Ct. App. May 12, 2015), which affirmed the superior court's order dismissing Krawiec's appeal. The Department filed a timely motion to publish on March 14, 2015, joined by Respondent Red Dot Corporation on May 20, 2015, which was granted by the Court of Appeals per an order on August 11, 2015. The copy of the published opinion is attached at Tab 1 of the Appendix.

C. ISSUES PRESENTED FOR REVIEW

I. Whether the dismissal of an appeal under the Industrial Insurance Act is required when (1) the appeal is timely filed and served upon all interested parties, (2) untimely service upon a non-interested party does not prejudice the interested parties, and (3) the Superior Court has discretion to fashion remedies short of dismissal; and

II. Whether filing of an appeal under the Industrial Insurance Act with a superior court within the prescribed time under RCW 51.52.110 invokes jurisdiction, and if so, did the court err in dismissing Appellant's appeal.

D. STATEMENT OF THE CASE

This matter arises out of Krawiec's claim for benefits under the Industrial Insurance Act, which establishes the workers' compensation system for Washington State. RCW 51.04.010, 51.04.020, 51.52.010. In accordance with the Act, the Appellant/Petitioner Krawiec, filed an appeal with the Board of Industrial Insurance Appeals (Board) on January 21, 2011, from an Order of the Department of Labor and Industries (Department) dated December 14, 2010, closing Krawiec's workers' compensation claim. CP 46. The Department's Order was affirmed by way of a Proposed Decision and Order issued by Industrial Appeals Judge Kathleen A. Stockman on August 24, 2012. CP 46-58. Ms. Krawiec filed a Petition for Review of the August 24, 2012 Proposed Decision and Order of the Board, and said Petition was received by the Board on October 10, 2012. CP 28-37. An Order Denying Petition for Review was issued on October 29, 2012, and thus, the Proposed Decision and Order became the Decision and Order of the Board on said date. CP 24.

On November 19, 2012, Krawiec filed a Notice of Appeal of the Board's decision, under its docket number of 11 10761, in the Pierce County Superior Court. CP 1-2. Each party submitted a notice of appearance in the matter at superior court. CP 3, 8-9. Respondent, self-insured employer Red Dot Corporation, filed a demand for trial by a six person jury on April 17, 2013. CP 10. On April 19, 2013, Krawiec filed an amended affidavit of service, with the addition of the Board, to obtain the Certified Appeal Board Record (Original was on November 19, 2012). CP 13-18.

In the Order Setting Case Schedule filed in open court on May 10, 2013, a mandatory court review hearing was scheduled at 9:00 am to be held on June 6, 2013. CP 19-20. On May 16, 2013, the Board sent the certified copy of the Board record to the trial court, cause number 12-2-14905-0, with instructions that after conclusion of the appeal, the parties should forward a conformed copy of the judgment to the Board per WAC 263-12-171. CP 21, 21-144. The Pierce County Superior Court received the certified Board record on May 17, 2013. CP 21.

On June 7, 2013, a request for reassignment was issued by the court and reassigned to a different hearing judge. CP 439. An Order Setting Case Schedule was issued by the court on June 10, 2013, with an anticipated trial date of February 11, 2014. CP 442. The Respondent Red Dot Corporation filed a motion to dismiss Krawiec's appeal on August 26, 2013, on the

grounds that the Pierce County Superior Court lacked jurisdiction due to a failure to timely serve the Board with her notice of appeal. CP 447-463. Ms. Krawiec filed her response to the Defendant's motion to dismiss on September 6, 2013. CP 464-478. The Department of Labor and Industries then filed its response to the Respondent Red Dot Corporation's motion to dismiss on October 31, 2013. CP 482-496. Respondent Red Dot Corporation then filed its reply in support of the Department's response to the Respondent's motion to dismiss. CP 497-499.

On November 15, 2013, the Superior Court, per Judge Vicki L. Hogan, after oral argument was had, granted the Respondent's motion to dismiss and ordered the date of December 13, 2013 for presentation of findings of fact and conclusions of law. CP 500-503. The order was filed in open court on December 13, 2013. CP 504-506. On January 9, 2014, Krawiec filed a notice of appeal to the Court of Appeals, Division II. CP 507-513.

On May 12, 2015, the Court of Appeals affirmed the Superior Court order granting the Respondent Red Dot Corporation's motion to dismiss. *Krawiec v. Red Dot Corp. and Dep't of Labor and Indus.*, 45776-8-II, 2015 WL 2225438 (Wash. Ct. App. May 12, 2015). The Department of Labor and Industries per the Office of the Attorney General timely filed a motion to publish on May 14, 2015, which the Court of Appeals granted on August

11, 2015. Appendix 2. Ms. Krawiec now seeks review of these decisions as contained in this Petition for Review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A petition for review may be accepted by this Court if the decision of the Court of Appeals (1) conflicts with another decision of the Supreme Court; (2) conflicts with another decision of the Court of Appeals; or (3) if the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2) and (4).

The Appellant posits that this Court should review this matter for two reasons. First, the Court of Appeals' decision affirming the superior court order granting the Respondent's motion to dismiss — based on failure to perfect the appeal under RCW 51.52.110 — conflicts with this Court's decisions in *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003); *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n,* 173 Wn.2d 608, 268 P.3d 929 (2012); *MHM&F LLC v. Pryor,* 168 Wn. App. 451, 277 P.3d 62 (2012), and broadens this Court's holding in *Fay v. Nw. Airlines, Inc.,* 115 Wn.2d 194, 201, 796 P.2d 412 (1990). Second, clarification of which procedural errors require dismissal is an issue of substantial public interest that should be determined by this Court.

I. THIS COURT SHOULD ACCEPT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE

HOLDINGS IN *DOUGHERTY, ZDI, AND MHM&F,* AND TO CLARIFY THE APPLICATION OF *FAY.*

The court of appeals held that the superior court did not err in dismissing Krawiec's appeal because she "failed to comply with the statutory requirement that she timely serve the Board with a copy of her notice of appeal." Opinion at 7. However, this holding conflicts with the holdings of *Dougherty,* 150 Wn.2d 310; *ZDI Gaming, Inc.,* 173 Wn.2d 608; and *MHM&F,* 168 Wn. App. 451, and incorrectly broadens this Court's holding in *Fay,* 115 Wn.2d 194. Rather, in light of *ZDI* and *MHM&F*, the holding in *Dougherty* cannot be limited only to procedural venue errors. Here, applying *Dougherty* to Ms. Krawiec's minor procedural service error would avoid inconsistency in the application of the Act and adhere to the Court's preference for "allow[ing] appeals to proceed . . . on the merits in the absence of substantial prejudice to other parties," *Dougherty* at 320, when, unlike *Fay*, subject matter jurisdiction is not at issue.

a. The Court's Holding In *Fay* Does Not Extend Beyond A Jurisdictional Analysis, Which Is Inapplicable When Jurisdiction Is Not At Issue.

In its decision affirming the superior court's dismissal, the Court of Appeals relied on *Fay v. Northwest Airlines, Inc.,* 115 Wn.2d 194, 796 P.2d 412 (1990). The court in *Fay* held that perfecting the appeal within 30 days was a prerequisite to invoking the court's subject matter jurisdiction. However, reliance on *Fay* to uphold dismissal for a procedural error outside

of a jurisdictional context, as was done in this case, incorrectly broadens the Court's holding when jurisdiction is not at issue.

In *Fay*, the Court recognized that on its face, the Act did not require dismissal when a claimant serves notice of appeal 30 days after receiving a Board decision. The court acknowledged that "[t]he perfection provision [of RCW 51.52.110] does not explicitly provide that a party must both file and serve within a specific time." *Fay,* 115 Wn.2d at 198 (citations omitted). However, relying on past cases, the court held that compliance with statutory procedures was required to invoke the court's subject matter jurisdiction, stating that "[c]ases interpreting RCW 51.52.110 hold that in order to invoke the jurisdiction of the superior court an appealing party must file and serve notice within the 30-day appeal period." *Id.*

In its decision, the court in this case also relied on *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 842 P.2d 1006 (1992) and *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 26 P.3d 977 (2001), which followed the *Fay* court's interpretation of RCW 51.52.110. However, the court in these cases also dismissed the appeals based on lack of jurisdiction as a result of service either being delayed or not accomplished. *See Petta,* 68 Wn. App. at 408 (holding trial court erred when it denied Department's motion to dismiss on the ground that superior court lacked subject matter jurisdiction due to claimant's failure to timely serve); *see also Hernandez,*

107 Wn. App. at 195-198 (holding claimant's petition was properly dismissed for lack of subject matter jurisdiction because claimant failed to both file and serve her appeal within 30 days).

The courts in *Fay*, *Petta*, and *Hernandez* were analyzing each case to determine if the superior court had subject matter jurisdiction to entertain the appeal. These cases did not deal with remedies for failure to strictly comply with the statutory procedural requirements of RCW 51.52.110, or the Superior Court's discretion to excuse statutory procedural errors. Therefore, jurisdiction aside, these cases do not stand for the proposition that the Industrial Insurance Act requires automatic dismissal when a claimant serves notice more than 30 days after receiving the Board of Industrial Insurance Appeal's (The Board or BIIA) order.

b. The *Dougherty* Court's Interpretation of Statutory Procedural Requirements Outside Of a Jurisdictional Context Does Not Mandate Dismissal Under RCW 51.52.110 and Favors Resolution on the Merits.

Dougherty is precedential and indicates that courts should look to the prejudice of the parties when determining remedies. In *Dougherty*, the claimant failed to adhere to the Act's statutory procedure when he filed his appeal in the county where his attorney resided. *Dougherty*, 150 Wn.2d at 313, 316-319. The Washington State Supreme Court in *Dougherty* analyzed the Industrial Insurance Act's venue requirement, determined that the Court had jurisdiction, and found the claimant's misfiling could be cured. *Id.*

Despite the clear violation of the procedural directive under RCW 51.52.110, the Supreme Court "[d]ecline[d] to read RCW 51.52.110 as requiring dismissal of Dougherty's otherwise timely filing" and held that "[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." *Id.* at 319-320 (citing *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025 (1997)).

The Court has held that the requirement of service of notice of appeal is intended to ensure "that *interested* parties receive actual notice of appeals of Board decisions." *In re Saltis*, 94 Wn.2d 889, 895, 621 P.2d 716, 719 (1980) (emphasis added). The interested parties in this case, the Employer and the Department of Labor & Industries, have not suffered any prejudice, as they both received timely notice of the appeal. Additionally, like *Dougherty*, the appeal was timely filed and this invoked jurisdiction. Furthermore, like the claimant in *Dougherty*, Krawiec was seeking to comply with the statute after timely filing her appeal by serving notice of the appeal on the Board, which was served on the Board before the motion to dismiss was filed, in order for the certified Board record to be sent to the reviewing court. *See* CP 17.

As the Court in *Dougherty* recognized, "'[e]levating procedural requirements to the level of jurisdictional imperative has little practical

value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice.'" *Dougherty* at 319 (citing *Okanogan Wilderness League, Inc. v. Town of Twisp,* 133 Wn.2d 769, 791, 947 P.2d 732 (1997)). Thus, the Court should apply the *Dougherty* Court's interpretation that the Act does not require dismissal and confirm that, despite procedural errors, courts have discretion to allow claims to proceed in a timely filed appeal.

c. Holding that a Procedural Service Error Requires Dismissal, But a Procedural Venue Error Does Not, Creates an Inconsistency in the Application of the Industrial Insurance Act.

The statute on its face only requires dismissal for failing to file within 30 days, and such a reading is consistent with the appellate authority, which has repeatedly instructed the Superior Courts to allow cases to be heard on the merits. See RCW 51.52.110. Once you file, you invoke jurisdiction. This interpretation of the statute would be consistent with a liberal construction of the Act that resolves all doubts in favor of the worker.

As emphasized by the dissent in *Dougherty*, according to the statute:

> [T]o perfect an appeal, the worker '*shall*' file an appeal in the superior court of one of three possible counties . . . If such worker . . . fails to file with the superior court [his] 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.

Dougherty, 150 Wn.2d at 323 (Fairhurst, J., dissenting) (quoting RCW 51.52.110) (emphasis added). Yet, the *Dougherty* Court interpreted the word "shall" within the Act as a directory procedural guide, rather than an imperative demand. *See Dougherty* at 319-320. Under *Dougherty*, a failure to file in the county as designated by the statute "can be cured by a change of venue." *Id.* at 320. The Court recognized the "distinct preference" for all appeals to proceed absent "substantial prejudice." *Id.* at 319-320. 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. For instance, "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). Moreover, "when 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).

In this case, the service and perfection provisions of the statute state that the, "appeals 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 both procedural steps not to be ignored but at the same time not requiring dismissal, "[a]lthough directory provisions are not intended by the legislature to be disregarded . . . the seriousness of noncompliance is not considered so great . . . ." *Niichel v. Lancaster*, 97 Wn.2d 620, 623, 647 P.2d 1021 (1982) (quoting 1A C. Sands, *Statutory Construction* § 25.03, at 298-99 (4th ed. 1972)). Thus, the Court's holding in *Dougherty* cannot be narrowly read as applying only to venue.

The effect that the courts holding in *Dougherty* has on the interpretation of the word "shall" creates an inconsistency with *Fay* and later holdings that interpret "shall," as it relates to service requirements, as mandatory and requiring dismissal. This Court should take this opportunity to clarify this inconsistency.

d. Based On the Holdings In *ZDI* and *MHM&F, Fay* is No Longer Good Law to the Extent it Mandates Dismissal.

As a matter of construction, when there is conflicting case law, the Court's more recent pronouncement on the subject should control. *Matsyuk v. State Farm Fire & Cas. Co.,* 173 Wn.2d 643, 659, 272 P.3d 802, (2012) (citing *Lunsford v. Saberhagen Holdings, Inc.,* 166 Wn.2d 264, 280, 208

P.3d 1092 (2009) (observing "[a] later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law")). Thus, to the extent that the *Fay* court's holding requires a claimant to file and serve her notice of appeal within 30 days to invoke the superior court's jurisdiction, *Fay* has been overruled by *ZDI* as acknowledged by the court of appeals in *MHM&F*.

In *ZDI Gaming Inc. v. Wash. State Gambling Comm'n*, this Court 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 608, 616-17, 268 P.3d 929 (2012). "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 (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). The Court explained that "[t]he existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules." *ZDI Gaming* at 617 (citing 14 Karl B. Tegland, Washington Practice: Civil Procedure § 3. 1, at 20 (2d ed.2009)). Although *ZDI* was not an appeal under the Industrial Insurance

Act, the Court recognized that the Superior Court was sitting in its appellate capacity on an administrative appeal under the APA. *Id.* at 619-620.

In *MHM&F,* the court held that the landlord's failure to include in his summons the facsimile number of his attorney and failure to include a necessary party did not deprive Superior Court of subject matter jurisdiction. *MHM&F, LLC v. Pryor,* 168 Wn. App. 451, 458-59, 277 P.3d 62 (2012). The court acknowledged that under prior case law such procedural failures would likely have resulted in dismissal for lack of subject matter jurisdiction. *Id.* At 459. Citing several workers' compensation cases, however, the court applied the *ZDI* holding and recognized that the *ZDI* decision overruled precedents that erroneously classify the Superior Court's jurisdiction as statutory. *Id.* at 459-60. 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 a result of a party's failure to act." *Id.* at 460.

Accordingly, the *MHM&F* court's acknowledgment that *ZDI* overruled outmoded precedent elevating procedural requirements to a jurisdictional imperative should include cases such as *Fay.* The Court in *Fay* did not make a statutory interpretation of available remedies when a claimant failed to comply with RCW 51.52.110. Because the Court determined that the Superior Court lacked jurisdiction, there were no

remedies to consider. Therefore, *Fay* does not support mandatory dismissal outside of a jurisdictional analysis and the Court made no such holding.

Here, *Fay* is not instructive because the Superior Court has subject matter jurisdiction. Determining whether the Department and Board correctly determined Ms. Krawiec's entitlement to benefits is the type of controversy that a Superior Court acting in its appellate capacity is empowered to resolve. *See Sprint Spectrum, LLC v. Dep't of Revenue,* 156 Wn. App. 949, 965, 235 P.3d 849 (2010) (Becker, J., concurring, noting that "[w]ithout question, determining whether or not the Department of Revenue assessed taxes correctly is a type of controversy a superior court acting in its appellate capacity is empowered to resolve."). Because jurisdiction is not at issue here, Ms. Krawiec's alleged errors go to statutory interpretation. Therefore, the question of whether the Act requires dismissal of a timely filed appeal due to a minor procedural error that did not cause substantial prejudice to interested parties is answered by *Dougherty*, which interpreted RCW 51.52.110 as allowing a procedurally defective appeal to be remedied and to proceed. *Dougherty,* 150 Wn.2d at 319-320.

e. The Superior Court Should Have the Discretion to Excuse or Remedy a Minor Procedural Service Error in the Absence of Prejudice to Opposing Parties.

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 Wn. 82, 84, 198 P. 728 (1921). Here, the Court, per *Dougherty*, retains its jurisdiction and because no interested party has suffered any prejudice, the Superior Court has the discretion to allow the case to proceed on its merits.

In such a case involving a minor procedural error, the case of *Dougherty* should govern. The Superior Court, as in this case, should have the discretion to fashion remedies short of dismissal and allow cases to be heard on the merits, particularly when the procedural violation has not prejudiced the opposing party, which would be consistent with a liberal construction of the Act that resolves all doubts in favor of the worker.

f. Holding That Dismissal is Required for a Failure to Serve the Board Within 30-days When the Statutory Time Limits Only Reference Filing Conflicts With the Application of Substantial Compliance.

The court in *Saltis* held that "substantial compliance" with procedural rules is sufficient, because "delay and even the loss of lawsuits (should not be) occasioned by unnecessarily complex and vagrant procedural technicalities." *In re Saltis*, at 896 (quoting *Curtis Lumber Co.*

v. Sortor, 83 Wn.2d 764, 767, 522 P.2d 822 (1974)). In its reasoning, the court recognized the need to "'eliminate or at least . . . minimize technical miscarriages of justice inherent in archaic procedural concepts.'" *Id.* Furthermore, the courts have defined substantial compliance as actual compliance with the "substance essential to every reasonable objective of [a] statute." *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 602, 910 P.2d 1284 (1996) (quoting *City of Seattle v. Public Employment Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991); *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981). In *Santore*, the court further explained that "[i]t means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case." *Santore* at 327 (citations omitted).

Here, the court of appeals cited to *Humphrey Indus., Ltd.* in support of its decision that Ms. Krawiec was not in substantial compliance with the statutory time limits, *Krawiec*, 45776-8-II, 2015 WL 2225438 at *7, however, the court in that case noted that the statute "[u]nambiguously require[ed] payment 'within thirty days.'" *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 170 Wn. 2d 495, 506, 242 P.3d 846 (2010). In contrast, RCW 51.52.110 is not unambiguous and does not state that a party must

serve notice within 30-days. Furthermore, the court's reference in this case to *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn. 2d 923, 928-29, 809 P.2d 1377 (1991) is inapplicable as *City of Seattle* does not address substantial compliance with the service provision when the statutory time limit for filing was met.

Rather, here, the "reasonable objective" of the statute is to serve notice on the Board, not because it is an interested or even a named party to the appeal, but to ensure that a copy of the certified board record (Certified Appeal Board Record - CABR) is sent to the interested parties and filed with the clerk before trial. Thus, the timely filing with the clerk and on interested parties and service of notice on the Board for the purpose of obtaining a certified copy of the board record amounts to compliance in meeting "every reasonable objective of the statute." Such compliance is sufficient to satisfy, what the court has characterized as, "the 'spirit' of a procedural requirement . . . ." *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025, 1028 (1997) (quoting *Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wn.2d 227, 230, 643 P.2d 436 (1982)).

II. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(B)(4) BECAUSE THERE IS SUBSTANTIAL PUBLIC INTEREST IN CLARIFYING WHICH PROCEDURAL ERRORS REQUIRE DISMISSAL.

The Industrial Insurance Act applies to nearly every worker in this state and these workers have a substantial interest in knowing that

Washington State Workers' Compensation law is applied in a clear, consistent, and fair manner. In the context of Industrial Insurance appeals, this Court has acknowledged "[t]he distinct preference of modern procedural rules . . . 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 quotations and citations omitted). Allowing Industrial Insurance administrative law claims to proceed on the merits is consistent with the Act's liberal construction and remedial nature.

The error in this case was minor and did not prejudice the interested parties, who had been timely served with notice of appeal. Opposing counsel waited to raise the issue over three months after the Superior Court had already received a certified copy of the Board of Industrial Insurance Appeals record and a trial date had been set. Requiring automatic dismissal for such a procedural error misinterprets the statute and is contrary to the court's preference to allow cases to be heard on the merits.

F. CONCLUSION

For the reasons set forth above, without waiver of issues or arguments made in the lower courts and made herein, including but not limited to attorney fees and expenses as allowed under the law, the

Petitioner Krawiec respectfully requests that this Court grant this petition for review. See RAP 18.1 and RCW 51.52.130.

Respectfully submitted this 9th day of September, 2015.

TACOMA INJURY LAW GROUP, INC., P.S.

CAMERON T. RIECAN, WSBA# 46330
Tacoma Injury Law Group, Inc. P.S.
3848 S. Junett St., Tacoma, WA 98409
P.O. Box 1113, Tacoma, WA 98401
Telephone: (253) 472-8566
Fax: (253) 475-1221
E-mail: Cameron@tacomainjurylawgroup.com

Attorney for Petitioner, Maria Krawiec

TACOMA INJURY LAW GROUP INC PS

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anas@atg.wa.gov
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cameron@tacomainjurylawgroup.com

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AFFIDAVIT OF SERVICE

Cameron T. Riecan, WSBA# 46330
TACOMA INJURY LAW GROUP, INC., P.S.
A Professional Services Corporation
Attorneys at Law
3848 S. Junett St.
Tacoma, WA 98409
P.O. Box 1113
Tacoma, WA 98401
Ph: (253) 472-8566
Fax: (253) 475-1221
Cameron@tacomainjurylawgroup.com

Attorney for Appellant, Maria Krawiec

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

COURTNEY E. RIECAN, being first duly sworn on oath, deposes and says: That she is a Paralegal employed by TACOMA INJURY LAW GROUP, INC., P.S., Attorneys for Appellant/Plaintiff in the above-entitled matter, and that on the 9th day of September 2015, she caused to be served, by E-File, Email, Legal Messenger, Certified Mail, or First Class Mail, as indicated, Petition for Review to the following:

Thomas Hall, WSBA #8708 Ryan Miller, WSBA #40026 Thomas G. Hall & Associates 706 N. 182nd Street P.O. Box 33990 Seattle, WA 98133-0990 Email: rmiller@thall.com Email: thall@thall.com	Via Regular Mail and Email and FAX
Anastasia Sandstrom, WSBA #24163 Office of the Attorney General – Seattle 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 Email: Anas@atg.wa.gov	Via Regular Mail and Email and FAX

DATED this 9th day of September, 2015.

Courtney E. Riecan, Paralegal
Tacoma Injury Law Group, Inc., P.S.

SUBSCRIBED AND SWORN to before me this 9th day of September, 2015.

NOTARY PUBLIC in and for the State of Washington, residing at Tacoma WA. My Commission expires 7/30/19

SARA M WOOD NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 07-30-19

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Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

● Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Courtney Riecan - Email: courtney@tacomainjurylawgroup.com

A copy of this document has been emailed to the following addresses:

rmiller@thall.com
thall@thall.com
anas@atg.wa.gov
cameron@tacomainjurylawgroup.com

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARIA KRAWIEC,

Appellant,

v.

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

Respondents.

No. 45776-8-II

ORDER GRANTING MOTION TO PUBLISH OPINION

The respondent, Department of Labor and Industries, filed a motion to publish the opinion that was filed on May 12, 2015. After consideration, it is hereby

ORDERED that the final paragraph, which reads as follows, shall be deleted: "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." It is further

ORDERED that this opinion is now published.

DATED this 11th day of August, 2015.

PANEL: Jj. Bjorgen, Lee, Sutton

FOR THE COURT:

Bjorgen, A.C.J.

BJORGEN, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARIA KRAWIEC, Appellant, v. RED DOT CORPORATION; DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	No. 45776-8-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — After the Board of Industrial Insurance Appeals (Board) entered an order affirming the decision by the Department of Labor & Industries (Department) to close Maria Krawiec's worker's compensation claim, Krawiec appealed the Board's order to the superior court. The superior court dismissed Krawiec's appeal based on her failure to timely serve the Board as required under RCW 51.52.110. Krawiec appeals, asserting that the superior court erred by dismissing her appeal from the Board's order. We affirm.

FACTS

On August 20, 2001, Krawiec sustained an industrial injury while working for Red Dot Corporation, a self-insured employer. In 2010, the Department entered an order closing Krawiec's worker's compensation claim with benefits paid through August 11, 2010. Krawiec

appealed the Department's order to the Board. On October 29, 2012, the Board entered a final order affirming the Department's decision to close Krawiec's worker's compensation claim. Krawiec received a copy of the Board's final order on October 31, 2012.

On November 19, 2012, Krawiec filed in the Pierce County Superior Court a notice of appeal from the Board's final order. On that same date, Krawiec served copies of her notice of appeal on Red Dot, Red Dot's attorney, and the Department's attorney. Krawiec did not, however, serve the Board with a copy of her notice of appeal until April 19, 2013.

On August 26, 2013, Red Dot filed a motion to dismiss Krawiec's appeal for failing to timely serve the Board with her notice of appeal. The trial court held a hearing on Red Dot's motion, at which hearing the trial court stated it was required to dismiss Krawiec's appeal under RCW 51.52.110. The trial court later entered the following findings of fact and conclusions of law in support of its dismissal order:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board). Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on August 24, 2012 from which Plaintiff filed a timely Petition for Review on October 10, 2012. On October 29, 2012 the Board, having considered Plaintiff's Petition for Review, denied the same and adopted the Proposed Decision and Order as the Board's final order.

1.2 The Plaintiff received her copy of the Board's Final Order on October 31, 2012.

1.3 On November 19, 2012, the Plaintiff filed a Notice of Appeal in Pierce County Superior Court. Her affidavit of service did not include service upon the Board.

1.4 On April 19, 2013, the Plaintiff first served the Board with a copy of her Notice of Appeal, and filed an amended notice of service indicating service of the Board on that date.

Based upon the foregoing Findings of Fact, the Court now makes the following:

II. CONCLUSIONS OF LAW

2.1 This Court has subject matter jurisdiction over the parties to this appeal.

2.2 The Plaintiff did not timely serve the Board and therefore did not comply with RCW 51.52.110. Because she did not comply with the service requirements of RCW 51.52.110, she failed to perfect her appeal and her appeal must be dismissed.

Clerk's Papers (CP) at 505. Krawiec appeals the superior court order dismissing her appeal.

ANALYSIS

I. STANDARD OF REVIEW

RCW 51.52.140 governs appeals for proceedings under Washington's Industrial Insurance Act, providing that "[e]xcept as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases." Krawiec's appeal requires us to construe the service requirements of RCW 51.52.110, an issue of law that we review de novo. *See Dep't of Labor & Indus. v. Granger*, 130 Wn. App. 489, 493, 123 P.3d 858 (2005) ("Statutory construction is a question of law, which we review de novo."). Krawiec does not assign error to any of the superior court's factual findings and, thus, we treat those findings as verities in this appeal. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

II. RCW 51.52.110

Krawiec first contends that the superior court erred in dismissing her appeal for failing to comply with RCW 51.52.110's service provisions because the statute makes a distinction between "filing" and "perfecting" an appeal. She thus argues that her failure to timely serve the Board under the perfection provision of the statute did not require dismissal of her appeal. We disagree.

RCW 51.52.110 provides in relevant part:

> 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.
>
> . . .
>
> 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.

Although Krawiec is correct that this statutory provision does not explicitly state that the failure to "perfect" an appeal will result in the finality of a board decision, our Supreme Court has interpreted RCW 51.52.110 to require "a party appealing a decision of the Board of Industrial Insurance Appeals [to] file *and* serve notice of the appeal on the Director and the Board within 30 days after receiving notification of the Board's decision." *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 201, 796 P.2d 412 (1990). Division Three of our court relied on the *Fay* court's interpretation of RCW 51.52.110 in rejecting the same argument Krawiec raises here, stating, "The perfection provision of the statute does not expressly provide that an appealing party must both file and serve within 30 days in order to invoke the [superior court's appellate] jurisdiction. But that has been the interpretation." *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 196, 26 P.3d 977 (2001) (citing *Fay*, 115 Wn.2d at 198); *see also Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 410, 842 P.2d 1006 (1992) (RCW 51.52.110 requires dismissal of appeal for failure to timely serve Board with notice). Because we are bound by our Supreme Court's interpretation of RCW 51.52.110, we must reject Krawiec's claim that the statute

distinguishes between filing and perfecting an appeal.

III. DISMISSAL REQUIRED UNDER RCW 51.52.110

Next, Krawiec contends that the superior court erred in dismissing her appeal, because it failed to consider sanctions apart from dismissal. In raising this contention, Krawiec acknowledges that *Fay* held that the failure to timely serve required parties under RCW 51.52.110 required dismissal, but she appears to argue that *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Commission*, 173 Wn.2d 608, 268 P.3d 929 (2012), and *Dougherty v. Department of Labor and Industries*, 150 Wn.2d 310, 76 P.3d 1183 (2003), have called the *Fay* holding into question. Krawiec's argument fails for a number of reasons.

First, our Supreme Court has not announced its intention to overrule *Fay*, and our Supreme Court has made clear that it does not "overrule . . . binding precedent *sub silentio*." *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Accordingly, *Fay*'s holding that dismissal is required for the appealing party's failure to timely file and serve under RCW 51.52.110 remains good law and is binding on our court.

Second, neither *ZDI* nor *Dougherty* call into question *Fay*'s holding that a Board's decision is deemed final if an appealing party fails to both timely file and serve required parties under RCW 51.52.110. In *ZDI*, our Supreme Court held that a statute cannot limit the original jurisdiction of superior courts. 173 Wn.2d at 620. In so holding, the *ZDI* court distinguished between a superior court's original jurisdiction and its appellate jurisdiction, stating:

> Our constitution suggests, and our cases have from time to time assumed, that the legislature has greater power to sculpt the appellate jurisdiction of the individual superior courts. *See* WASH. CONST. art. IV, § 6 ("The superior court . . . shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law."). But whether or not the appellate jurisdiction of the superior court can be limited county by county, the simple fact is, *original jurisdiction may not be.*

173 Wn.2d at 619-20. In *Fay*, as here, the superior court was acting under its appellate jurisdiction and not its original jurisdiction. 115 Wn.2d at 197. Accordingly, *ZDI*'s holding regarding a superior court's original jurisdiction has no bearing on *Fay*. Further, even if *ZDI* stood for the proposition that a statute could not divest a superior court of its appellate jurisdiction, it has no bearing on the statutory requirement that an appealing party timely file its appeal and serve required parties.[1]

Dougherty similarly did not affect the holding in *Fay*. In *Dougherty*, our Supreme Court did not address the service requirements of RCW 51.52.110. Instead, the court addressed the statute's venue requirement, holding that

> RCW 51.52.110's requirements regarding the location of the superior court where appeals are to be filed are procedural and relate to venue, not subject matter jurisdiction. Filing an appeal from a decision of the Board in the wrong county does not defeat subject matter jurisdiction and can be cured by a change of venue.

150 Wn.2d at 320. Because *Dougherty* addressed only venue, it did not affect *Fay's* holding that dismissal is required for failure to comply with RCW 51.52.110's service requirement.

Finally, we are not persuaded by Krawiec's argument that a lesser sanction was available to the superior court because the Board was not an interested party to the appeal. This argument ignores RCW 51.52.110's requirement that Krawiec timely serve the Board with her notice of appeal and does not comport with the precedent of *Fay*.

IV. SUBSTANTIAL COMPLIANCE

Last, Krawiec contends that the superior court erred in dismissing her appeal because she

[1] We note that the superior court here dismissed Krawiec's appeal based on her failure to comply with the statutory service requirements under RCW 51.52.110 and not based on a lack of subject matter jurisdiction.

substantially complied with the service requirements of RCW 51.52.110. Again, we disagree.

"Substantial compliance is generally defined as actual compliance with the 'substance essential to every reasonable objective' of a statute." *Hernandez*, 107 Wn. App. at 196 (quoting *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 602, 910 P.2d 1284 (1996)). The doctrine of substantial compliance, though, does not save the failure to comply with statutory time limits, such as the 30-day filing and service requirements of RCW 51.52.110. *See, e.g.*, *Petta*, 68 Wn. App. at 409-10 (holding that failure to serve required party under RCW 51.52.110 was not substantial compliance); *see also Humphrey Indus., Ltd. v. Clay Street Assoc., LLC*, 170 Wn.2d 495, 506, 242 P.3d 846 (2010) ("A six-month deferral of payment is not 'substantial compliance' with a statute that unambiguously requires payment 'within thirty days.'"); *City of Seattle v. Pub. Emp. Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991) ("It is impossible to substantially comply with a statutory time limit. . . . It is either complied with or it is not.").

Krawiec failed to comply with the statutory requirement that she timely serve the Board with a copy of her notice of appeal. Under *Petta*, 68 Wn. App. at 409-10, and the other decisions just cited, that failure cannot constitute substantial compliance with the statute. Therefore, we affirm the superior court's order dismissing Krawiec's appeal.

V. ATTORNEY FEES

Krawiec requests attorney fees under RAP 18.1 and RCW 51.52.130. RAP 18.1 provides that a party may be awarded attorney fees on appeal if "applicable law grants to a party the right to recover" such attorney fees. RCW 51.52.130 provides in relevant part that a worker who succeeds in getting a Board order reversed on appeal is entitled to a reasonable attorney fees award. Krawiec did not succeed in getting the Board order reversed on appeal and, thus, we

deny her request for attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

J.
LEE, J.

Sutton, J.
SUTTON, J.