No. 45776-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIA KRAWIEC Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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II. STATEMENT OF ISSUES

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2. 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. (Assignment of Error 1).

III. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

This appeal stems out of a claim under the Industrial Insurance Act (Title 51), and the subsequent procedural history. The Appellant Krawiec, filed an appeal with the Board of Industrial Insurance Appeals on January 21, 2011, from an Order of the Department of Labor and Industries dated

December 14, 2010. 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. Mrs. 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, Appellant Krawiec filed a Notice of Appeal of the Board of Industrial Insurance Appeals decision under its docket number of 11 10761. 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, Appellant Krawiec filed an amended affidavit of service, with addition of the Board of Industrial Insurance Appeals, 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 of Industrial Insurance Appeals 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 on August 26, 2013. CP 447-463. The Appellant 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 in the County of Pierce, 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, Appellant Krawiec filed a notice of appeal to the Court of Appeals, Division II. CP 507-513.

2. STATEMENT OF FACTS

In accordance with the Act, the Appellant herein, Maria Krawiec, sought judicial review of the Board of Industrial Insurance Appeals (Hereinafter "Board") decision of August 24, 2012, and the subsequent denial of the Appellant's Petition for Review dated October 29, 2012.

Ms. Krawiec filed her appeal to the Pierce County Superior Court for the State of Washington on November 19, 2012, well within 30 days of receiving the Board's decision. CP 1. On November 19, 2012, she also completed an affidavit of service that included service upon the department, by and through the Office of the Attorney General, and the self-insured employer. CP 13. On April 19, 2013, the Appellant filed an amended affidavit of service when it became apparent that the November 19, 2012 affidavit of service did not include service upon the Board. CP 17.

On August 22, 2013, nine months after the appeal was originally filed and four months after the Board received service, the defendant filed its motion to dismiss based on a failure to perfect the appeal. CP 447. On December 13, 2013, the Superior Court granted the defendant's motion to

dismiss. CP 504.

IV. STANDARD OF REVIEW

The Superior Court's dismissal of an action for insufficient service of process is a question of law, which this court reviews de novo. *Witt v. Port of Olympia*, 126 Wn. App. 752, 109 P.3d 489 (2005). Normally, review by the Court of Appeals in a workers' compensation case is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review of the decision by the Board of Industrial Insurance Appeals, and whether the superior court's conclusions of laws flow from the findings. *Hill v. Dep't of Labor & Indus*, 161 Wn. App. 286, 253 P.3d 430 (2011), *review denied,* 172 Wn.2d 1008, 259 P.3d 1108 (Table), (2011).

The first step in seeking review of the Department's decision is an appeal to the Board. RCW 51.52.060. Decisions of the Board may be appealed to superior court. RCW 51.52.110. In an appeal of the Board's decision, the superior court holds a de novo hearing but does not hear any evidence or testimony other than that included in the record filed by the Board. *Du Pont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 476, 730 P.2d 1345 (1986). The findings and decision of the Board are *prima facie* correct until the superior court, by a preponderance of the evidence, finds

them incorrect. *Dep't of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983).

In reviewing the superior court's decision, the role of the court of appeals "is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether the conclusions of law flow therefrom." *Du Pont*, 46 Wn. App at 476-77. Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).

However, The Court of Appeals reviews interpretation of the Industrial Insurance Act by the Board of Industrial Insurance Appeals de novo under "error of law" standard and may substitute its judgment for that of the Board, although the court must accord substantial weight to the agency's interpretation. *Littlejohn Construction Company v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). When reviewing a workman's compensation case, the appellate court can evaluate the written record to test conclusions that have been drawn from the facts, explore for sufficiency of the probative evidence to support findings of fact and analyze findings when the evidence is undisputed,

uncontradicted and unimpeached. *Gilbertson v. Dep't of Labor & Indus.*, 22 Wn. App. 813, 592 P.2d 665, (1979).

The Court of Appeals' inquiry is the same as that of the Superior Court when a party appeals from a decision of the Board of Industrial Insurance Appeals regarding workers' compensation claims and the Superior Court grants summary judgment affirming the Board's Decision, *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 117 P.3d 365 (2005), review granted, 156 Wn.2d 1024, 133 P.3d 473 (2006), affirmed 163 Wn.2d 133, 177 P.3d 692 (2008).

"[O]n appeal of a summary judgment order where no facts are in dispute and the only issue is a question of law, the standard of review is de novo." *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993). However, again it is important to note that the Superior Court's dismissal of an action for insufficient service of process is a question of law, which this court reviews de novo. *Witt v. Port of Olympia*, 126 Wn. App. 752, 109 P.3d 489 (2005).

V. LEGAL AUTHORITY AND ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION TO DISMISS BECAUSE UNDER THE ACT THE COURT HAS DISCRETION TO ALLOW AN APPEAL TO PROCEED ON THE MERITS WHEN A SERVICE DELAY RESULTED IN NO PREJUDICE AND WAS EXCUSABLE.

In this case, the superior court does not lack discretion to fashion remedies short of dismissal. Traditionally, there was a long held notion that the superior court lacked jurisdiction to hear Industrial Insurance Appeals unless the claimant complied exactly with all statutory procedural steps. However, recently, the higher courts have clarified that the Superior Court does retain its jurisdiction to hear such appeals. *See ZDI Gaming Inc., v. State*, 173 Wn.2d 608, 268 P.3d 929 (2012), *See also MHM&F, LLC v. Pryor*, 168 Wn. App. 451, 227 P.3d 62 (2012). Furthermore, the "notice requirement is a practical one meant to insure that interested parties receive notice of appeals of Board decisions; thus, substantial compliance is sufficient to invoke the appellate jurisdiction of the superior court." *Black v. Dep't of Labor & Indus.*, 81 Wn. App. 722, 725, 915 P.2d 1170 (1996) *aff'd,* 131 Wn.2d 547, 933 P.2d 1025 (1997) (citing *In re Saltis*, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980)) (Emphasis added). Because the Court has jurisdiction to hear the case, it should also have discretion to fashion remedies short of dismissal.

Additionally, the Act allows for less severe remedies in cases of delayed service. First, the Industrial Insurance Act, as a whole, is remedial in nature and is to be liberally construed in the worker's favor. Second, the Supreme Court of the State of Washington reviewed the venue requirement within the statute at issue, and it determined that the Court

had jurisdiction to allow the claimant to cure his procedural error. *See Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003). Third, the Act makes a distinction between "filing" and "perfecting" an appeal and only states that a board decision will become final if notice of appeal is not filed within the 30-day time limit. Finally, under the facts of this case, it was unreasonable to dismiss Mrs. Krawiec's appeal, as she substantially complied with the statute, no interested party was prejudiced by delayed service on a non-interested party to request a certified copy of the Board record, all interested parties received notice, and the Act's purpose favors the Appellant, Ms. Maria Krawiec, and further supports a finding that the superior court had subject matter jurisdiction to hear the case on the merits.

a. The Act is to be Liberally Construed in Favor of the Worker, i.e. Appellant Maria Krawiec.

The Industrial Insurance Act of the State of Washington was enacted in 1911. The Industrial Insurance Act (Hereinafter "Act") essentially did away with the common law system governing the remedy of workers against employers for injuries received in the course of their employment, "finding that due to modern industrial conditions the remedies were economically unwise and unfair." RCW 51.04.010. The Act is a compromise between employers and their workers. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d

467, 469, 745 P.2d 1295 (1987). In exchange for limited liability, the employer pays on some claims that have no common law liability. *Id.* at 469. And in exchange for a lower rate of recovery than he or she could have received in a civil action, the worker is assured of a remedy without having to fight for it. *Id.*

This case arises out of a workplace injury and thus the Act applies by and through RCW 51. The Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment. *Dennis,* 109 Wn.2d at 470, 745 P.2d 1295 (1987); see also RCW 51.12.010; see also *Montoya v. Greenway Aluminum Co.*, 10 Wn. App. 630, 634, 519 P.2d 22 (1974). In accordance with the Act, the Appellant herein, Maria Krawiec, sought judicial review of the Board's decision of October 29, 2012, by filing her appeal of said decision in the Pierce County Superior Court and thereby invoking its jurisdiction to hear the case on its merits.

The Industrial Insurance Act differs substantially from other administrative laws. The Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573,

141 P.3d 1 (2006). It is important to note that, "the Act was written to provide sure and certain relief to injured workers." *Dennis*, 109 Wn.2d at 470, 475 P.2d 1295 (1987). All doubts are to be resolved in favor of the injured worker. *Id.* at 470. It has been noted that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the entire statutory scheme that receives the benefits of liberal construction. Each statutory provision should be read in reference to the whole act. For instance, "We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001).

In *Cockle v. Dep't of Labor & Indus.,*, 142 Wn.2d 801, 16 P.3d 583 (2001), the Court observed the "overarching objective" of Title 51 RCW is to reduce to a minimum "the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle,* 142 Wn.2d at 822, 16 P.3d 583 (quoting RCW 51.12.010) (Emphasis added). "Also, on a practical level, this Court has recognized that the workers' compensation system should continue "serv[ing] the goal of swift and certain relief for injured workers." *Cockle,* 142 Wn.2d at 822, 16 P.3d 583 (quoting *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

Additionally, "where reasonable minds can differ over what Title 51

provisions mean, in keeping with the legislation's fundamental purpose, the benefits of the doubt belongs to the injured worker." *Id.* at 811. *See Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996); *see also McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

b. The Trial Court Erred in Granting the Motion to Dismiss When Failure to Comply With the Act's Non-jurisdictional Procedural Steps Does Not Require Dismissal.

Consistent with the Act's liberal construction and remedial nature, the Supreme Court in *Dougherty* interpreted the Act's venue requirement as a non-jurisdictional procedural step. *Dougherty*, 150 Wn.2d at 319-320 (overruling *Tennyson v. Dep't of Labor & Indus.*, 189 Wash. 616, 66 P.2d 314 (1937) (holding that failure to comply with venue requirement deprived the Superior Court of jurisdiction)). *Ergo*, the Court held that noncompliance with the Act's procedural directive did not require dismissal. *Id.* The Court interpreted the word "shall" within the Act as a directory procedural guide, rather than an imperative demand. *See Id.* 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" to 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 states 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 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, yet 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)).

c. The Trial Court Erred in Granting the Motion to Dismiss When the Distinction Between "Filing" an Appeal and "Perfecting" One Demonstrates that Dismissal is Required Only When There is a Failure to File the Notice of Appeal Within 30-Day Time Limit.

The only dismissal requirement within the aforementioned statute relates to filing:

> If such worker...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 decisions and order of the board shall become final.

RCW 51.52.110 (emphasis added). While leaving out any reference to service in the above provisions, the statute later states, "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." *Id.* The Legislature was aware that there were venue, service, and filing requirements outlined in RCW 51.52.110, but the only mandatory consequence for failing to comply is related to timely *filing* and not timely *service or venue*. The Legislature could have easily added the word "and serve," *see, e.g.,* RCW 36.70C.040(2)-(3) (barring review of a land use petition by Superior Court unless it is "*filed and served* . . . within twenty-one days of the issuance of the land use decision") (emphasis added), but it did not do so, and a liberal

construction of the Act precludes the Court from reading this into the statute.

In *Fay v. Northwest Airlines, Inc.,* 115 Wn.2d 194, 796 P.2d 412 (1990), the Court considered a similar argument. In that case, like in this one, the claimant filed her workers' compensation appeal to superior court within thirty days of the Board's order denying benefits. *Fay*, 115 Wn.2d at 196. But she served the Department notice more than thirty days after receiving the Board's order. *Id.* Fay argued that the statute did not require both filing and service within thirty days to perfect her appeal. *Id.* at 197. The Court held that Fay, by failing to serve within thirty days, failed to secure the Court's subject matter jurisdiction and dismissed her appeal. *Id.* at 197-198. However, this case is distinguishable from the case at hand. First, this case was heard and decided before the *Dougherty* case previously mentioned. **Secondly, this case, as in most decisions with similar fact patterns at the Court of Appeals, dealt with service upon an interested party, not the Board.** Also, the Washington State Supreme Court has recently 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 at 616-617. "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). Although *ZDI* was not an appeal under the 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 May 2012, the Court of Appeals, Division I, began to apply the *ZDI* holding. *MHM & F, LLC*, 168 Wn. App. at 459. Citing several workers' compensation cases, Division I recognized that the *ZDI* decision overruled precedents that erroneously classify the Superior Court's jurisdiction as statutory. *Id.* at 459-460. 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. In this case, the Respondent is seeking dismissal contending that this Court lacks jurisdiction due to the Appellant's failure to timely perfect her appeal pursuant to RCW 51.62.110 and cites the case of *Corona v. Boeing Co.*, 111 Wn. App. 1, 46 P.3d 253 (2002). As made clear in *ZDI Gaming* and *MHM & F, LLC,* the Superior Court's jurisdiction is not at issue. And as

previously discussed, the case of *Fay* and *Corona*, which are based in jurisdictional principles and precede the case law favoring the Appellant as cited above, is not instructive. Rather, the statute on its face only requires dismissal for failing to file within thirty (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. Once you file, you invoke jurisdiction. Therefore, the Court has discretion to fashion remedies short of dismissal in this case, which would be consistent with a liberal construction of the Act that resolves all doubts in favor of the worker. Finally, *Dougherty* is applicable here, as the Court in that case, outside of jurisdictional arguments, "decline[d] to read RCW 51.52.110 as requiring dismissal of Dougherty's otherwise timely filing." *Dougherty*, 150 Wn.2d at 319-320.

d. Under the Facts of This Case, Allowing the Appeal to Proceed is a Reasonable Exercise of Discretion When there is No Prejudice to the Interest Parties.

As discussed above, the statute does not require dismissal based on untimely service. 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 Wash. 82, 84, 198 P. 728 (1921). The Appellant herein requests that the Court hear the case on the merits to conform to the spirit of Title 51 and its goal of providing sure and certain relief for injured workers and resolving all doubts in favor of the claimant/injured worker, i.e. Appellant Maria Krawiec.

Dougherty is precedential and indicates that the Court should look to the prejudice of the parties when determining remedies. The Court in *Dougherty* analyzed the Act's venue requirement, determined that the Court had jurisdiction, and found the claimant's misfiling could be cured. Despite the clear violation of the procedural directive under RCW 51.52.110, the Supreme Court held that rather than dismissing the claim, "[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." *Dougherty*, 150 Wn.2d at 219-320 (quoting *Black v. Dep't of Labor & Indus.*, 131 Wn.2d at 552). Here, the Court, per *Dougherty*, retains its jurisdiction and because no interested party has suffered any prejudice, the Superior Court has the discretion to, and should allow, the case to proceed on its merits. 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, the appeal was timely filed and this invoked jurisdiction. Furthermore, the Board was served with notice before the motion to dismiss was filed, in order for the certified Board record to be sent to the reviewing court. *See* CP 17. Notice to the Board was for a strictly administrative procedural step to be completed, as they were not an interested party, and the Board was not prejudiced by "late" notice as they are not a party to the case at controversy. Thus, all interested parties were timely served with notice of this appeal, and the appeal was timely e-filed with the County Clerk of the Pierce County Superior Court on November 19, 2012 (Order denying petition for review dated October 29, 2012), with service by Certified Mail to every interested party. *See* CP 13.

Additionally, post *Hernandez* (Appellate Court case), the Washington State Supreme Court had the opportunity to analyze RCW 51.52.110 in the case of *Dougherty v. Dep't of Labor & Indus.*, Furthermore, *Hernandez* is distinguishable from the current case in controversy, as the plaintiff in *Hernandez* failed to serve notice upon the

Board after a motion to dismiss for lack of jurisdiction. *Hernandez v. Dep't of Labor & Indus.,* 107 Wn. App. 190, 195 (2001). Here, Ms. Krawiec gave notice to the Board prior to a motion being made by opposing counsel. The only reason why it was necessary to notify the Board was to make sure that the certified board record was sent to superior court. This purpose is made clear in the statute which states:

> 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 become the record in such case.

RCW 51.52.110. It is also important to note that the statute does not prescribe a time limit for the Board other than requiring service and filing of the certified record sometime before trial. Therefore, there was no prejudice to any party in this case, nor was the Board an interested party in which jurisdiction would fail but for the procedural requirement. The case of *Dougherty* should govern in this instance.

e. Assuming *Arguendo* that the *Dougherty* Case Does Not Apply, the Trial Court Erred in Granting the Motion to Dismiss When the Plaintiff met the Substantial Compliance Standard.

Prior to *Saltis,* "only strict compliance with all statutory procedures could secure superior court jurisdiction." *Hernandez* at 195. However, 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.* Likewise, the court in *Vasquez* followed *Saltis* in holding that "substantial compliance with procedural rules is sufficient to invoke the general as well as the RCW 51.52.110 appellate jurisdiction of the superior court." *Vasquez v. Dep't of Labor & Indus.*, 44 Wn. App. 379, 383, 722 P.2d 854, 857 (1986) (quoting *Saltis* at 896). Thus, substantial compliance with the terms of RCW 51.52.110 is now sufficient to invoke the superior court's appellate jurisdiction. *Id.* at 895-96.

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 "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 is sent to the interested parties and filed with the clerk before trial. This was done 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)).

Likewise, since service upon the Board is merely a procedural step to having the certified copy of the record filed with the court, substantial compliance would be appropriately applied in this case as this requirement was met. Unlike *Hernandez*, where a failure to serve the Board at all would prevent the interested parties and the court from receiving a copy of the certified Board record, and thus, fail to comply with the reasonable

objective of the statute, Appellant Krawiec served notice upon the Board before the motion to dismiss was filed and as a result the interested parties and clerk of the court received the necessary copies of the Board record; this does not amount to no compliance. Rather, the Appellant, Ms. Krawiec, satisfied the requirements, even the substantial compliance standard, by meeting every reasonable objective of the statute and as such, the superior court had subject matter jurisdiction to hear the case on the merits.

2. APPELLANT MARIA KRAWIEC'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURT AS WELL AS WORK DONE AT THE COURT OF APPEALS.

Rule 18.1 of the Rules of Appellate Procedure provides that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1

RCW 51.52.130 provides that in worker's compensation cases, if the worker appeals from a decision and order of the Board and the order is reversed or modified and additional relief is granted to the worker, the worker is entitled to attorney's fees for the work done before that court.

Ms. Krawiec's attorneys therefore request that this Court overturn the decision of the Superior Court which affirmed the decision of the Board, and that they be awarded reasonable fees for the work done on this appeal before the Court.

VI. CONCLUSION

For the reasons stated above, Ms. Krawiec respectfully requests that the Court reverse the trial court's December 13, 2013 Findings of Fact, Conclusions of Law, and Judgment that dismissed Appellant Maria Krawiec's workers' compensation appeal, and to remand this action back to superior court to be heard on its merits.

Ms. Krawiec also respectfully asks this Court to grant her an award for attorney's fees for the work done before this Court under the provisions of RAP 18.1 and RCW 51.52.130.

Respectfully submitted this 27th day of May, 2014.

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Attorney for Appellant, Maria Krawiec

No. 45776-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIA KRAWIEC, Appellant,

v.

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

Respondent.

AFFIDAVIT OF SERVICE

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STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

DOUGLAS W. LOPEZ, being first duly sworn on oath, deposes and says: That he 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 27th day of May, 2014, he caused to be served, by E-File, Email, Legal Messenger, Certified Mail, or First Class Mail, as indicated, Brief of Appellant to the following:

Thomas Hall, WSBA #8708
Ryan Miller, WSBA #40026
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P.O. Box 33990
Seattle, WA 98133-0990

Via Regular Mail

Anastasia Sandstrom, WSBA #24163
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Seattle, WA 98104-3188

Via Regular Mail

DATED this 27th day of May, 2014.

Douglas W. Lopez Paralegal of Tacoma
Injury Law Group, Inc., P.S.

SUBSCRIBED AND SWORN to before me this 27th day of May, 2014.

COURTNEY E RIECAN
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
04-22-17

NOTARY PUBLIC in and for the State of Washington, residing at Tacoma. My Commission expires 4/22/2017.

TACOMA INJURY LAW GROUP INC PS

May 27, 2014 - 4:53 PM

Transmittal Letter

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Court of Appeals Case Number: 45776-8

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