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No. 69408-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

MICHAEL SMITH,

Petitioner,

v.

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

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF MOVING PARTY

Petitioner, Michael Smith, respectfully submits this Petition for Review.

II. COURT OF APPEALS DECISION

Mr. Smith seeks review of the Court of Appeals, Division 1, decision filed in this case on January 21, 2014. Appendix at A1-A7. An order denying Mr. Smith's motion for reconsideration was entered on March 17, 2014. Appendix at A8.

III. ISSUE PRESENTED FOR REVIEW

Under the Industrial Insurance Act, must the superior court dismiss a worker's claim for benefits if he timely files his appeal, but serves notice of his appeal one business day late due to severe weather conditions, or, in light of new case law, does the superior court have discretion to excuse the late service or fashion remedies short of dismissal?

IV. STATEMENT OF THE CASE

The Industrial Insurance Act (Act) outlines Washington's workers' compensation system – a remedial statutory benefits program administered by the Department of Labor and Industries (Department) and overseen by the Board of Industrial Insurance Appeals (Board). *See* RCW 51.04.010, 51.04.020, 51.52.010. Washington workers gave up their rights to pursue civil actions against their employers in exchange for this liberally

constructed program designed to provide sure and certain relief to all workers injured in their employment. *See* RCW 51.04.010; *see also Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Workers, however, retained their right to present their case to a jury for a decision regarding their benefits claim. RCW 51.52.115.

On December 21, 2011, Mr. Smith received a Board order denying him benefits. CP 151, 172. Believing the Board erred, Mr. Smith sought judicial review and a jury trial to establish his right to benefits. Thirty days after he received the Board order, on Friday, January 20, 2012, Mr. Smith filed a notice of appeal (notice) in superior court. CP 151-159, 176. Attached to the notice was a certificate of service, signed by Terri Matson, legal assistant to Mr. Smith's attorney; the certificate stated that Ms. Matson served the notice to the appropriate parties via U.S. mail on the same day. CP 157-158, 179-180.

On that following Monday, January 23, 2012, Mr. Smith served the case scheduling order along with a copy of the notice to the Department, Board, and Attorney General's Office via U.S. mail. CP 152, 162-164, 173. This notice was received by all parties. CP 39.

From this time on, Mr. Smith's case proceeded in due course. In mid-February, the Department and employer entered their notices of appearance. CP 13-18. Shortly after, on April 10, 2013, Mr. Smith filed

his demand for a jury trial. CP 19-21. In early July, Mr. Smith submitted his trial materials. CP 22-35. Around this same time, all parties signed statements of trial readiness. CP 36-37.

Then, just four weeks before trial, the Department filed a motion to dismiss under CR 12(b)(1) for lack of subject matter jurisdiction. CP 38-46, 201-202. The Department claimed it only received the notice mailed with the case scheduling order in an envelope postmarked Monday, January 23, 2011. Although the Department quickly withdrew its 12(b)(1) argument, conceding that the superior court did have subject matter jurisdiction, it argued that when a claimant serves notice more than 30 days after receiving a Board order all applicable case law holds that the superior court has no discretion but to dismiss. Verbatim Report of the Proceedings (VRP) 6, ll. 13-25; 7, ll. 1-25; CP 40,199-200.

The superior court held an evidentiary hearing on August 16, 2012 to determine when notice was served. CP 209-208, 238-239; and *see generally* VRP. It was made clear that the case was not dropped, forgotten, or neglected by Mr. Smith or his attorney's office. CP 151-152, 154-161, 172-174, 175-183. Rather, the matter was properly calendared, filed with the court, and prepared for service. *Id.* At issue was whether Ms. Matson served notice on Friday, January 20, 2012, or whether service was not completed until Monday, January 23, 2012. CP 41, 102, 184-185,

208-209; VRP 8-71. Ms. Matson, due to the volume of her practice, has no independent recollection of this case. CP 172-174.

Mr. Smith presented evidence that, at this same time, severe snow and ice storms hit the region. CP 152, 165-171; VRP 41, ll. 8-16. Mr. Smith's lawyer's office remained open and Ms. Matson does not recall the snow that week; however, she does not recall the case filing or service at all. CP 172-174; VRP 59, ll. 3-6, 18-22. It is undisputed that the storm made traveling in the area extremely difficult. CP 152, 165-171.

From this set of circumstances, the superior court inferred the most likely factual scenario: that the delay in service was unintended and likely due to bad weather, "when there is a storm in Seattle people want to leave the office and I think that's probably what occurred here. I think everything was set up probably to get done that day, but . . . it wasn't completed until Monday."[1] VRP 70, ll. 18-23.

The superior court appeared to recognize the injustice of dismissal, "I would find that there [is] substantial compliance. But . . . the substantial compliance cases simply don't fit here in this analysis." VRP

[1] In its order dismissing Mr. Smith's claim, the superior court did not make a finding of fact that the weather affirmatively caused the service delay. CP 239. However, the superior court's rational as to why it found that service was delayed can be read into its order, "[a]n oral decision consistent with findings and conclusions may be used to interpret them[.]" *Johnson v. Whitman*, 1 Wn. App. 540, 546, 463 P.2d 207 (1969). Moreover, according to the court of appeals decision, such a finding would matter; it held that the superior court has no discretion but to dismiss.

77, ll. 12-14. The superior court also attempted to make sense of the Supreme Court's recent decision in *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 173 Wn.2d 608, 268 P.3d 929 (2012). The superior court asked, "I want to know what the application of *ZDI* to the factual finding that an appeal was not timely [served]. . . . It's a remedies issue."[2] VRP 78, ll. 15-20. Ultimately, the superior court agreed with the Department that it was bound by case law and had no discretion to fashion less severe remedies, "if it's discretionary with the Court I have to say I'm very empathetic here with the . . . plaintiff. But I don't think that that's the authority of this court." VRP 77, ll. 7-10.

Mr. Smith appealed the decision to the Court of Appeals, Division 1. The court affirmed dismissal and confirmed that the superior court had no discretion but to dismiss regardless of the circumstances, stating "service must be accomplished within 30 days of the Board's decision and order being communicated to the appellant." Appendix (A) at 4 (opinion at 4 citing *Fay v. Northwest Airlines, Inc.*, 115Wn.2d 194, 198, 796 P.2d 412 (1990)). The court of appeals also denied Mr. Smith's motion for reconsideration. A at 8. Mr. Smith now petitions this Court for review.

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[2] Judge Erlick actually stated, "I want to know what the application of *ZDI* to the factual finding that an appeal was not timely *filed*." VRP 78, ll. 15-20 (emphasis added). However, by the context of the dispute it is clear that Judge Erlick simply misspoke and intended to say "*served*" as service was the issue before the superior court and timely filing is not contested.

V. ARGUMENT

This petition for review asks whether the superior court has discretion to deny the Department's motion to dismiss, a question of law. Questions of law, including questions of statutory construction, are reviewed de novo. *AOL, LLC v. Washington State Dep't of Revenue*, 149 Wn. App. 533, 541-42, 205 P.3d 159, 163 (2009) (citations omitted). This Court will grant review if the court of appeals decision is in conflict with a decision of this Court, is in conflict with another decision of the court of appeals, or if the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2), (3).

A. Review should be Granted under RAP 13.4(b)(1) and (2) because the Decision Below Conflicts with the Decisions in *ZDI*, *Dougherty*, *MHM&F*, and it Broadens the Decision of *Fay*

The superior court found that Mr. Smith served his notice 33 days after receiving the Board's decision. CP 238-239. The court of appeals held that the superior court had no discretion but to dismiss Mr. Smith's claim for benefits because he failed to follow the Act's statutory procedures. A at 1, 4. This holding is contrary to the holdings of *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003); *ZDI Gaming, Inc.*, 173 Wn.2d 608; *MHM&F LLC v. Pryor*, 168 Wn. App. 451, 277 P.3d 62 (2012), and it inappropriately broadens the Court's holding of *Fay*, 115 Wn.2d 194.

Whether the language of the Act requires a superior court with jurisdiction to dismiss a claim for benefits when the claimant serves notice post 30 days, presents a question of first impression. Although similarly situated cases have been dismissed for failing to invoke the court's subject matter jurisdiction, subject matter jurisdiction is not at issue. Jurisdiction aside, the Act on its face and applicable case law does not require dismissal for statutory procedural errors. *See* RCW 51.52.110, *see also Dougherty*, 150 Wn.2d at 319. Mr. Smith committed a minor procedural service error that can be remedied or excused, dismissal is not required.

1. The Court's holding in *Fay* is limited to a jurisdictional analysis

The Court requires dismissal when a claimant fails to invoke the court's subject matter jurisdiction. The Court in *Fay* held that a claimant must serve notice of his appeal within 30 days to invoke the court's subject matter jurisdiction. *Fay*, 115 Wn.2d at 198; *see also Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 408-410, 842 P.2d 1006 (1992) (holding the superior court erred when it denied the Department's motion to dismiss because the court lacked subject matter jurisdiction due to the claimant's failure to timely serve); *see also Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 195-198, 26 P.3d 977 (2001) (holding the claimant's petition was properly dismissed for lack of subject matter

jurisdiction because the claimant failed to both file and serve her appeal within 30 days).

Here, although the court of appeals carefully crafts an argument for dismissal without referencing the superior court's jurisdiction, it continues to rely upon *Fay*. Reliance on *Fay* to uphold dismissal for a procedural error outside of a jurisdictional context inappropriately broadens the Court's holding.

The Court in *Fay* did not interpret the remedies for failing to strictly comply with the statutory procedural requirements of RCW 51.52.110, or the superior court's discretion to excuse statutory procedural errors. When examining the text of the statute, the Court recognized that the Act, on its face, did not require dismissal when a claimant serves 30 days after receiving a Board decision. "The 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). Instead, *Fay* echoed past cases holding that compliance with statutory procedures was required to invoke the court's subject matter jurisdiction, "cases 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.* Thus, jurisdiction aside, *Fay* does not stand for the proposition that the Act requires automatic dismissal

when a claimant serves notice more than 30 days after receiving the Board's order.

2. The *Dougherty* Court's statutory interpretation is controlling and it allowed a claim to proceed despite a procedural error

Absent a jurisdictional bar, the Court holds that failure to strictly adhere to the statutory procedures does not require dismissal. *See Dougherty*, 150 Wn.2d at 319. 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. *Id.* at 313, 316-319. According to the Act:

> [A]n appeal to the superior court *shall* be to the superior court of the county of residence of the worker . . . the superior court of the county wherein the injury occurred or where neither the county of residence not the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county.

RCW 51.52.110 (emphasis added).

The dissent in *Dougherty* argued that the claim should have been dismissed because "to perfect an appeal, the worker 'shall' file an appeal in the superior court of one of three possible counties[.] . . . [T]he statute is also unambiguous that fulfillment of its requirements is mandatory." *Dougherty*, 150 Wn.2d at 323 (Fairhurst, J., dissenting). Yet, the *Dougherty* Court held, "RCW 51.52.110's requirements regarding location relate to venue, not jurisdiction[,]" and it, "*decline[d] to read RCW*

51.52.110 as requiring dismissal of Dougherty's otherwise timely filing." *Id.* at 313, 319 (emphasis added). Instead of dismissing the claim for failing to perfect his appeal, the Court remanded the claim for trial. *Id.* at 320. Here, 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.

3. In light of *ZDI* and *MHM&F*, *Fay* is no longer good law to the extent it mandates dismissal

Dougherty did not expressly overrule *Fay*. Instead, the Court's decision in *ZDI* and the court of appeals decision in *MHM&F* tugged the last thread holding the *Fay* line of cases as viable. To the extent that *Fay*'s holding requires a claimant to file and serve her notice of appeal within 30 days to avail herself of the superior court's jurisdiction, *Fay* has been overruled by *ZDI* as acknowledged by the court of appeals in *MHM&F*. 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")).

The Court in *ZDI* explained that "the existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules." *ZDI Gaming, Inc.*, 173 Wn.2d at 616-617. The Court observed that legislation cannot encroach upon the court's constitutional powers and that courts have rejected the principle that all statutory procedural requirements of superior court review are jurisdictional. *Id.*

Citing to *ZDI*, the court of appeals explained, "[o]ur Supreme Court . . . has overruled precedents that erroneously classify the superior court's jurisdiction as statutory." *MHM&F LLC*, 168 Wn. App. at 459 (citations omitted). "Thus, it is incorrect to say that the court acquires subject matter jurisdiction from an action taken by a party or that it loses subject matter jurisdiction as the result of a party's failure to act." *Id.* at 460 (citations omitted).

In *MHM&F*, a landlord did not comply with statutory procedures when, on his summons, he failed to include a street address for service or a facsimile number for his attorney and he failed to include a necessary party. *MHM&F LLC*, 168 Wn. App. at 458. The court of appeals acknowledged that under prior case law such procedural failures would likely have resulted in dismissal for lack of subject matter jurisdiction. *Id.* at 459. However, the court found that such cases were incorrectly reasoned because the superior court indeed has subject matter jurisdiction

over the type of controversy at issue – title or possession of real property. *Id.* at 459-460.

Therefore, the alleged errors went to statutory interpretation and to matters of procedure. *Id.* at 460. Had these issues been timely brought before the superior court, it could have determined whether failure to strictly follow the statute required that the action be dismissed. *Id.* at 460.

As acknowledged in *MHM&F*, *ZDI* overruled outmoded precedent elevating procedural requirements to a jurisdictional imperative. This should include cases such as *Fay*. The Court's decision in *Fay* did not make a statutory interpretation of available remedies when a claimant failed to comply with RCW 51.52.110. There were no remedies to consider because the superior court lacked jurisdiction. *Fay* does not support mandatory dismissal outside of a jurisdictional analysis and the Court made no such holding.

Here, the superior court has subject matter jurisdiction.[3] Being so, *Fay* is not applicable. Rather, Mr. Smith's alleged errors go to statutory interpretation – the question is whether the Act requires that the action be

[3] Based on the Court's reasoning in *ZDI* the Department agreed that superior court has jurisdiction. *See* VRP 6, ll. 13-25; 7, ll. 1-25. Moreover, determining whether the Department and Board correctly determined benefit entitlements 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.")

dismissed due to a minor and excusable procedural error. The Court in *Dougherty* answered this question when it interpreted RCW 51.52.110 as allowing a procedurally defective appeal to be remedied and to proceed. *Dougherty*, 150 Wn.2d at 319-320.

In light of *ZDI* and *MHM&F*, the Court's holding in *Dougherty* cannot be narrowly read as applying only to venue. Rather, venue selection and service are both statutory procedures under the Act, and the Court's statutory interpretation in *Dougherty* controlls. *See Medcalf v. State Dep't of* Licensing, 133 Wn.2d 290, 300-301, 944 P.2d 1014 (1997) (holding "[w]hen the same word or words are used in different party of the same statute, it is presumed that the words of the enactment are intended to have same meaning."); *see also Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (holding "[i]t 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.").

In *Dougherty*, the Court found that the Act, specifically RCW 51.52.110, did not require dismissal for a statutory procedural error and remanded the case to superior court, despite use of the term "shall." *Dougherty*, 150 Wn.2d at 320. Yet, here, the court below mirrored *Dougherty's* dissent when it held that the superior court had no discretion

but to dismiss because "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 . . . with the 30-day time limit." A at 5. This holding conflicts with the Court's holding in *Dougherty* and creates inconsistent interpretations within the statute.

4. Holding that a procedural service error requires dismissal, but a procedural venue error does not, creates inconsistency within the Act

To challenge a Board decision a claimant must 1) file a notice of appeal in superior court, 2) in one of three specified counties, and 3) serve his notice of appeal to appropriate parties. RCW 51.52.110. As it stands, failure to follow the statutory venue requirement does not require dismissal, but failure follow the statutory service requirement within 30 days does require dismissal.[4] This Court should take this opportunity to clarify this inconsistency.

5. The Act was uniquely formed to address the needs of injured workers and its service requirement is not analogous with the APA

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[4] The statute's filing requirement is not at issue here. However, of these three requirements, the statute, on its face, only states that filing must be accomplished within 30 days to avoid dismissal, "[i]f such worker . . . *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.*" RCW 51.52.110 (emphasis added). Nonetheless, even late filing has been excused. *See Graves v. Vaagen Brothers Lumber, Inc.*, 55 Wn. App. 908, 909, 913, 781 P.2d 895 (1989) (the court found substantial compliance and allowed the claim to proceed, even though not properly filed within 30 days).

Rather than attempt to harmonize this case with *Dougherty*, *ZDI*, and *MHM&F*, the court of appeals analogized this case to *Sprint Spectrum*, which held, "failure to timely serve . . . was a failure to comply with the express terms of the statute," and, "noncompliance with the service requirements . . . supports . . . dismissal." A at 6 *(citing Sprint Spectrum LLC*, 156 Wn. App. at 955, 963). The court of appeals analogy is inaccurate. The Administrative Procedures Act (APA), at issue in *Sprint Spectrum*, and the Industrial Insurance Act, applicable here, are two vastly different programs; statutory construction of one does not extrapolate to the other.

First, the textual requirements of service differ between the Act and the APA. The APA in a single statement reads, "[a] petition for judicial review of an order shall be filed with the court and served . . . within thirty days after service of the final order." RCW 34.05.542(2). By contrast, 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; RCW 51.52.110. As stated, this Court has "decline[d] to read RCW 51.52.110 as requiring dismissal of [a claimant's] otherwise timely *filing*." *Dougherty*, 150 Wn.2d at 319 (emphasis added).

The Act is to be liberally construed in favor of the worker. RCW 51.04.010; *Dennis*, 109 Wn.2d at 470. It would be inconsistent with a

liberal construction to find dismissal mandatory when not explicitly stated in the statute.

Further, unlike here, the *Sprint* court was not asked to consider remedies other than dismissal. "Sprint has not questioned the Department of Revenue's theory that a failure to comply [with the APA service requirements] deprives the superior court of subject matter jurisdiction. Consequently Sprint has not argued that the consequences should be anything other than dismissal[.]" *Sprint Spectrum LLC*, 156 Wn. App. at 967 (Becker, J., concurring).

6. The superior court may excuse or remedy a minor procedural service error

In the case of a minor service delay, remedies, or excusal, have been requested and are possible. A 33 day service cannot be transformed into a 30 day service. However, the error could be excused, cured by a continuance, or have other terms imposed. In other contexts, the superior court regularly examines the circumstances surrounding each case in order to do justice – it looks to the applicable statutes, case law, and facts. *See e.g.* CR 1, 60(b); s*ee also e.g.* RAP 18.8(b). In other words, the court applies its discretion to consider whether remedies would be appropriate to cure or excuse minor errors. The courts should have that discretion in industrial insurance cases as well.

B. Review should be Granted under RAP 13.4(b)(4), as there is Substantial Public Interest to Clarify which Procedural Errors Require Dismissal

The workers' compensation system affects nearly every worker in this state. These workers have a substantial interest in knowing that the workers' compensation Act is applied in a clear, consistent, and fair manner. This Court has held, "[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*, 150 Wn.2d at 316-319 (internal quotation marks and citations omitted).

In this case, the error was a minor and excusable service delay. The error was not even brought to the court or parties' attention until all parties were prepared for trial. To hold that this procedural error requires automatic dismissal misinterprets the statute and continues to elevate the Act's statutory requirements to jurisdictional imperatives. It likewise allows a procedural error to interfere with the court's ability to do substantive justice. Courts generally discourage such a practice. "The distinct preference of modern procedural rules is to allow appeals to proceed to a hearing on the merits in the absence of serious prejudice to other parties." *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025 (1997) (internal quotations and citations omitted).

The Court's preference to hear cases on the merits is present in other areas of law, even in cases of late service. *See Davidson v. Thomas*, 55 Wn. App. 794, 799, 780 P.2d 910 (1989) (holding, "in the absence of prejudice, late service in the circumstances of this case does not warrant dismissal. . . . This result comports with the modern trend of the law to interpret court rules and statutes to allow decision on the merits of the case."); *See also City of Goldendale v. Graves*, 88 Wn.2d 417, 424, 562 P.2d 1272 (1977) (holding that a minor delay should not result in dismissal, "if a court is unable to correct an injustice where a defendant or his attorney was unable to comply with the rules through no intent or act of his own volition[,] [t]his is not reasonable . . . under the circumstances here, justice requires relief.").

Similarly, this Court should allow workers' claims to proceed on their merits, to do so is not only in line with general notions of justice, but is also consistent with the Act's liberal construction and remedial nature.

VI. CONCLUSION

This case proceeded with no complaint and in due course until the eve of trial, when the Department moved to dismiss. The parties were ready for trial, but instead, the superior court felt constrained by *Fay*, and held that it had no choice but to dismiss. This result is not mandated by the statute and conflicts with *Dougherty*, *ZDI*, and *MHM&F*. A minor

service delay is a procedural error, not amounting to a jurisdictional bar, and this Court has already determined that the Act does not require dismissal of a claimant's otherwise timely filing.

Mr. Smith does not argue that failure to timely serve should be ignored. Indeed, there are circumstances in which it would be an abuse of discretion not to dismiss due to service error. However, as is the case in other areas of law, this Court should determine that the superior court is not required to dismiss a worker's claim due to a minor and excusable procedural error. The superior court has discretion to evaluate the merits of a motion to dismiss and consider the length of the delay, the reason for the delay, and the prejudice to other parties.

Based on the forgoing arguments, Mr. Smith respectfully requests this Court to grant his Petition for Review.

Dated this 2nd day of April, 2014.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL SMITH,	)	No. 69408-1-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
DEPARTMENT OF LABOR & INDUSTRIES, and EASTSIDE GLASS & SEALANTS,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	FILED: January 21, 2014

SCHINDLER, J. — Michael Smith challenges dismissal of his appeal of the decision and order of the Board of Industrial Insurance Appeals. Because Smith did not comply with the mandatory statutory service requirements of RCW 51.52.110, we affirm.

FACTS

The facts are undisputed. On December 19, 2011, the Board of Industrial Insurance Appeals (Board) issued a decision and order denying Smith's request for worker compensation benefits. Smith's attorney received a copy of the Board's decision and order on December 21, 2011. Smith filed a notice of appeal in the superior court on January 20, 2012. Smith mailed a copy of the notice of appeal to the Department of Labor and Industries (Department), the Board, and the Attorney General's Office (AGO), with a postmark of January 23, 2012.

The Department filed a motion to dismiss for failure to perfect the appeal. The Department argued that Smith did not comply with the statutory requirement to serve a copy of the notice of appeal on the Department and the Board within 30 days after the Board's decision and order as required by RCW 51.52.110. The Department provided copies of the envelopes with a postmark of January 23, 2012 that were sent to the Department, the Board, and the AGO.

In opposition, Smith submitted a declaration from his attorney and the attorney's paralegal. The paralegal stated that she had "no specific recollection of the filing or mailing" of the notice of appeal but, based on the certificate of service, believed that she had mailed the notice of appeal "in sealed envelopes, with postage prepaid" to the Department, the Board, and the AGO on January 20, 2012. Smith's attorney stated that "[i]n the week leading up to January 20, 2012, the region suffered from severe winter snow and ice storms" but "we did not lose power and were open for business."

The superior court scheduled an evidentiary hearing on service. Witnesses for the Board, the Department, and the AGO testified that they did not receive the notice of appeal until January 25, 2012. Smith's paralegal testified that "[a]ccording to my Certificate of Service it says I mailed it on January 20th and that's all I can rely on." The paralegal was not able to explain why the envelopes were postmarked January 23, 2012. The paralegal did not recall snow or ice causing her any problems that day.

At the conclusion of the hearing, the court found that Smith did not timely serve the notice of appeal: "[W]hat was consistent with each of the State's witnesses is that

they recall receiving only one envelope, all those envelopes were dated January 23rd, there's no record of any envelopes dated January 20th." However, the court reserved ruling on the motion to dismiss pending submission of additional briefing on whether the court had discretion to allow the appeal to proceed despite untimely service.

Following submission of additional briefing, the court granted the motion to dismiss and entered findings of fact and conclusions of law. The findings state:

1.1 On December 21, 2011, Plaintiff's counsel received the Board of Industrial Insurance Appeals' Decision and Order dated December 19, 2011.
1.2 Plaintiff's 30-day time limit to file and serve his notice of appeal expired on January 20, 2012.
1.3 On January 20, 2012, Plaintiff filed an appeal to the December 19, 2011 Decision and Order with the King County Superior Court.
1.4 Plaintiff served the Board, the Department, and the Attorney General's Office on or after January 23, 2012.

The court concluded that Smith's appeal had not been perfected as required by RCW 51.52.110. Smith appeals.

ANALYSIS

On appeal, Smith does not challenge the court's findings.[1] Smith concedes he did not serve the notice of appeal on the Board, the Department, or the AGO within the 30-day time limit as required by RCW 51.52.110. Nevertheless, Smith asserts that the superior court erred in failing to recognize it had the discretion to allow his appeal to proceed despite untimely service.

[1] Unchallenged findings are verities on appeal. In re Marriage of Vander Veen, 62 Wn. App. 861, 865, 815 P.2d 843 (1991).

We review de novo a superior court's dismissal of an action for insufficient service of process. Witt v. Port of Olympia, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). RCW 51.52.110 establishes the exclusive means of appealing from a decision of the Board:

> Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. . . .
> . . . 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.[2]

The statute is clear and unambiguous. In order to perfect an appeal of a Board decision and order, the appellant "shall" serve a copy of the notice of appeal in person or by mail on the Board and the Department. RCW 51.52.110. Such service must be accomplished within 30 days of the Board's decision and order being communicated to the appellant. RCW 51.52.110; Fay v. Nw. Airlines, Inc., 115 Wn.2d 194, 198, 796 P.2d 412 (1990). The word "shall" in a statute imposes a mandatory duty unless a contrary legislative intent is apparent. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). By contrast, where a statute says that a matter "may" be dismissed for failure to substantially comply with the service requirement, dismissal is discretionary and we review a superior court's decision to dismiss for abuse of that discretion. Spokane

[2] (Emphasis added.)

County v. E. Wash. Growth Mgmt. Hearings Bd., 173 Wn. App. 310, 323-24, 293 P.3d 1248 (2013).

We conclude the legislature's 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. RCW 51.52.110. Because there is no dispute Smith did not comply with RCW 51.52.110, the superior court did not err in dismissing his appeal.

Sprint Spectrum, LP v. Department of Revenue, 156 Wn. App. 949, 235 P.3d 849 (2010), is analogous and supports our conclusion. Sprint Spectrum involved the service requirements for an appeal of an administrative agency's final order under the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.542(2) requires that "[a] petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order."[3] The appellant in Sprint Spectrum served copies of its notice of appeal on the Department of Revenue but did not serve the Board of Tax Appeals. Sprint Spectrum, 156 Wn. App. at 952. On appeal, we held that under the plain and unambiguous language of the statute, the failure to timely serve a copy of the notice of appeal on the Board of Tax Appeals supported the superior court's dismissal of the appeal. Sprint Spectrum, 156 Wn. App. at 953-55.

[3] (Emphasis added.)

Smith attempts to distinguish Sprint Spectrum on two grounds. First, Smith argues that unlike the APA, the Industrial Insurance Act (IIA), Title 51 RCW, is to be "liberally construed" in the employee's favor. See RCW 51.12.010; Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Accordingly, "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker." Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 811, 16 P.3d 583 (2001). But here, because the requirement to perfect an appeal of a decision and order under the IIA is not ambiguous, reasonable minds cannot differ.

Smith also claims that Sprint Spectrum held that dismissal of the appeal was appropriate because the failure to comply with the statutory requirements deprived the superior court of subject matter jurisdiction. Citing ZDI Gaming, Inc. v. Washington State Gambling Commission, 173 Wn.2d 608, 268 P.3d 929 (2012), Smith argues that "the existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules." ZDI, 173 Wn.2d at 617. But Sprint Spectrum did not affirm dismissal of the appeal on jurisdictional grounds. The court held that the "failure to timely serve a copy of the petition on the Board was a failure to comply with the express terms of the statute," and "noncompliance with the service requirements of the statute supports the superior court's dismissal of the petition." Sprint Spectrum, 156 Wn. App. at 955, 963.

Because the uncontroverted facts establish that Smith did not comply with the mandatory statutory requirements under RCW 51.52.110 to perfect his appeal of the Board's decision and order, we affirm.

Schindler, J.

WE CONCUR:

Leach, C.J.

Ann, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL SMITH, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, and EASTSIDE GLASS & SEALANTS, Respondents.	)	No. 69408-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Michael Smith, having filed a motion for reconsideration herein and the respondents having filed answers to the motion, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 17th day of March, 2014.

FOR THE COURT:

Judge

RCW 51.52.110
Court appeal — Taking the appeal.

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

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. The department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. If the case is one involving a self-insurer, such self-insurer shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases the department may appear and take part in any proceedings. The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case. No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under *RCW 51.48.070, shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay: PROVIDED, HOWEVER, That whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director, the department shall have the right of appeal to the superior court.

[1988 c 202 § 49; 1982 c 109 § 6; 1977 ex.s. c 350 § 80; 1973 c 40 § 1. Prior: 1972 ex.s. c 50 § 1; 1972 ex.s. c 43 § 36; 1971 ex.s. c 289 § 24; 1971 c 81 § 122; 1961 c 23 § 51.52.110; prior: 1957 c 70 § 61; 1951 c 225 § 14; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Rules of court: Cf. Title 8 RAP, RAP 18.22.

***Reviser's note:** RCW 51.48.070 was repealed by 1996 c 60 § 2.

Severability -- 1988 c 202: See note following RCW 2.24.050.

A-9

No. 69408–1–I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL SMITH, Petitioner, vs. STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES and EASTSIDE GLASS & SEALANTS, Respondents.	**CERTIFICATE OF SERVICE**

I, Lee S. Thomas, hereby certify under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy of Petitioner's Petition for Review to the Supreme Court upon the individuals listed by the following means:

Original to:
Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

[ ] U.S. Postal Service (First Class)
[ ] Facsimile
[ ] E-Service (by agreement)
[X] Via Legal Messenger –For filing April 3, 2014

Copy to:
Anastasia Sandstrom, AAG
Office of the Attorney General
800 5th Avenue, Suite 2000
Seattle WA 98104-3188

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Copy to:
Jennifer L. Truong
AMS Law
1711 S. Jackson Street
Seattle, WA 98144

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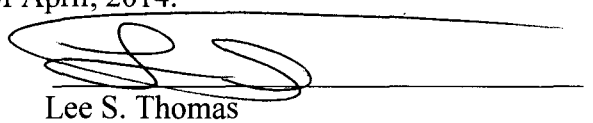
[X] Via Legal Messenger – For service April 3, 2014

DATED this 2nd day of April, 2014.



Lee S. Thomas

CERTIFICATE OF SERVICE
Regarding: Petition for Review