

FILED
Court of Appeals
Division II
COURT OF APPEALS, DIVISION II
State of Washington
OF THE SUPREME COURT
9/30/2019 2:51 PM

No. 53007-4-II

PAUL UMINSKI, Respondent,

v.

CLARK COUNTY, Appellant,

APPELLANT'S REPLY BRIEF

Respectfully submitted,

GRESS, CLARK, YOUNG & SCHOEPPER


James L. Gress, WSBA #25731 for 44100
Of Attorneys for Appellant

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ARGUMENT IN REPLY TO BRIEF OF RESPONDENT

A. The Department of Labor and Industries chose not to participate in proceedings before the Board of Industrial Insurance Appeals and so it did not have an attorney of record.

Throughout the proceedings before the Board of Industrial Insurance Appeals, the Department of Labor and Industries (Department) chose not to participate, a fact which the Respondent is well aware of. As a result of the Department's choice not to participate, it did not have an attorney of record. Report of Proceedings at 2.

The Respondent highlighted that Judge Lewis relied on *Black v. Dep't of Labor & Indus.*, 81 Wn. App. 722, 915 P.2d. 1170 (1996) to find that the practical purpose of Revised Code Washington (RCW) 51.52.110 was achieved for substantial compliance purposes by serving the Office of Attorney General. Br. Resp. at 7. However, *Black* is distinguishable from this case in two ways. First, in *Black*, there was actual service on the Office of Attorney General rather than the Notice of Appeal being fortuitously forwarded by the Board. Second, the claimant in *Black* actually served his Notice of Appeal on the specific assistant attorney general who represented the Department throughout the proceedings at the Board of Industrial Insurance Appeals (Board). *Black*, 81 Wn.App. at 729. In fact, the Court in *Black* stated "we emphasize several important facts ...

notice was served on the specific attorney at the Yakima Attorney General's Office who had been representing the Department in the proceedings, not simply on the state attorney general's office..." *Id.*

In this case, the Respondent did not serve his Notice of Appeal on Mr. Johnson. In fact, he did not serve it on anyone at the Office of Attorney General or the Department. Even if the Respondent had attempted to serve his Notice of Appeal on the attorney of record for the Department, there would have been no attorney to serve as the Department did not have an attorney of record in this matter.

B. The Director of the Department of Labor and Industries, not the Office of Attorney General must receive actual notice of the Notice of Appeal to comply with RCW 51.52.110.

Respondent relies on the declaration of Assistant Attorney General Johnson to attempt to show the Director of the Department received actual notice of the Respondent's Notice of Appeal. However, this argument fails for several reasons. First and foremost, the Respondent misconstrues the declaration of Mr. Johnson. In Respondent's brief, he states:

[i]t was forwarded to James Johnson who received it on June 14, 2018. The next day, June 15, "we [The Department of Labor & Industries] had decided not to participate.

Br. Resp. at 1. However, Mr. Johnson's declaration actually says:

The Department does not participate in all Superior Court appeals involving self-insured employers. Therefore, that same day, June 14, 2018, AGO staff forwarded to me and other attorneys copies of Exhibit 1 so we could decide whether the Department of Labor and Industries would actively participate in the case. By June 15, 2018, we had decided not to participate.

Clerk's Papers (CP) 11.1 Exhibit 1, page 1-2, (emphasis added). In context, the statement in Mr. Johnson's declaration, it is clear that the decision not to participate was made by the attorneys at the Office of Attorney General, not the Department as represented by the Respondent. Further, there is nothing in Mr. Johnson's declaration that indicates that he or any of the other attorneys he references actually consulted with the Department or the Director of the Department regarding the Respondent's Notice of Appeal. As such, the record does not indicate or show that the Director had actual notice of the Respondent's Notice of Appeal. That the Director did not have actual notice is further reinforced by the Affidavit of Roxanne Yaconetti who averred that the Director has never received claimant's Notice of Appeal. CP 11.

Secondly, the Respondent argues that since Mr. Johnson became the attorney of record and filed a Notice of Appeal, the Director of the Department must have had actual notice. However, this court has repeatedly rejected the argument that simply because a Notice of Appearance is filed on behalf of a state agency, the statutory notice

requirements necessary to invoke the Superior Court's appellate jurisdiction have been met. *See Petta v. Dep't of Labor & Indus.*, 68 Wn.App. 406, 410, 842 P.2d 1006 (1992); *City of Spokane v. Dep't Labor & Indus.*, 34 Wash. App. 581, 582 n.1, 663 P.2d 843 (1983).

C. Whether the Appellant was prejudiced by the Respondent's failure to comply with the service requirements of RCW 51.52.110 is irrelevant to the jurisdictional analysis.

The Respondent's argument that his failure to comply with statutory service requirements is excusable so long as no prejudice to Appellant resulted is irrelevant. In *Hernandez v. Dep't of Labor & Indus.*, 107 Wash. App. 190, 26 P.3d 977 (2001), the Court ended its inquiry without conducting a prejudice analysis after concluding the party appealing the decision failed to comply with statutory service requirements. The Respondent's argument is nothing more than an attempt to excuse his noncompliance with the statutory service requirements necessary to invoke the Superior Court's appellate jurisdiction.

Further, the Respondent also argues that since the Department has not filed a brief in opposition to his position, they are in agreement with it. However, this is pure speculation by the Respondent. In addition, it is inconsistent with the fact that the assistant attorney general assigned to this matter appeared and argued against the Respondent at the oral argument on Appellant's Motion for Discretionary Review. As such, this

court should find the Department's decision to not file a brief in opposition to the Respondent's brief to be nothing more than acting consistently with its prior decision not to participate in this matter.

D. The Respondent did not either actually or substantially comply with the requirements of RCW 51.52.110.

Though posed as an alternative theory, the Respondent's entire brief is premised on the Doctrine of Substantial Compliance. The record in this matter is clear that the Respondent did not actually comply with the requirements RCW 51.52.110 because it did not serve a Notice of Appeal on the Director of the Department within 30 days as required by statute. CP 3. As such, the only question is whether the Respondent substantially complied with the statutory requirements necessary to invoke the Superior Court's appellate jurisdiction.

The minimum requirement for substantial compliance with the service requirement contained in RCW 51.52.110 is that a party to be served must receive actual notice of the appeal to the Superior Court or service by a method reasonably calculated to succeed. *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980). But in every case where substantial compliance has been found, there has been some actual, even if ineffective, compliance with the statute. *Petta*, 68 Wn.App. at 409

(emphasis added). Noncompliance is not substantial compliance. *Crosby v. Cnty. of Spokane*, 137 Wn.2d. 296, 302, 971 P.2d 32 (1999).

As discussed at length above, the declaration of Mr. Johnson does not indicate that he conferred with the Director of the Department or in any way showed that the Director had actual knowledge of the Respondent's Notice of Appeal. Further, in regards to the Respondent's substantial compliance and prejudice arguments, the Respondent focuses on how the "Office of Attorney General" and "the Department's attorney" received the Respondent's Notice of Appeal. Br. Resp. at 8, 10. The relevant inquiry is whether the Director, the person to be served, received actual notice, and the record in this case indicates the Director did not. *See Skinner v. Comm'n of City of Medina*, 168 Wash.2d 845, 232 P.3d 558, 562 (2010).

The only other question then is whether there was service on the Director by a method reasonably calculated to succeed. *Saltis*, 94 Wn.2d at 896. The Respondent himself has readily admitted that "he did not serve his Notice of Appeal in a manner reasonably calculated to give notice to the Director." CP 11.1. Therefore, the Respondent did not comply with RCW 51.52.110 substantially or otherwise, and the Superior Court lacks jurisdiction to hear the Respondent's appeal.

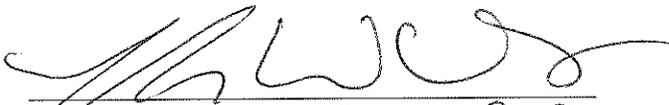
CONCLUSION

The Respondent has admitted he failed to comply with the service requirements necessary to invoke the Superior Court's appellate jurisdiction. Only through misconstruing the declaration of Mr. Johnson can the Respondent even claim he substantially complied with the statutory service requirements. However, this court has repeatedly rejected these arguments and declined to find substantial compliance in similar cases and should do so again here. Consequently, the trial court lacks subject matter jurisdiction to hear the Respondent's appeal and committed obvious error by denying appellant's Motion to Dismiss.

DATED this 30 September 2019.

Respectfully submitted,

GRESS, CLARK, YOUNG & SCHOEPPER


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Of Attorneys for Appellant 44100

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CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **Appellant's Reply Brief** on the following individuals on September 30, 2019, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

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