NO. 90149-0

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL SMITH,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES, and EASTSIDE GLASS & SEALANTS,

Respondents.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Department of Labor and Industries (Department) opposes review of the unpublished decision in this workers' compensation appeal. *See Smith v. Dep't of Labor & Indus.*, No. 69408-I-1 (Wash. Ct. App. Jan. 21, 2014) (Slip op.). Michael Smith failed to meet the explicit, statutory requirements for perfecting an appeal to the Board of Industrial Insurance Appeals (Board) within 30 days. The trial court and Court of Appeals thus properly dismissed his appeal as untimely. Smith nevertheless contends that the Court could ignore these statutory requirements and hear his appeal anyway. This Court should reject his petition for review of this unpublished opinion because the case involves the application of undisputed facts to unambiguous statutory language.

Although Smith couches the case as presenting issues of substantial interest that warrant this Court's review, in truth it presents nothing more than a dismissal of an appeal based on garden-variety neglect relating to his failure to comply with the service requirements imposed by the Industrial Insurance Act. Smith does not dispute that he failed to timely serve the Board or Department, as RCW 51.52.110 requires. Rather he argues the Court of Appeals decision here conflicts with decisions of the Supreme Court and Court of Appeals because the superior court had subject matter jurisdiction over his appeal, and he

argues therefore the court should have fashioned a remedy short of dismissal to address his failure to comply with the statute. But this case does not conflict with any appellate decision and the fact that a court has subject matter over an appeal does not mean that filing and service requirements are optional. Accordingly, this case presents no issue for Supreme Court review.

II. ISSUE

> 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. STATEMENT OF THE CASE

The facts are undisputed as to whether Smith timely perfected his appeal. Slip op. at 1. On December 19, 2011, the Board issued a decision denying Smith's request for workers' compensation benefits. CP 48-51. He received this decision on December 21, 2011. CP 1. RCW 51.52.110 requires that an appealing party file and serve a notice of appeal within 30 days of the receipt of the order. The 30th day was January 20, 2012. Smith filed a notice of appeal in the superior court on January 20, 2012. CP 1. But Smith failed to serve the parties with a copy of the notice of appeal on that date. Instead, Smith mailed a copy of the notice of appeals

to the Department of Labor & Industries, the Board, and the Attorney General's Office, with a postmark of January 23, 2012. CP 67, 69, 75, 87.

The Department filed a motion to dismiss for failure to perfect the appeal. CP 38-43. The superior court granted the motion. CP 238-40. Smith asserts that the superior court attributed the late service to snow, but the superior court did not find this. Pet. at 4; CP 239. Rather, after an evidentiary hearing on the matter, it found only that Smith did not timely serve the appeal. CP 239.[1] Smith appealed the dismissal. CP 241. At the Court of Appeals, Smith did not dispute that he served the copy of the appeal late nor did he claim it was error to not have a finding about snow. Appellant's Br. 2-3, 3 n.2.

In affirming the superior court's dismissal of his appeal, the Court of Appeals rejected Smith's argument that "the superior court erred in failing to recognize it had the discretion to allow his appeal to proceed despite untimely service." Slip op. at 3. The Court of Appeals held that

[1] Although Smith argues that statements made by the trial court about snow should be used to interpret the trial court's written findings of facts and conclusions of law (Pet. at 4, n.1), if such a fact were material, it is well-established that absence of a finding with the party with the burden of proof is a finding against them. *See Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001). It is also well-established that oral rulings cannot substitute for written findings. *Huzzy v. Culbert Const. Co.*, 5 Wn. App. 581, 583, 489 P.2d 749 (1971). In any event, the record does not support that the appeal was not served because of snow. No such inference can be drawn given that the notice of appeal was timely filed on the day Smith now argues he could not serve the appeal because of snow. CP 1. The testimony presented by Smith does no more than make reference to a snow storm during the week of January 20. RP 41, 59. Further, neither witness that Smith presented testified that the weather impacted service of the appeal and, to the contrary, one witness drove that day and another witness had no recollection about difficulty driving in the weather. RP 41, 59.

RCW 51.52.110 required service within 30 days of receipt of the Board decision. Slip op. at 4 (citing RCW 51.52.110; *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990)). Because there was no dispute that Smith did not comply with the statute, the Court of Appeals held that the superior court did not err in dismissing the appeal. Slip op. at 5.

Smith moved for reconsideration, which the Court of Appeals denied. Smith now petitions for review.

IV. ARGUMENT

As decided by this Court, RCW 51.52.110 requires a party to both file and serve a notice of appeal within 30 days of communication of the Board's order. *Fay*, 115 Wn.2d at 198-201. Smith does not dispute that he did not comply with RCW 51.52.110. He argues that because RCW 51.52.110's requirements are not a matter of subject matter jurisdiction, the superior court had discretion to ignore them. Although he claims review is warranted under RAP 13.4(b)(1) and (b)(2), none of the cases he cites stands for the proposition that a superior court is free to ignore the Legislature's directives about requiring a filing and service deadline. Indeed, case law establishes that such a directive must be followed. Likewise, his neglect in complying with the statute's requirements presents no issue of public interest.

This Court has developed two doctrines that allow a party, in the correct case, to argue he or she should be allowed to proceed in a case with defects in filing and service: substantial compliance and equitable tolling. Smith meets neither test, and his backdoor attempt to circumvent these requirements does not present an issue for review.

A. Requiring a Party to Comply with Statutory Requirements Does Not Conflict with *ZDI Gaming*, *Dougherty, MHM&F*, or *Fay*

1. *ZDI Gaming, Dougherty*, and *MHM&F* Do Not Hold That Just Because a Requirement Is Not a Jurisdictional One, It Does Not Need To Be Followed

Contrary to Smith's arguments, the Court of Appeals' unpublished decision, which held that the Legislature imposed a mandatory timeliness requirement for service in RCW 51.52.110, does not conflict with *ZDI Gaming, Inc. v. Washington State Gambling Commission*, 173 Wn.2d 608, 268 P.3d 929 (2012), *Dougherty v. Department of Labor & Industries*, 150 Wn.2d 310, 76 P.3d 1183 (2003), or *MHM&F LLC v. Pryor*, 168 Wn. App. 451, 277 P.3d 52 (2012). Smith argues that review should be granted under RAP 13.4(b)(1) and (2) because he claims that the Court of Appeals' holding that dismissal was required because he failed to follow the "Act's statutory procedures" conflicts with *ZDI Gaming*, *Dougherty*, and *MHM&F*. Pet. at 6. Smith's theory is that deadlines imposed by the

Legislature are not mandatory because they are not a matter of subject matter jurisdiction. But none of these cases so hold.

It is correct that under *ZDI Gaming*, *Dougherty*, and *MHM&F*, the existence of subject matter jurisdiction does not depend on compliance with procedural rules. *ZDI Gaming*, 173 Wn.2d at 617; *Dougherty*, 150 Wn.2d at 316-17; *MHM&F*, 168 Wn. App. 459-61.[2] 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 Smith has confused the concept of jurisdiction with statutory deadlines for filing appeals of administrative decisions. He 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 because of

[2] 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* 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).

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, the 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 in certain actions with the government agencies before commencing suit. *E.g.*, RCW 4.92.100; RCW 4.96.020; *Medina v. Pub. Util. Dist. No. 1 of Benton Cnty.*, 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). Smith provides no authority, and we are aware of none, that the Legislature cannot require certain prerequisites to appeal of an administrative order.

2. Holding That the Legislature May Require a Filing and Service Deadline Is Consistent With *Fay*

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). In RCW 51.52.110, the Legislature has decided the timeliness requirements to perfect an appeal from a Board decision to superior court in a workers' compensation appeal. Smith does not dispute that there is a 30-day deadline to file and serve his appeal in his petition.

Smith also does not dispute that he did not serve a copy of his notice of appeal within the 30 day deadline established by RCW 51.52.110. CP 67, 69, 75, 87. This statute requires such service to perfect an appeal: "Such appeal *shall* be perfected . . . by serving a copy . . . on the director and on the board." The Court of Appeals concluded that the use of the word "'shall' in describing the appellant's duty to perfect the appeal imposes a mandatory obligation to serve the notice of appeal on the Board and the Department within the 30-day time limit." Slip. op. at 5. Not only does this holding not conflict with any decision of the Supreme

Court or Court of Appeals, it is consistent with Washington Supreme Court authority. In *Fay*, the Court interpreted the statute at issue here and held that service must be accomplished within 30 days of the Board's decision and order being communicated to the appellant. *Fay*, 115 Wn.2d at 198-201. Smith argues that *Fay* is limited to a "jurisdictional context" and the holding cannot be "broaden[ed]" Pet. at 8. But he ignores that the *Fay* decision was not limited to the jurisdictional context. Rather the 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). Smith quotes *Fay* for the proposition 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.'" Pet. at 8 (quoting *Fay*, 115 Wn.2d at 198). *Fay*, however, considered the legislative history of the statute, including a 1982 statutory amendment, and concluded that "[w]e hold that the amendment did not alter the requirement that an aggrieved party both file and serve a notice of appeal within 30 days of receiving notice of the Board's decision." *Fay*, 115 Wn.2d at 200.

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 one dismisses for lack of jurisdiction or not. 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 as the Court of Appeals held, failing to perfect the appeal requires dismissal on statutory, not jurisdictional grounds. The Court of Appeals properly relied on *Fay* for the proposition that service must be accomplished within 30 days of the Board's decision. Slip op. at 4.

3. *Dougherty* Does Not Hold That Filing and Service Deadlines Are Optional

Contrary to Smith's arguments, the Court of Appeals decision does not conflict with *Dougherty*, which addressed a question of venue, not service requirements. *See Dougherty*, 150 Wn.2d at 313. Smith argues that this Court in *Dougherty* "has already determined that the Act does not require dismissal of a claimant's otherwise timely filing." Pet. at 19, 9-10. Smith asserts that *Dougherty* stands for the proposition that if an appeal is timely filed, the court has discretion to allow parties to proceed "despite procedural errors." Pet. at 10, 13. Smith overstates the scope of

Dougherty. *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 issue 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 both "establishes the appellate jurisdiction of the superior courts and . . . 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 and Board. As *Petta* recognized, allowing an appellant to serve a notice of appeal late would render RCW 51.52.110's language meaningless. *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 411, 842 P.2d 1006 (1992). 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 actually be heard in the correct venue.

RCW 51.52.110 contains mandatory language requiring a party to perfect his or her appeal by serving a party within the time limit. The Court of Appeals held that RCW 51.52.110's mandatory 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." Slip op. at 5. Smith argues this conflicts with *Dougherty* because in *Dougherty* the statutory language related to the location of venue involved the word "shall." Pet. at 13-14. He argues that it is inconsistent to require dismissal for failure to serve parties but not for failure to file in the correct county. Pet. at 14. But the venue requirement is not included in the sentence that specifies how an appeal is perfected: "[s]uch appeal shall be perfected . . . by serving a copy . . . on the director and on the board." RCW 51.52.110. It is service that is included.

Contrary to Smith's argument, the *Dougherty* opinion nowhere states that "shall" is permissive with respect to the requirement to file and serve an appeal within thirty days. 150 Wn.2d 310. 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 that an appeal be filed in a given county, the requirement is one of venue rather than jurisdiction. *Dougherty*, 150 Wn.2d at 316-17.

4. The Court of Appeals Decision Is Consistent With *Sprint Spectrum*

Not only does the Court of Appeals case not conflict with Supreme Court authority, it is consistent with Court of Appeals case law. *See Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 235 P.3d 849 (2010). *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 Board of Tax Appeals, and the Court held that the failure to serve the Board of Tax Appeals warranted dismissal. *Id.* at 953-54.

Here the court properly dismissed Smith'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. Smith posits *Sprint Spectrum* did

not reach the issue of "remedies." Pet. at 16. But the *Sprint Spectrum* Court necessarily had before it the question of whether dismissal is the proper remedy when a tribunal has subject matter jurisdiction over the case but the appellant failed to follow the service requirements of the relevant statute, as the *Sprint Spectrum* court was reviewing the trial court's decision to dismiss the appeal based on the failure to follow the statutory service requirements. 156 Wn. App. at 952-53. 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. *Sprint Spectrum*, 156 Wn. App. at 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. Smith cites no authority for the notion that the courts have the discretion to ignore statutory requirements for filing and serving appeals.

Because *Sprint Spectrum* involves the failure to follow statutory guidelines and serve an entity named in the statute, the Court of Appeals properly applied it here. Smith incorrectly argues that *Sprint Spectrum*

should not be followed because it was a case under the Administrative Procedure Act. Pet. at 15. It is correct that the statutes are different. But both require filing and service within 30 days after issuance of the final agency order. RCW 51.52.110; RCW 34.05.542; *Fay*, 115 Wn.2d at 198 (service of notice of appeal required 30 days from date order is communicated to the worker). Failure to follow the service requirements dictated by the Legislature necessitates dismissal.

Following this rule effectuates the Legislature's intent under the unambiguous terms of RCW 51.52.110. Smith argues that it is inconsistent with the rule of liberal construction in workers' compensation cases to order dismissal. Pet. at 15-16. The Court in *Sprint Spectrum* considered and rejected this precise 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).[3]

B. Requiring a Party to Follow a Statutory Directive Does Not Create an Issue of Substantial Public Interest

No issue of public interest is created by one party's failure to follow statutory directives. Smith argues that he "committed a minor procedural service error that can be remedied or excused." Pet. at 7. His error is not minor, nor can it be excused.

Smith does not demonstrate that he complied with the terms of the statute; therefore, his failure to timely serve the notice of appeal cannot be excused. It is well-established that strict compliance with service requirements is not required if a party substantially complies with the statute. *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. Assoc., LLC*, 170 Wn.2d 495, 504, 242 P.3d 846 (2010) (substantial compliance requires actual compliance in respect to the substance essential to the statute's reasonable objectives). One either complies with a deadline or one does not. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d

[3] To the extent, there was any ambiguity in the statutory language, this Court has already resolved what the statute means in *Fay*. *Fay*, 115 Wn.2d at 198-201.

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 504-05. The doctrine of substantial compliance allows an appeal of 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 party is noncompliance with statute) *with Black*, 131 Wn.2d at 553 (serving wrong person for agency substantial compliance because agency was timely served). Smith did not actually comply with the objectives of the statute as he did not serve the Director or the Board within 30 days; therefore, he does not have a minor procedural defect that can be cured.

Smith's argument that the Court of Appeals decision "allows a procedural error to interfere with the court's ability to do substantive justice" relies on inapposite authority and ignores the long line of authority holding that failure to meet a deadline cannot constitute

substantial compliance. *See* Pet. at 17. Smith quotes *Black* 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.'" Pet. at 17 (quoting *Black*, 131 Wn.2d at 552 (citations 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. Moreover, contrary to Smith's argument, it is appropriate to follow the Legislature's intent by applying a statutory filing and service requirement, and it does not elevate such requirements to jurisdictional ones to do so. *Contra* Pet. at 17.

Smith incorrectly argues that it is within the court's discretion to consider whether there are remedies that would be appropriate to cure or excuse minor errors. Pet. at 16.[4] What Smith is really attempting is a

[4] To argue that late service is acceptable, Smith relies on *Davidson* and *City of Goldendale*. Pet. at 18 (citing *Davidson v. Thomas*, 55 Wn. App. 794, 780 P.2d 910 (1989); *City of Goldendale v. Graves*, 88 Wn.2d 417, 562 P.2d 1272 (1977)). Neither case applies here. In *Davidson*, under the rule involved, it was only the notice of filing that was considered mandatory. *See Davidson*, 55 Wn. App. at 798. *City of Goldendale* does not concern the timeliness of filing or serving an appeal, and rather involved a late filing of a note for hearing, which is a routine matter for a court's discretion. *City of Goldendale*, 88 Wn.2d at 419, 422.

backdoor request for equitable tolling of the filing and service deadline. Even if the doctrine is available in this setting, Smith makes no claim that equity should apply, and in any event, he could not meet its requirements. *See* Appellant's Br. at 2-3. 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, Smith cannot meet the requirements necessary to obtain equitable tolling, and his attempt to circumvent this by arguing the superior court had "discretion" to overlook his failure to comply with the filing and service perfection deadline should be rejected.

The fact that Smith was late by only three days does not relieve him of his responsibility to comply with the statute. A short time period is non-compliance. In Smith's view, serving three days late is a "minor procedural error" presumably because of the short time period. *See* Pet. at 17. But Smith provides no meaningful distinction between a filing deadline and a service deadline. Under Smith's view, filing three days late

would be a "minor error." Yet to allow this would mean that there is no finality and repose for decisions. The Legislature has specified that perfection of an appeal requires both timely filing the appeal and serving the appeal. RCW 51.52.110. Consistent with this intent, the Court of Appeals properly held that the Legislature required compliance with the service deadline requirements. Following this well-established principle does not raise an issue of substantial public interest.

V. CONCLUSION

Applying a filing and service requirement to perfect an administrative appeal does not conflict with decisions of the Supreme Court or Court of Appeals. The Legislature may specify how to perfect an appeal from an administrative decision. Having a statutory requirement for filing and service does not present an issue of substantial public interest. Accordingly, the Department asks that this Court deny the petition for review.

RESPECTFULLY SUBMITTED this 28th day of May, 2014.

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NO. 90149-0

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL SMITH,

Appellant,

v.

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

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 Answer to Petition for Review and this Certificate of Service in the below described manner.

Via Email filing to:

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Via First Class United States Mail, Postage Prepaid and E-Mail to:

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DATED this 28th day of May, 2014.

SHANA PACARRO-MULLER
Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Subject: RE: Supreme Court No. 90149-0; Michael Smith v. DLI & Eastside Glass & Sealants

Rec'd 5-28-14

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Subject: Supreme Court No. 90149-0; Michael Smith v. DLI & Eastside Glass & Sealants

RE: *Michael Smith v. Department of Labor and Industries and Eastside Glass & Sealants*
Supreme Court Case No. 90149-0

Dear Mr. Carpenter:

Attached for filing are the Department's Answer to Petition for Review and Certificate of Service regarding the above reference matter.
Thank you,

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