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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 97838-7

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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PERRENOUD ROOFING, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**DEPARTMENT'S ANSWER TO PETITION FOR REVIEW**

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ROBERT W. FERGUSON  
Attorney General

Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104  
206-464-6933

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUE.....1

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

    A. The Department Cited Perrenoud for Violating WISHA,  
    and the Board Affirmed that Citation .....2

    B. The Superior Court Dismissed Perrenoud’s Appeal for  
    Failure to Perfect Its Appeal Within 30 Days as Required  
    by Statute .....2

IV. ARGUMENT .....3

    No Issue of Substantial Public Interest is Raised by Failing to  
    Perfect Appellate Jurisdiction .....3

V. CONCLUSION .....6

## TABLE OF AUTHORITIES

### Cases

<i>Fay v. Nw. Airlines, Inc.</i> , 115 Wn.2d 194, 796 P.2d 412 (1990).....	3, 4, 6
<i>Hernandez v. Dep't of Labor &amp; Indus.</i> , 107 Wn. App. 190, 26 P.3d 977 (2001).....	5
<i>Krawiec v. Red Dot Corp.</i> , 189 Wn. App. 234, 354 P.3d 854 (2015).....	6
<i>Performance Contracting Inc. v. Dep't of Labor &amp; Indus.</i> , No. 32377-3-III, 2015 WL 5564853 (Wash. Ct. App. Sept. 22, 2015).....	5
<i>Stewart v. Dep't of Empl. Sec.</i> , 191 Wn.2d 42, 419 P.3d 838 (2018).....	3, 5, 6

### Statutes

RCW 49.17.140(3).....	3
RCW 49.17.150 .....	1, 2, 3, 5
RCW 49.17.150(1).....	4
RCW 51.52.110 .....	4, 5

## **I. INTRODUCTION**

The Court of Appeals followed well-established case law in affirming the dismissal of an appeal in which the appealing party failed to follow mandatory statutory requirements. Perrenoud Roofing, Inc. failed to meet the express, statutory requirements for perfecting an appeal by failing to serve its appeal on the Board of Industrial Insurance Appeals within 30 days of the Board's decision. The trial court correctly dismissed its appeal as untimely.

Under RCW 49.17.150, a party must both file and serve a superior court appeal on the Director of Labor & Industries and the Board within 30 days of communication of the Board's order. The appellate courts recognize that failure to follow statutory requirements to invoke appellate jurisdiction requires an appeal's dismissal. This routine ruling does not present an issue of substantial public interest.

This Court should affirm.

## **II. ISSUE**

Did the trial court correctly dismiss Perrenoud's appeal because it was not served on the Board within 30 days of communication of the Board's decision as statutorily required to perfect its appeal?

### III. STATEMENT OF THE CASE

#### A. The Department Cited Perrenoud for Violating WISHA, and the Board Affirmed that Citation

The Department issued a citation alleging that Perrenoud violated the Washington Industrial Health & Safety Act. Certified Appeal Board Record (AR) 62-66. Perrenoud appealed the Department's citation to the Board. AR 60-66. The Board issued a final decision affirming the citation on August 9, 2017. *See* AR 3-14.

#### B. The Superior Court Dismissed Perrenoud's Appeal for Failure to Perfect Its Appeal Within 30 Days as Required by Statute

Perrenoud filed a notice of appeal in superior court on August 22, 2017. CP 79-91. The Department received notice of Perrenoud's appeal on August 23, 2017. CP 33. Perrenoud served notice of its appeal on the Board on November 17, 2017, almost three months after Perrenoud filed its appeal with the superior court. CP 35. The Department moved to dismiss because Perrenoud did not timely serve the notice of appeal on the Board, as required by RCW 49.17.150. CP 18-46.

The superior court granted the Department's motion. CP 127-29. Perrenoud appealed. CP 154-55. The Court of Appeals affirmed the superior court. *Perrenoud Roofing, Inc. v. Dep't of Labor & Indus.*, No. 36219-1-III, 2019 WL 4072359 (Wash. Ct. App. Aug. 29, 2019) (unpublished).

#### IV. ARGUMENT

Perrenoud did not perfect its appeal within 30 days of the administrative order as required by RCW 49.17.150. Courts routinely hold that a party needs to perfect its appeal of an administrative order to obtain appellate jurisdiction. *Stewart v. Dep't of Empl. Sec.*, 191 Wn.2d 42, 54, 419 P.3d 838 (2018) (“[B]y failing to serve its [appeal] within the 30-day time limit, a party fails to invoke the superior court’s appellate jurisdiction.”) (internal citations omitted). There is no need to reexamine this established principle, and Perrenoud shows no issue of substantial public interest.

##### **No Issue of Substantial Public Interest is Raised by Failing to Perfect Appellate Jurisdiction**

Perrenoud failed to perfect appellate jurisdiction by not perfecting its appeal within 30 days of communication of the Board’s order, necessitating dismissal. *Stewart*, 191 Wn.2d at 54; *see also Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 198, 796 P.2d 412 (1990) (failure to perfect appeal requires dismissal)., RCW 49.17.150 provides for the superior court appeal process in a WISHA case:

Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred, by filing in such court within thirty days following the communication of the board’s order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside. Such appeal

shall be perfected by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and on the board. The board shall thereupon transmit a copy of the notice of appeal to all parties who participated in proceedings before the board, and shall file in the court the complete record of the proceedings. Upon such filing the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings and the record of proceedings a decree affirming, modifying, or setting aside in all or in part, the decision of the board of industrial insurance appeals and enforcing the same to the extent that such order is affirmed or modified.

RCW 49.17.150(1). The first sentence of RCW 49.17.150(1) requires an aggrieved party to file its notice of appeal in superior court within 30 days. The second sentence establishes how a party “perfect[s]” an appeal: by serving it on both the Department and the Board. RCW 49.17.150(1).

The Court in *Fay* construed almost identical language in RCW 51.52.110 to require perfection within 30 days of the Board’s order.<sup>1</sup> 115 Wn.2d at 198. The Court held that the statutory language required a party to “file and serve notice within the 30-day appeal period.” *Fay*, 115 Wn.2d

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<sup>1</sup> RCW 51.52.110 provides:

Within thirty days after a decision of the board . . . [a] 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.

at 198-99.<sup>2</sup> Although Perrenoud did not raise the argument at the Court of Appeals, it now argues that the case law should be “revised” to show that RCW 49.17.150 does not state a deadline to perfect an appeal. Pet. 1, 5; Appellant’s Br. 1-12. *Fay* forecloses such an argument.

Perrenoud then argues it substantially complied when it filed late. Pet. 5-6. But noncompliance with a deadline is not substantial compliance. *Stewart*, 191 Wn.2d at 53; *Hernandez v. Dep’t of Labor & Indus.*, 107 Wn. App. 190, 196, 26 P.3d 977 (2001). As the Court of Appeals correctly concluded, “[f]or a party to benefit from substantial compliance with service demands, the party to be served must receive actual notice of the appeal to the superior court or service by a method reasonably calculated to succeed.” *Perrenoud Roofing, Inc.*, slip op. 4 (citing *Hernandez*, 107 Wn. App. at 196). As Perrenoud attempted no service on the Board within the statutory timeframe, substantial compliance does not apply. Nor does service of the notice on the Department suffice. The Department is an entirely separate governmental entity from the Board. *Id.* at 5.

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<sup>2</sup> One appellate court, in an unpublished decision, looked to the cases examining RCW 51.52.110’s analogous workers’ compensation statute’s perfection requirements to conclude that there is a requirement to serve the Director and Board within 30 days under RCW 49.17.150. See *Performance Contracting Inc. v. Dep’t of Labor & Indus.*, No. 32377-3-III, 2015 WL 5564853, at \*5, 6 (Wash. Ct. App. Sept. 22, 2015) (unpublished)



Finally, Perrenoud argues that there was no prejudice to the Department caused by its late filing. Pet. 6-7. But “compliance with statutory time limits for perfecting appeals from agency decisions is necessary ‘in order to invoke the jurisdiction of the superior court.’” *Stewart*, 191 Wn.2d at 53 (quoting *Fay*, 115 Wn.2d at 198). It is not the Department’s burden to show prejudice because a showing of prejudice is unnecessary for dismissal to occur. *See Krawiec v. Red Dot Corp.*, 189 Wn. App. 234, 241, 354 P.3d 854 (2015) (failure to serve Board requires dismissal without necessity of considering whether a lesser sanction applied).

The Court of Appeals applied well-settled law, and its decision need not be reviewed.

## V. CONCLUSION

For the above reasons, the Department requests that the Court not grant review.

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RESPECTFULLY SUBMITTED this 8th day of January, 2020.

ROBERT W. FERGUSON  
Attorney General



Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 464-6993

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CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

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Supreme Court Clerk  
Supreme Court of the State of Washington

**E-Mail via Washington State Appellate Courts Portal:**

J. Gregory Lockwood  
[jgregorylockwood@hotmail.com](mailto:jgregorylockwood@hotmail.com)

DATED this 8th day of January, 2020.



SHANA PACARRO-MULLER  
Legal Assistant  
Office of the Attorney General

**WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE**

**January 08, 2020 - 9:26 AM**

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**Filing on Behalf of:** Anastasia R. Sandstrom - Email: anastasia.sandstrom@atg.wa.gov (Alternate Email: )

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