COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

PAUL UMINSKI, Respondent

v.

CLARK COUNTY, Petitioner

RESPONDENT'S BRIEF

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A. Issue Presented for Review

Where James Johnson, Assistant Attorney General receives a copy of Respondent's Notice of Appeal and confers with the Department whether or not to appear and participate on or before the 30-day time limit to file and service such appeals contained in RCW 51.52.110, did Respondent comply with RCW 51.52.110?

B. Statement of the Case

On May 16, 2018, the Board of Industrial Insurance Appeals issued its Order Denying Mr. Uminski's Petition for Review. Mr. Uminski's attorneys received that Order on May 21, 2018. Then on June 4, 2018, Mr. Uminski filed and served a Notice of Appeal in Clark County Superior Court. The Notice of Appeal was directly served on the Board of Industrial Insurance Appeals and the Self-Insured Employer, Clark County. (Appendix A)

While Mr. Uminski did not directly serve the Department of Labor & Industries, the Board of Industrial Insurance Appeals forwarded the Appeal to the Attorney General's Office. It was forwarded to James Johnson, who received it on June 14, 2018. (Appendix A & B). The next day, June 15, "We [The Department of Labor & Industries] had decided not to participate." (Appendix B, page 2, lines 2-3). Mr. Johnson also declared that he was the attorney of record for the Department. (Appendix B, page

2, lines 4-6). The RCW 51.52.110 30-day appeal deadline ran on June 19, 2018 (the 30th day after the May 16, 2018 decision was communicated to Mr. Uminski's attorney). The Department then notified the Court of its non-participation in mid-July 2018.

C. Standard of Review

This appeal involves a question of statutory construction, which is reviewed *de novo*. *Krawiec v. Red Dot Corp.*.

D. Argument

The Court should affirm the decision of Clark County Superior Court. It should affirm because the Department received actual notice of the appeal on or before statutory deadline. In response to that Notice the Department timely chose not to participate in the appeal in Superior Court.

RCW 51.52.110 governs appeals from decisions of the Board of Industrial Insurance Appeals to superior courts. It provides in relevant part, "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." Long-established precedent interpreting this statute has held:

> We have held an appellant substantially complies with RCW 51.52.110 if: "(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." *In re Saltis*, 94 Wn. 2d 889, 896, 621 P.2d 716 (1980). *Saltis* has been followed and remains good law.

Black v. Dep't of Labor & Indus., 131 Wn.2d 547, 553, 933 P.2d 1025 (1997) (emphasis added); *see also Fay v. Northwest Airlines*, 115 Wn.2d 194, 199 (1990). The Supreme Court also held that service on the Attorney General substantially complies with service on the Department. *Black*, 131 Wn.2d at 555. Also, "it 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. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d. 547, 552, 933 P.2d 1025 (1997)." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319-20, 76 P.3d 1183, 1187 (2003) (whether the appeal was filed in the wrong venue).

1. The Department through its attorney of record received actual notice of the appeal.

The purpose of the appeal statute is to apprise the parties that an appeal has been filed and give them an opportunity to appear and defend. *King Cty. v. Washington State Boundary Review Bd. for King Cty.*, 122 Wn.2d 648, 660, 860 P.2d 1024 (1993). "The requirement of notice contained in RCW 51.52.110 is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions." *In re Saltis*, 94 Wn.2d 889, 895, 621 P.2d 716 (1980). This comports with the basic notions of due process guaranteed by our Constitution.

Our Courts have affirmatively cited to *Black* in other contexts and by so doing found actual notice sufficient:

> In determining whether a party has substantially complied with service requirements, the relevant inquiry is <u>whether the party to be served has received actual notice of appeal or</u> the notice was served in a manner reasonably calculated to give notice to the opposing party. *Black*, 131 Wn.2d at 553 (*citing Saltis*, 94 Wn.2d at 896). Here, we know that the Commission received actual notice of the appeal from the fact that it filed a notice of appearance 6 days after Skinner's attorney served the city clerk, but we do not know whether that actual notice was received within 30 days of the issuance of the order.

Skinner v. Civil Serv. Comm'n of City of Medina, 168 Wn.2d 845, 855, 232 P.3d 558, 562 (2010) (emphasis added).

In a sworn declaration, James Johnson, AAG, averred he was the attorney of record for the Department in this appeal. (Appendix B). He swore that he received actual notice of the appeal prior to the 30-day deadline. (Appendix B). He declared that he and the Department of Labor & Industries decided, again prior to the 30-day deadline, not to participate in this appeal. (Appendix B).

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The essential holding of *Saltis* has been followed again, and again, and again by our courts without modification:

> The minimum requirement for substantial compliance with the service requirement is <u>that the party to be served must receive actual notice of the appeal to superior court</u>, or service by a method reasonably calculated to succeed. *Saltis*, 94 Wn.2d at 895-96. 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.

Hernandez v. Labor & Indus., 107 Wn. App. 190, 196-97, 26 P.3d 977, 980 (2001) (emphasis added). Here, the Department was notified of Mr. Uminski's appeal prior to the 30-day deadline and had reached a decision not to participate prior to that deadline. This is actual compliance with RCW 51.52.110 because it gave the Department notice and an opportunity to be heard; which it declined.

It bears repeating that actual notice received by the Attorney General is compliance with RCW 51.52.110:

> Setting forth the standard of substantial compliance, we held that proper service on the Director of the Department could be shown if: '(1) the Director received <u>actual notice of appeal to the Superior Court</u> or (2) the notice of appeal was served in a manner reasonably calculated to give notice to the Director.' *Saltis*, 94 Wn.2d at 896.

Fay v. Nw. Airlines, 115 Wn.2d 194, 199, 796 P.2d 412, 414 (1990) (emphasis added). Again, Mr. Johnson's declaration identifies himself as the attorney of record, actually receiving the Notice of Appeal, and

conferring with his client all prior to the expiration of the 30-day statutory deadline of RCW 51.52.110. This complies with *Fay* and another decision:

> The RCW 51.52.110 requirement of notice is a practical one meant to insure interested parties receive actual notice of appeals of Board decisions and is satisfied upon: (1) receipt of actual notice of appeal to the superior court, or (2) service of the notice of appeal in a manner reasonably calculated to give notice. *In re Saltis*, at 896.

Vasquez v. Dep't of Labor & Indus., 44 Wn. App. 379, 384, 722 P.2d 854, 858 (1986) (emphasis added).

Here, that practical purpose of the statute was achieved. The Department was notified and given an opportunity to appear in Clark County Superior Court. That opportunity occurred prior to the 30-day deadline imposed by RCW 51.52.110, which is an important factual distinction from *Krawiec v. Red Dot Corp*, 189 Wn. App. 234, 354 P.3d 854 (2015). In that case, the Board did not receive notice until after the 30-day deadline had passed. Presently, the Department was given notice and an opportunity to appear; per the declaration of James Johnson, it formally decided to pass on that opportunity.

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It is that sense of practical purpose that guided the decision of Judge Lewis below:

> So, it's just a question of whether under these circumstances where the claimant, or the person filing the appeal, didn't serve the documents, but the documents got over to the attorneys that were in the position to make the decision, whether that constitutes substantial compliance for jurisdictional purposes under Black. I find that it does; I deny the Motion to Dismiss.

(Report of Proceedings p. 5). There are few things more practical then the Department's attorney-of-record getting notice of the appeal, talking with his client (the Department), and his client deciding it does not need to get involved. Due process was given to the Department: timely notice and an opportunity to be heard.

Finally, it should be noted by this Court that the Department was given a similar opportunity with this appeal. The Department initially appeared, requested an extension of time to file its brief, then notified the Court that it has decided not to be heard. While the Court cannot divine what is the Department's position with this appeal, this is still important in assessing the next element: prejudice.

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2. Clark County is not prejudiced by the irregular way in which the Office of Attorney General received actual notice on behalf of the Department.

The other principle is the objecting party must show harm or injustice created by the failure to strictly comply. "No harm or injustice was done to the District by petitioners' failure to strictly comply with the statute." *In re Appeal of Des Moines Sewer Dist.*, 97 Wn.2d 227, 231, 643 P.2d 436, 438-39 (1982). "It 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. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d. 547, 552, 933 P.2d 1025 (1997)." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319-20, 76 P.3d 1183, 1187 (2003) (whether the appeal was filed in the wrong venue);

The Court should also consider *Graham Thrift Grp., Inc. v. Pierce Cty.*, 75 Wn. App. 263, 268-9, 877 P.2d 228 (1994). In that case, a filing fee was not included in a land use appeal, after reviewing case law, the court wrote,

> These cases involve courts interpreting court rules concerning how appeals are consummated in the courts. Even though this court and others have liberalized jurisdictional rules for appeals to the court, we cannot impose the same liberal interpretation onto legislation enacted by Pierce County.

The same liberalization should apply here.

The objecting party here is Clark County. The Department clearly had an opportunity to file a brief to official object and argue how it was prejudiced here. It chose not to. The Court should find the Department's choice significant.

It is significant, because it shows the Department was not prejudiced by this sequence of events. "[T]he modern preference of courts [is] to interpret their procedural rules to allow creditable appeals to be addressed on the merits absent serious prejudice to other parties." *Graham Thrift Grp., Inc.,* 75 Wn. App. 263 at 268. Appellants are complaining about the form over the substance of this issue. Furthermore, Judge Lewis below found no party was prejudiced. (Report of Proceedings p. 5, ln. 7-8). Such factual finding must be given deference by this Court. The Court should affirm the decision of the trial court because the practical objectives of the Act was achieved without prejudice.

3. In the alternative, Respondent substantially complied with RCW 51.52.110

As Appellants correctly state in their opening brief, "Substantial compliance is generally defined as compliance with the substance essential to every reasonable objective of a statute. *Krawiec*, 189 Wash.App. at 241." (Appellant's Brief p. 4). As stated above, the objective of the statute is to

give the Department of Labor & Industries actual notice that an appeal has been filed and an opportunity to appear. That objective was achieved because the Department's counsel of record, James Johnson, declared that prior to the 30-day time limit he was aware of the appeal, conferred with the Department, and the Department decided not to participate.

Instead, Appellants wrongly focus on the red herring issues of how the Department's attorney of record received the Notice of Appeal and a meaningless distinction between the Director of the Department of Labor & Industries and the Department itself. If the fundamental, practical objectives of RCW 51.52.110 were achieved, then it does not matter that the Department's attorney of record received it from the Board rather than from Mr. Uminski's attorney.

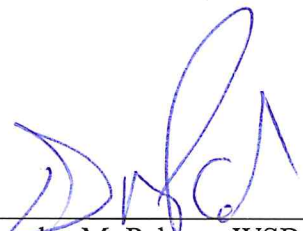
There is also no significant legal distinction between the Director and the Department. The Supreme Court did not draw such distinctions in *Black*. 131 Wn.2d at 551 ("The issue here is whether service of notice of appeal on the assistant attorney general assigned to represent the Department in the case substantially complies with the requirement that service be made on the Department through its director.") Again, Mr. Johnson swore that he conferred with the Department, which then decided not to participate, and Mr. Johnson effectuated that by notifying the Court of the Department's non-participation. (Appendix B).

Appellants rely upon a Declaration of Roxanne Yaconetti. (Appellant's Brief p. 5). The trial court rightly did not put much weight upon her statement that the Director's office did not receive the Notice of Appeal. As she states, once an appeal is received, it is forwarded to the Attorney General's Office. Here, the reverse happened. Once the Attorney General's Office received the appeal, it notified the Department, conferred with the Department, and decided not to participate. Appellants have failed to identify how this sequence of events did not achieve the fundamental purpose of the Act or how it was prejudiced.

E. Conclusion

The Court should affirm the decision of Clark County Superior Court. Multiple decisions have held that what is required is actual notice of an appeal and that service upon the Attorney General is sufficient. Here, there is no factual dispute that the attorney of record for the Department timely received the appeal, conferred with the Department, and the Department chose not to participate. These are not grounds for dismissal. The decision below should be affirmed.

Dated: September 5, 2019.



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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

PAUL UMINSKI, Respondent, v. CLARK COUNTY, Petitioner.	)	Cause No: 53007-4-II CERTIFICATE OF SERVICE

The undersigned states that on the 5th day of September, 2019, I served copies of the Respondent's Brief on the following individuals, via electronically or first class mail, postage paid, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

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Re: *Paul Uminski v. Clark County*
Superior Court Case No. 18-2-01238-8
Court of Appeals Case No. 53007-4-II

Dear Clerk of Court:

Enclosed please find Respondent's Brief dated September 5, 2019, with Proof of Service for review and filing.

Sincerely,

Douglas M. Palmer

DMP/sh
Enclosure
cc: James L. Gress
Harlen Mechling
Paul Uminski