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Division II
State of Washington
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAUL UMINSKI, Respondent,

v.

CLARK COUNTY, Appellant,

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Clark County, by way of its attorneys, seek an order reversing the Superior Court of Clark County's order denying appellant's motion to dismiss respondent's appeal from the Board of Industrial Insurance Appeals for failure to serve his Notice of Appeal on the Director of the Department of Labor and Industries pursuant to Revised Code of Washington (RCW) 51.52.110.

ASSIGNMENT OF ERROR

1. The trial court committed obvious error in denying appellant's motion to dismiss by finding that respondent had satisfied the requirements of RCW 51.52.110 despite failing to serve his Notice of Appeal to the Clark County Superior Court on the Director of the Department of Labor and Industries.

STATEMENT OF THE CASE

Respondent, Paul Uminski, filed a claim for an occupational disease allegedly associated with his employment with appellant, Clark County. Clerks Papers (CP) 11. The Department of Labor and Industries assigned Claim No. SZ38960 to this claim. *Id.* By order dated March 13, 2017, the Department of Labor and Industries denied the claim on the basis that this was not an industrial injury or occupational disease. *Id.* Respondent filed an appeal to the Board of Industrial Insurance Appeals which was assigned Docket No. 17 14288. *Id.* A full hearing was had before Industrial Appeals Judge Jeffrey A. Friedman and evidence was taken. *Id.* The industrial appeals judge issued a Proposed Decision and Order March 19, 2018. *Id.* That order affirmed the Department of Labor and Industries' decision dated March 13, 2017. *Id.* Respondent filed a Petition for Review and the Board of Industrial Insurance Appeals issued an order May 16, 2018, denying the Petition for Review with Errata Sheet. *Id.* Respondent filed a

Notice of Appeal June 4, 2018, with a Certificate of Service dated June 5, 2018. CP 2. As reflected in the Notice of Appeal and the Certificate of Service, no service was provided to the Department of Labor and Industries or the Office of Attorney General for the State of Washington, and to date service on the Department of Labor and Industries has not occurred. CP 2, 11.

ARGUMENT

The respondent failed to comply with RCW 51.52.110 which requires actual service either by mail or personally on the Director of the Department of Labor and Industries (hereinafter "Director"). The trial court committed obvious error because 1) by not serving the Director, the respondent failed to perfect his appeal to Superior Court as required by RCW 51.52.110; 2) dismissal is required when a party fails to perfect its appeal under RCW 51.52.110 because the Superior Court then lacks subject matter jurisdiction; and 3) the Doctrine of Substantial Compliance does not apply to statutorily imposed timelines.

1. The claimant failed to perfect his appeal to Superior Court by not serving the Director of the Department as required by RCW 51.52.110.

The issue in this case is whether the claimant followed the explicit requirements of RCW 51.52.110 necessary to perfect his appeal from the decision of the Board of Industrial Insurance Appeals (hereinafter "Board"). In relevant part, RCW 51.52.110 provides:

> If such worker, beneficiary, employer or other person fails to file with the Superior Court its appeal as provided in this section within said 30 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.
>
> ***
>
> 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.

(*emphasis added*). This court has recently examined this specific statute in *Krawiec v. Red Dot Corp.*, 189 Wash.App. 234, 354 P.3d 854 (2015). *Krawiec* is only distinguishable from the present case in two ways: first, the claimant failed to serve their Notice of Appeal on the Board rather than the Director, and, second, the trial court properly dismissed that action for failure to properly serve all required parties.

In *Krawiec*, the Court noted that the Supreme Court of Washington has interpreted this statute to require the appealing party to both "file and serve a Notice of Appeal on the Director and the Board within 30 days after receiving notification of the Board's decision" in order to perfect an appeal. *Id.* at 239, citing *Fay v. Nw. Airlines, Inc.*, 115 Wash.2d 194, 201, 796 P.2d 412 (1990).

In this case, it is uncontested that respondent has never served the Notice of Appeal on the Director. Rather, the respondent even acknowledged that "the manner of service was not reasonably calculated to give notice to the Director." CP 11.1. As such, the trial court committed obvious error when it determined respondent perfected his appeal necessary to invoke the Court's subject matter jurisdiction and denied appellant's Motion to Dismiss.

2. Dismissal is required when a party fails to perfect their appeal under RCW 51.52.110 because the Superior Court otherwise lacks subject matter jurisdiction to hear the appeal.

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. *Doughtery v. Dep't of Labor & Industries*, 150 Wash.2d 310, 76 P.3d 1183, 1184 (2003). The Supreme Court of Washington has held failure to serve required parties under RCW 51.52.110 requires dismissal because otherwise the Superior Court lacks subject matter jurisdiction. *Fay*, 115 Wash.2d at 197. As the Supreme Court explained in *Fay*:

> Appeals from administrative tribunals invoke the appellate, not the general or original, jurisdiction of the Superior Court. Acting in its appellate capacity, the

> Superior Court is of limited jurisdiction, and all statutory requirements must be met before jurisdiction is properly invoked.

Id. (internal citations omitted). As it is uncontested in this case that respondent failed to meet all of the statutory notice requirements necessary to invoke the Superior Court's appellate jurisdiction, the trial court lacked subject matter jurisdiction to hear respondent's appeal from the Board. As this court stated in *Davis v. Wash. State Dep't of Labor & Indus.*, without subject matter jurisdiction, a Superior Court lacks the power to decide the controversy. 159 Wash.App. 437, 442, 245 P.3d 253 (2011). Without the power to decide this case, further proceedings in the trial court are useless. Consequently, the trial court's refusal to dismiss respondent's action is obvious error within the meaning of RAP 2.3(b)(1) and should be reversed.

3. The Doctrine of Substantial Compliance does not apply to statutorily imposed jurisdictional time limits.

Respondent has argued, and the trial court accepted, that he substantially complied with the requirements of RCW 51.52.110. However, this is simply not accurate. Substantial compliance is generally defined as compliance with the substance essential to every reasonable objective of a statute. *Krawiec*, 189 Wash.App. at 241. However, the Doctrine of Substantial Compliance does not save the failure to comply with statutory time limits, such as the 30-day filing and service requirements of RCW 51.52.110. *Id.*; see also *City of Seattle v. Pub. Emp. Relations Comm'n*, 116 Wash.2d 923, 928-29, 809 P.2d 1377 (1991) ("It is impossible to substantially comply with a statutory time limit… it is either complied with or it is not.").

Again, in this case it is uncontested that the respondent did not comply with the statutory requirements of RCW 51.52.110 because he did not serve the Director of the Department. While respondent is correct historically, courts have found that substantial compliance with this statute is sufficient. *In re Saltis*, 94 Wn. 2d 889, 896, 621 P.2d 716 (1980) establishes a two-part test for

substantial compliance as interpreted under this statute. The test is "(1) the Director received actual Notice of Appeal to the Superior Court or (2) the Notice of Appeal was served in a manner reasonably calculated to give notice to the Director." Neither prong was met in the case at hand.

The first prong is that the Director receive actual notice. In this case, the Affidavit of Roxanne Yaconetti (previously provided) demonstrates that the Director did not receive actual notice of this appeal. CP 11. There is no case law allowing service on the Office of Attorney General to substitute for actual notice to the Director under this test or statute. This prong was not met.

The second prong is that the Notice of Appeal was served in a manner reasonably calculated to give notice to the Director. As has been clearly established, the respondent did not attempt service upon the Director at all, through their legal representative or otherwise, and therefore, admittedly, did not provide service in a manner reasonably calculated to give notice to the Director. CP 11.1.

Furthermore, respondent's argument hinges the Department having actual notice because of the Notice of Appearance filed by the Office of Attorney General. To support his position, the respondent relies on *Black v. Dep't of Labor & Industries,* 131 Wn.2d 547, 933 P.2d 1025 (1997). However, *Black* is distinguishable from the present case because in that case the appellant actually served the Notice of Appeal on the Office of the Attorney General and specifically on the assistant attorney general who had been representing the Department at the Board. In this case, respondent did not serve the Notice of Appeal on the Office of Attorney General at all and therefore logically could not have served it on the specific assistant attorney general who had represented the Department. This is more like *Petta v. Dep't of Labor & Indust.* in which the Court stated:

> Petta argues that service upon the Attorney General's office should be regarded as substantial compliance because a Notice of Appearance was filed by that office on behalf of the Department. However, service on the Attorney General's office not only fails to meet the requirements of RCW 51.52.100, but is not even contemplated as necessary by the statute. Prior cases have thus held that service on the Attorney General's office alone does not meet the requirements of the statute, *even if that office has filed a Notice of Appearance on behalf of the agency named.*

68 Wash.App. 406, 410, 842 P.2d 1006 (1992) (*emphasis added*). It should be noted again, however, that unlike *Petta*, respondent didn't even serve his Notice of Appeal on the Office of Attorney General, let alone the specific assistant attorney general who had represented the Department at the Board. As such, respondent has no basis to claim that he substantially complied with the requirements of RCW 51.52.110. Therefore, the order of the trial court denying appellant's Motion to Dismiss should be reversed as obvious error.

CONCLUSION

This is a simple case of a party failing to comply with the statutory requirements necessary to invoke the appellate jurisdiction of the Superior Court. The evidence is uncontested that respondent did not serve the required parties denoted in RCW 51.52.100 with his Notice of Appeal. Further, the respondent has readily admitted that "he did not serve his Notice of Appeal in a manner reasonably calculated to give notice to the Director." Consequently, there can be no dispute that the trial court lacks subject matter jurisdiction to hear respondent's appeal and committed obvious error which would render further proceeding pointless by denying appellant's Motion to Dismiss.

GRESS, CLARK, YOUNG & SCHOEPPER

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