

NO. 45776-8-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

MARIA KRAWIEC,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT RED DOT CORPORATION

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUE2

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT4

A. Ms. Krawiec Failed To Follow The Procedural Requirements Of RCW 51.52.110 And Therefore Her Appeal Must Be Dismissed.....4

B. The Rule of Liberal Construction Does Not Apply Where There Is No Ambiguity In The Law.5

C. The Trial Court Was Correct In Dismissing Mr. Krawiec’s Appeal for Failure to Comply with the Service Requirements of RCW 51.52.110.....6

D. Dismissal Is Required When A Party Fails To Effectuate Timely Service On Interested Parties.7

E. Ms. Krawiec Did Not Substantially Comply With RCW 51.52.110, Therefore Her Appeal Should Be Dismissed.....8

F. Ms. Krawiec Is Not Entitled To Attorney Fees Under The Law.8

V. CONCLUSION10

TABLE OF AUTHORITIES

Cases

<i>Corona v. Boeing Co.</i> , 111 Wn. App. 1, 46 P.3d 253 (2002).....	5
<i>Dougherty v. Dep't of Labor & Indus.</i> 150 Wn.2d 310, 76 P.3d 1183 (2003).....	6
<i>Fay v. N.W. Airlines</i> , 115 Wn.2d 194, 796 P.2d 412 (1990).....	5, 6
<i>Harris v. Dep't of Labor & Indus.</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993).....	5
<i>Hernandez v. Dep't of Labor & Indus.</i> , 107 Wn. App. 190, 26 P.3d 977, (2001).....	5, 6
<i>Jenkins v. Weyerhaeuser Co.</i> , 143 Wn. App. 246, 177 P.3d 180 (2008).....	9
<i>Petta v. Dep't of Labor & Indus.</i> , 68 Wn. App. 406, 842 P.2d 1006 (1992).....	8
<i>Public Util. Dist. No. 1 v. Dep't of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002).....	7
<i>Sacred Heart Med. Ctr. v. Knapp</i> , 172 Wn. App. 26, 288 P.3d 675 (2012).....	9
<i>Technical Employees Ass'n v. Pub. Employment Relations Comm'n</i> , 105 Wn. App. 434, 20 P.3d 472 (2001).....	5
<i>Tenino Aerie v. Grand Aerie</i> , 148 Wn.2d 224, 59 P.3d 655 (2002).....	7

Statutes

RCW 51.52.110	passim
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RCW 51.32.130	9
RCW 51.52.130(1).....	8, 9

I. INTRODUCTION

Red Dot Corporation concurs with the Department of Labor and Industries' Brief of Respondent.

With that said, this is a workers' compensation case; therefore the Industrial Insurance Act applies (i.e. RCW 51). The Industrial Insurance Act requires that if an aggrieved party to a final decision of the Board of Industrial Insurance Appeals (Board) desires to appeal, he/she must file his/her appeal to superior court within 30 days of receipt of the adverse Board decision.

Additionally, in order to perfect the appeal, within 30 days of receipt of the adverse Board decision, the aggrieved party must, at the very least, serve his/her appeal upon the Department of Labor & Industries (Department) and the Board. If an aggrieved party does not serve the Department and the Board within the requisite 30-day period, the superior court must dismiss.

In this case, Ms. Krawiec, the appellant, did not timely serve the Board within 30 days of receipt of the Board's final decision. Rather, the Appellant served the Board approximately 142 days after the 30-day appeal period had run.

After being fully advised, the Pierce County Superior Court correctly dismissed the Appellant's appeal for failure to perfect pursuant to RCW 51.52.110.

The Appellant now seeks to have this Court breathe life into an otherwise untimely appeal. Red Dot Corporation joins with the Department of Labor and Industries and respectfully requests that this Court affirm the December 13, 2013 judgment of the Pierce County Superior Court dismissing the Appellant's appeal.

II. STATEMENT OF THE ISSUE

Whether the Pierce County Superior Court was correct in finding that because Ms. Krawiec did not comply with the service requirements of RCW 51.52.110, Ms. Krawiec failed to perfect her appeal and therefore her appeal must be dismissed.

III. STATEMENT OF THE CASE

On August 20, 2001, Ms. Krawiec was cleaning up around the work area, dropped some garbage into a garbage can, noted pain in her right upper arm and the next day developed low back pain. CP 299-300.

On November 9, 2001 Ms. Krawiec filed a workers' compensation claim for the August 20, 2001 event. CP 99.

On November 21, 2001 the claim was allowed on a temporary basis. CP 99. On February 12, 2002 the claim was allowed and the

Employer was directed by the Department of Labor and Industries to pay all medical and time loss benefits as indicated. CP 99. On February 10, 2003, the claim was closed. CP 99. On March 10, 2005, Ms. Krawiec filed an aggravation application. CP 99. On October 5, 2005 the Department reopened Ms. Krawiec's claim. CP 99.

On September 1, 2010 the Department again closed the claim. CP 100. On October 26, 2010, Ms. Krawiec protested claim closure. CP 100. On December 14, 2010 the Department affirmed claim closure. CP 100. On January 21, 2011 Ms. Krawiec appealed the December 14, 2010 Department order closing the claim to the Board. CP 33-34. On February 7, 2011, the Board of Industrial Insurance Appeals granted the appeal. CP 100.

On August 24, 2012 the Board issued a Proposed Decision and Order affirming the Department's December 14, 2010 order closing the claim. CP 46-58.

On October 9, 2012, Ms. Krawiec filed a Petition for Review of the August 24, 2012 Proposed Decision & Order. CP 28-37.

On October 29, 2012 two members of the three-member Board issued an Order Denying Petition for Review. CP 24.

On November 19, 2012, Ms. Krawiec filed her notice of appeal of the October 29, 2012 Order Denying Petition for Review to Pierce County

Superior Court and served notice upon the Employer and the Department, but did not serve the Board of Industrial Insurance Appeals. CP 454-457.

On April 19, 2013, Ms. Krawiec served the Board of Industrial Insurance Appeals with her notice of appeal to superior court. CP 458-459.

On August 26, 2013 Red Dot Corporation filed a motion to dismiss. CP 447-463. On September 6, 2013 Ms. Krawiec filed her response to Red Dot Corporation's Motion to Dismiss. CP 464-478. The Department of Labor and Industries filed its Response to Red Dot Corporation's Motion to Dismiss on October 31, 2013. CP 482-496. Red Dot Corporation filed its Reply on November 8, 2013. CP 497-498.

On November 15, 2013, the Pierce County Superior Court, after hearing oral argument, granted Red Dot Corporation'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.

IV. ARGUMENT

A. Ms. Krawiec Failed To Follow The Procedural Requirements Of RCW 51.52.110 And Therefore Her Appeal Must Be Dismissed.

Ms. Krawiec failed to follow the mandatory procedural requirements of RCW 51.52.110, therefore her appeal must be dismissed. Appeals from

the Board invoke the superior court's appellate jurisdiction, not general or original jurisdiction. *Fay v. N.W. Airlines*, 115 Wn.2d 194, 796 P.2d 412 (1990). And "[a]cting in its appellate capacity, the superior court is of limited statutory jurisdiction, and a party seeking to properly invoke its jurisdiction must meet all statutory procedural requirements." *Technical Employees Ass'n v. Pub. Employment Relations Comm'n*, 105 Wn. App. 434, 438, 20 P.3d 472 (2001). One of the procedural requirements is for an aggrieved party to serve the notice of appeal upon the Board within the thirty-day appeal period. The Court of Appeals, in *Corona v. Boeing Co.*, 111 Wn. App. 1, 46 P.3d 253 (2002), held 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. See also *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 26 P.3d 977, (2001). It is undisputed that Ms. Krawiec failed to file and serve notice to all parties within the requisite period of time. Therefore, it is proper to dismiss her appeal.

B. The Rule of Liberal Construction Does Not Apply Where There Is No Ambiguity In The Law.

Ms. Krawiec ostensibly asserts that the doctrine of liberal construction should be applied to her case. App. Br. 9-12. Not so. The rule of liberal construction does not apply where there is no ambiguity in the law. See *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056

(1993). Here, RCW 51.52.110 is unambiguous in requiring both filing and service. See *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003). Therefore, the rule of liberal construction should not be applied to Ms. Krawiec's arguments here.

C. The Trial Court Was Correct In Dismissing Mr. Krawiec's Appeal for Failure to Comply with the Service Requirements of RCW 51.52.110.

Ms. Krawiec ostensibly asserts that the trial court erred in that it should not have dismissed her appeal because of a mistake in a "procedural step." App. Br. 12. Ms. Krawiec is incorrect. RCW 51.52.110 requires the "procedural step" of service on the parties. Further, the Supreme Court in *Fay v. N.W. Airlines*, 115 Wn.2d 194, 796 P.2d 412 (1990) has already considered facts very similar to the facts here and has determined that timely service on interested parties is required to perfect an appeal, otherwise the appeal must be dismissed. Ms. Krawiec's assertions on this point are without merit and should be disregarded.

Even further, Ms. Krawiec incorrectly attempts to distinguish the Board from other parties by ostensibly arguing that the Board is not an interested party and therefore it does not need to receive timely service. App. Br. 19. Ms. Krawiec's argument is without merit because the Board has already been determined to be an interested party by the Court of Appeals in *Hernandez v. Labor & Indus.*, 107 Wn. App. 190, 26 P.3d 977

(2001). Even further, RCW 51.52.110 makes no distinction between the Board and other interested parties. Ultimately, Ms. Krawiec's arguments on this point are not consistent with case law and should be disregarded.

D. Dismissal Is Required When A Party Fails To Effectuate Timely Service On Interested Parties.

Ms. Krawiec incorrectly asserts that there is a distinction in the time requirements between filing and service. App. Br. 14. That is, Ms. Krawiec ostensibly asserts that an appeal must be filed with a superior court in 30 days from the date of receipt of the final Board order, but that there is no requirement to effectuate service on the interested parties within 30 days. Ms. Krawiec's assertion is an interpretation of RCW 51.52.110 that fails to consider the statute as a whole and would lead to absurd results in that a party bringing the suit could wait any period of time desired to notify a defendant. In interpreting a statute, it is read as a whole. *Public Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002). Additionally, statutes are not construed in such a way to lead to absurd results. *See Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 59 P.3d 655 (2002). Ms. Krawiec's argument on this point is simply not consistent with the language of RCW 51.52.110 as a whole and, in application, would lead to absurd results. Therefore, Ms. Krawiec's assertions on this point should also be disregarded.

E. Ms. Krawiec Did Not Substantially Comply With RCW 51.52.110, Therefore Her Appeal Should Be Dismissed.

Ms. Krawiec incorrectly asserts that since she substantially complied with RCW 51.52.110, her case should not be dismissed. App. Br. 20. Ms. Krawiec did not substantially comply with RCW 51.52.110. In fact, Ms. Krawiec did not comply with RCW 51.52.110 at all, in that she did not serve the Board within the 30-day requirement. Noncompliance is not substantial compliance. *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 842 P.2d 1006 (1992). Since Ms. Krawiec did not comply at all with RCW 51.52.110, her arguments regarding substantial compliance are inapplicable and should be disregarded.

F. Ms. Krawiec Is Not Entitled To Attorney Fees Under The Law.

Ms. Krawiec requests attorney fees for work performed both at superior court and the Court of Appeals. App. Br. 23. However, Ms. Krawiec cites no authority that entitles her to fees. To the contrary, the authority in existence indicates that Ms. Krawiec is not entitled to fees. RCW 51.52.130(1) states,

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the

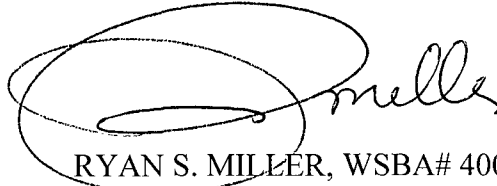
department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

RCW 51.52.130(1) requires 1) that the Board's Order be reversed or modified AND 2) that the claimant has obtained additional relief. *See Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180 (2008). Here, Ms. Krawiec has neither obtained reversal/modification of the Board Order nor has she obtained additional relief (i.e. workers' compensation benefits). Rather, Ms. Krawiec simply seeks remand. Remand is not additional relief. *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 28-29, 288 P.3d 675 (2012). Therefore, pursuant to RCW 51.52.130, Ms. Krawiec's fees request should be denied.

V. CONCLUSION

The law is clear, because Ms. Krawiec failed to timely perfect her appeal pursuant to RCW 51.52.110, her appeal must be dismissed. Therefore, Red Dot Corporation requests that this Court affirm the Pierce County Superior Court's December 13, 2013 judgment.

RESPECTFULLY SUBMITTED this 25 day of July, 2014.

A handwritten signature in black ink, appearing to read "Ryan S. Miller", is written over a circular stamp or seal that is partially obscured by the signature.

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CERTIFICATE OF
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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 Red Dot Corporation's Brief of Respondent and this Certificate of Service in the below described manner:

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