

FILED

JUN 29 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 305881

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OF THE STATE OF WASHINGTON**

ERIC T. ASH, DBA PAR ONERI CONCRETE,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case arises from an assessment issued by the Department of Labor and Industries (Department) under the Industrial Insurance Act, RCW Title 51, for unpaid industrial insurance premiums. The Department assessed Eric Ash, doing business as Par Oneri Concrete, for unpaid industrial insurance premiums, interest, and penalties in the amount of \$15,345.66. Ash appealed to the Board of Industrial Insurance Appeals (Board). The Board affirmed the Department's assessment. Ash filed a petition for review under the Administrative Procedure Act (APA), RCW 34.05, in superior court. However, Ash failed to pay the underlying industrial insurance assessment or obtain an undue hardship waiver before filing the petition for review as required by RCW 51.52.112. Ash then waited 182 days after filing his petition for review to file a motion for undue hardship. The superior court dismissed Ash's appeal. The Department respectfully requests this Court affirm the superior court's dismissal of Ash's appeal as Ash failed to perfect his appeal by complying with the requirements of RCW 51.52.112.

II. ISSUES

- A. Did the superior court properly dismiss Ash's appeal when he failed to pay the underlying industrial insurance assessment against him or obtain an undue hardship waiver before filing his petition for review as required by RCW 51.52.112?
- B. Does the doctrine of substantial compliance apply to a petitioner's failure to comply with RCW 51.52.112's time requirement?
- C. Did Ash substantially comply with RCW 51.52.112's requirement to pay an underlying industrial insurance assessment or obtain an undue hardship waiver before filing a petition for review when he filed a motion for undue hardship 182 days after filing a petition for review in superior court?
- D. Did the Department waive application of RCW 51.52.112 based on equitable estoppel or any other theory?
- E. Does RCW 51.52.112's requirement to pay an underlying assessment or obtain an undue hardship waiver before filing a petition for review from a Board determination following an evidentiary hearing violate procedural due process?
- F. Are attorney fees and sanctions appropriate against the Department on the basis of unconscionability when the Department defends a statutory requirement in accordance with a superior court determination and a published appellate court decision?
- G. If Ash's appeal was inappropriately dismissed, what is the proper remedy?

III. STATEMENT OF THE CASE

Par Oneri Concrete is a sole proprietorship owned and operated by Ash since 2000. CP at 87, 109. Ash was audited by the Department in 2004 and advised of the need to report his father, Robert Ash, as a worker

to the Department and pay industrial insurance premiums for the hours he worked.¹ CP at 106-07, 163-75.

In January 2008, Ash contracted to build a commercial building. CP at 88-89, 95. To perform the terms of the contract, he hired his father, Robert Ash, to assist him. CP at 89. Ash testified he had a verbal agreement with his father to “just be partners in the business.” CP at 89. Robert Ash worked part-time and was compensated only for the time he actually worked. CP at 109. Robert Ash did not have a contractor’s license. CP at 110, 177.

In 2009, the Department conducted another audit of Ash. The audit period was the last three quarters of 2008 and first quarter of 2009. CP at 178. The auditor concluded Robert Ash was a covered worker and Ash should have paid industrial insurance premiums for the hours Robert Ash worked. CP at 133, 155-56, 177-81. The auditor also determined premiums should have been paid for work performed by Gale Moseley, Francisco Garcia, and Marcia del Pilar Tello. CP at 134. Ash did not provide the auditor with any timecards or records of hours worked by the employees. CP at 133-34. Thus, the auditor estimated the number of hours worked by these individuals based on the amounts paid to the workers and the average hourly wage for the type of work they were

¹ All references to “Ash” refer to Eric Ash, doing business as Par Oneri Concrete. Ash’s father, Robert Ash, is referred to throughout this brief as “Robert Ash.”

performing. CP at 134. Penalties were assessed for inadequate recordkeeping due to Ash's failure to maintain payroll records or timecards. CP at 138-39. Additionally, a misrepresentation penalty of \$3,000 was assessed because Ash failed to report Robert Ash's hours despite the Department's instruction to do so in 2004. CP at 138-41.

On June 29, 2009, the Department issued a Notice and Order of Assessment of Industrial Insurance Taxes for premiums, penalties, and interest due in the amount of \$15,345.66. CP at 184-86. Ash requested the Department reconsider its order. On January 4, 2010, the Department affirmed the June 29, 2009 assessment. CP at 188-89. Ash appealed to the Board and an industrial appeals judge held an evidentiary hearing. The industrial appeals judge issued a proposed decision and order affirming the Department's assessment. CP at 32-37. Ash filed a petition for review with the Board. CP at 25-28.

The Board granted the petition for review and issued a March 17, 2011 Decision and Order affirming the Department's assessment. CP at 14-18. Specifically, the Board found during the audit period, "Par Oneri Concrete was operated by Eric T. Ash as a sole proprietorship, and was not operated by Eric T. Ash and Robert Ash as a partnership." CP at 16 (Finding of Fact (FF) 2). The Board also found Ash failed to pay industrial insurance premiums for his employees and

failed to maintain timecards or other records necessary to determine the amount of time employees worked. CP at 16-17 (FF 3, 4). Additionally, the Board found Ash “knowingly misrepresented to the Department the amount of the payroll or employee hours upon which the premium [sic] under this title are based by its failure to file quarter reports indicating the hours worked by Bob Ash and other employees.” CP at 17 (FF 5).

Ash filed a petition for review with the Walla Walla Superior Court on April 14, 2011. CP at 1-4. Ash did not pay the underlying assessment or file a motion for undue hardship prior to filing his petition for review. On October 13, 2011, 182 days after he filed his petition, Ash moved for an order waiving the statutory requirement to pay the underlying assessment. CP at 192. In support of his motion, Ash stated he did not have “sufficient funds” to pay the assessment. CP at 193. He did not provide financial documentation to verify his assertion. The Department opposed Ash’s motion and asked for his appeal to be dismissed. CP at 201-05. In response, Ash provided additional financial information.

The superior court held a hearing on Ash’s motion. After considering the arguments of counsel and the requirements of RCW 51.52.112, the court dismissed Ash’s appeal for lack of jurisdiction. CP at 241-45. Ash appealed to this Court.

IV. STANDARD OF REVIEW

Industrial insurance assessment appeals to superior court and the Court of Appeals are governed by the APA. RCW 51.48.131; *R & G Probst v. Dep't of Labor and Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004) (*Probst I*). An employer bears the burden of proving an industrial insurance tax assessment is incorrect. RCW 51.48.131; RCW 34.05.570(1)(a).

The court reviews issues of law de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). In doing so, the court accords deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues; however, the court is not bound by an agency's interpretation of a statute. *Id.*

V. ARGUMENT

The superior court's order dismissing Ash's appeal should be affirmed because Ash failed to perfect his appeal by complying with the requirements of RCW 51.52.112. Ash was required to pay the underlying industrial insurance assessment or obtain an undue hardship waiver before filing his petition for review in superior court. He did not do this. Instead, he waited 182 days until he filed a motion for undue hardship. Ash did not

actually or substantially comply with the procedural requirements for filing a petition for review and, consequently, his appeal was properly dismissed.

A. The Superior Court Properly Dismissed Ash’s Appeal Because Ash Failed To Pay The Assessment In Question Or Obtain An Undue Hardship Waiver Before Filing His Appeal In Violation Of RCW 51.52.112

Ash failed to properly perfect his appeal by not paying the industrial insurance assessment or seeking an undue hardship waiver prior to filing his petition for review. Under the Industrial Insurance Act, an employer must pay the underlying industrial insurance assessment before appealing a Board decision to superior court:

All taxes, penalties, and interest shall be paid in full *before* any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest unless the court determines that there would be an undue hardship to the employer. In the event an employer prevails in a court action, the employer shall be allowed interest on all taxes, penalties, and interest paid by the employer but determined by a final order of the court to not be due, from the date such taxes, penalties, and interest were paid. Interest shall be at the rate allowed by law as prejudgment interest.

RCW 51.52.112 (emphasis added). Under the APA, judicial review is “instituted” by paying the required filing fee and filing a petition for review in the appropriate superior court. RCW 34.05.514(1).

A court’s “fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature.” *In re Schneider*, 173

Wn.2d 353, 363, 268 P.3d 215 (2011). An interpretation rendering any of the statutory language superfluous should be avoided. *Id.* “If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says.” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The requirements of RCW 51.52.112 are clear and unambiguous. An underlying assessment must be paid or an undue hardship waiver obtained before a petition for review may be filed in superior court. This is reflected in the statutory language. RCW 51.52.112 says “[a]ll taxes, penalties, and interest shall be paid in full *before* any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest unless the court determines that there would be an undue hardship to the employer.” The word “before” plainly indicates the actions of either paying the assessment or obtaining an undue hardship waiver must be accomplished prior to instituting “any action.”

The statutory language in RCW 51.52.112 was considered by the court in *R. Probst v. Dep’t of Labor and Indus.*, 155 Wn. App. 908, 230 P.3d 271 (2010) (*Probst II*). Like Ash, Probst was assessed for unpaid industrial insurance premiums and penalties on a second audit. *Id.* at 908-14. On appeal, the Board affirmed the Department’s assessment. *Id.* at

914. Probst then appealed to superior court. The superior court dismissed Probst's appeal because he failed to pay the underlying assessment or move for an undue hardship waiver. *Id.* at 910. The Court of Appeals affirmed the superior court's dismissal, noting, "Probst neither paid the tax amount due nor sought an order before filing his appeal to confirm that the pre-appeal payment amount due was an undue hardship, as required by RCW 51.52.112." *Id.* at 914. In doing so, the court rejected Probst's arguments that RCW 51.52.112 did not apply and violated his right to due process.

Ash argues *Probst II* is inapplicable because Probst neither paid the underlying assessment nor did he file a motion for undue hardship. Br. of Appellant at 16-17. Probst simply argued he was not bound by RCW 51.52.112. *Probst II*, 155 Wn. App. at 915. Although, unlike Probst, Ash filed a motion for undue hardship, he still did not comply with RCW 51.52.112 and the court's reasoning in *Probst II* applies. Ash filed a petition for review in superior court on April 14, 2011. CP at 1. Before filing, Ash did not pay the underlying assessment or file an undue hardship motion. Ash waited 182 days before moving for an undue hardship waiver on October 13, 2011. CP at 192. Like Probst, Ash did not comply with the requirements of RCW 51.52.112.

Ash argues RCW 51.52.112's requirements present "an impossible procedural quandary." Br. of Appellant at 20. However, the requirement to pay an assessment or obtain an undue hardship waiver is clear. Courts must apply the literal meaning of a statute and not question the wisdom of the statute's requirements even if its results seem unduly harsh. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). Additionally, filing an undue hardship motion before filing a notice of appeal is not impossible. An undue hardship motion is similar to an in forma pauperis motion to waive a filing fee. A party is required to pay a filing fee at the time a civil action is filed with a superior court. RCW 36.18.020(2)(a). Filing fees are also required when a petition for judicial review is filed under the APA. RCW 36.18.020(2)(c). A court may waive the filing fees if a party is unable to pay due to financial hardship. RCW 36.18.022.

GR 34, in connection with applicable local court rules, governs the procedure for filing an in forma pauperis motion. The procedure allows a person to seek a waiver of a filing fee "or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court." GR 34(a). A person may apply for a waiver "ex parte in writing or orally, accompanied by a mandatory pattern form created by the Administrative Office of the Courts (AOC) whereby the applicant attests to his or her

financial status[.]” GR 34(a)(1). This same procedure can be utilized by an entity moving for an undue hardship waiver under RCW 51.52.112. Thus, it is not impossible to comply with the statute’s requirement.

The superior court properly dismissed Ash’s appeal for failure to comply with RCW 51.52.112. RCW 51.52.112 requires an assessment to be paid in full or a hardship waiver obtained *before* filing an appeal to superior court. Ash never paid the assessment in question and did not seek a hardship waiver prior to filing his appeal. Ash failed to properly perfect his appeal and, consequently, his appeal was properly dismissed.²

B. The Time Limitation Of RCW 51.52.112 Cannot Be Waived Under The Doctrine Of Substantial Compliance

Ash argues any “deficiencies in Mr. Ash’s filings,” namely his failure to comply with RCW 51.52.112, should be excused by the doctrine of substantial compliance. *See* Br. of Appellant at 18. This doctrine does not apply to the timing requirement of RCW 51.52.112. Generally, a party’s failure to follow statutory procedural requirements for appealing an industrial insurance assessment may be excused if a party substantially complies with such requirements. *See Cont’l Sports Corp. v. Dep’t of Labor & Indus.*, 128 Wn.2d 594, 603, 910 P.2d 1284 (1996). However,

² The superior court dismissed Ash’s appeal for failure to invoke the subject matter jurisdiction of the court. *See* CP at 243-45. The Department’s position is the appeal was properly dismissed because Ash failed to perfect the appeal by complying with the requirements of RCW 51.52.112. The Court may affirm on any basis supported by the record. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997).

the doctrine of substantial compliance does not extend to statutory time limits. *Id.* at 603-04. “It is impossible to substantially comply with a statutory time limit It is either complied with or it is not.” *City of Seattle v. Pub. Empl. Relations Comm’n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991). “[F]ailure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.” *Id.* at 929; *see also Westcott Homes LLC v. Chamness*, 146 Wn. App. 728, 735, 192 P.3d 394 (2008) (“Belated compliance, or a failure to comply through inaction or inadvertence cannot constitute substantial compliance.”).

In *San Juan Fidalgo Holding Company v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997), the court considered whether delivering a land use petition appeal to a deputy auditor after normal office hours on the last day for filing substantially complied with the applicable statutory time limits. In that case, service on the deputy auditor before 4:30 p.m. would have been timely, whereas the petition was untimely served at 5:06 p.m. *Id.* at 713. The court noted although the difference in time was negligible and dismissal was severe, “recognizing an exception to the requirement that service be made on deputy auditors within ‘normal office hours’ in this case would be to create an exception that would render the

rule a nullity.” *Id.* The court concluded substantial compliance did not apply to timing requirements. *Id.* at 712-13.

RCW 51.52.112 includes a statutory time limit. An assessment must be paid or an undue hardship waiver obtained *before* filing a petition for review from the Board to superior court. Although the timing requirement is not set forth in terms of days, it exists nonetheless. The assessment must be paid or waiver obtained before instituting an action in superior court. As this is a statutory time limit, the doctrine of substantial compliance does not apply and Ash’s failure to follow the statute may not be excused.

C. Filing A Motion For Undue Hardship 182 Days After Filing A Petition For Review Does Not Substantially Comply With RCW 51.52.112

Alternatively, if the court determines the RCW 51.52.112 requirement is not a timing requirement, and thus subject to the doctrine of substantial compliance, dismissal of Ash’s appeal was appropriate. Ash’s dilatory motion for undue hardship did not substantially comply with RCW 51.52.112.

Substantial compliance is ““actual compliance in respect to the substance essential to every reasonable objective of [a] statute.”” *Cont’l Sports Corp.*, 128 Wn.2d at 602 (alteration in original) (quoting *Pub. Empl. Relations Comm’n*, 116 Wn.2d at 928). “Substantial compliance

has been found where there has been compliance with the statute albeit with procedural imperfections.” *Id.* “Generally, ‘noncompliance with a statutory mandate is not substantial compliance.’” *Ruland v. Dep’t of Soc. & Health Servs.*, 144 Wn. App. 263, 274, 182 P.3d 470 (2008) (quoting *Crosby v. County. of Spokane*, 137 Wn.2d 296, 302, 971 P.2d 32 (1999)).

To determine whether Ash’s dilatory actions may be excused under the doctrine of substantial compliance, it is necessary to ascertain the “‘reasonable objective[s]’” of RCW 51.52.112. *See Cont’l Sports Corp.*, 128 Wn.2d at 602 (quoting *Pub. Empl. Relations Comm’n.*, 116 Wn.2d at 928). RCW 51.52.112 applies to assessments and penalties arising from an entity’s responsibility to pay industrial insurance premiums. Industrial insurance premiums fund the state’s industrial insurance program. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 203, 117 P. 1101 (1911). The premiums are used to “recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on.” *Id.* The Industrial Insurance Act

is highly remedial and, as such, is to be liberally construed with a view to the accomplishment of its beneficent purpose, namely, to withdraw all phases of the premises from private controversy and, by a plan of industrial insurance, to provide ‘sure and certain relief for workmen,

injured in extra hazardous work, and their families and dependents.’

Campbell v. Dep’t of Labor & Indus., 2 Wn.2d 173, 180, 97 P.2d 642 (1940). To provide such relief, the Department’s ability to collect industrial insurance premiums must be protected.

The reasonable objectives of RCW 51.52.112 may be deduced from a survey of other similar government collection and enforcement procedures. The requirement of full payment of an underlying assessment as a condition precedent to an appeal is not unique to the Industrial Insurance Act. Under federal law, a taxpayer must pay the full amount of internal revenue taxes assessed before filing a refund suit in federal district court. *Flora v. United States*, 362 U.S. 145, 177, 80 S. Ct. 630, 4 L. Ed. 2d 623 (1960). In considering the hardship such a requirement might impose on a taxpayer, the United States Supreme Court noted, “the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full.” *Id.* at 175.

Prepayment is also found in a number of areas under state law. For appeals to superior court regarding local improvement assessments, the law requires an appellant to post a bond of two hundred dollars “[a]t the time of filing the notice of appeal with the clerk of the superior court[.]”

RCW 35.44.220. The objective of this statute “is to assure speedy prosecution of the appeal and to prevent harassment by lengthy litigation.” *Patchell v. City of Puyallup*, 37 Wn. App. 434, 441, 682 P.2d 913 (1984);³ *see also Fisher Bros. Corp. v. Des Moines Sewer Dist. U.L.I.D. No. 29*, 97 Wn.2d 227, 231, 643 P.2d 436 (1982) (explaining the purpose of the appeal bond is to encourage speedy prosecution, prevent harassment of the appellee, and ensure the appellee its costs will be paid if the appeal is unsuccessful).

The law governing state excise taxes also contains similar prepayment provisions. If a taxpayer appeals to the Board of Tax Appeals, which does not require advanced payment of taxes, RCW 82.32.150, and then seeks to appeal the Board of Tax Appeals’ decision to superior court, “the taxpayer shall have first paid in full the contested tax, together with all penalties and interest thereon, if any.” RCW 82.03.180. In considering the policy behind such requirement, the Court of Appeals noted the public has an interest the solvency of the tax system:

in not disrupting tax streams into the state treasury. As an Indiana court noted, ‘the disruption of the state’s prompt and orderly collection of taxes ... could have catastrophic effects on [the state’s] economy, let alone the solvency of

³ In *Patchell*, the appellants filed the required appeal bond 64-days after the notice of appeal was filed. *Patchell*, 37 Wn. App. at 440. After considering the objectives of RCW 35.44.220, the court determined the 64 day delay without excuse did not constitute substantial compliance. *Id.* at 441. To determine otherwise “would render totally meaningless the plain statutory requirements.” *Id.*

the state government.’ Our legislature’s requirement that taxes be paid, and then contested, harmonizes with this policy.

Booker Auction Co. v. Dep’t of Revenue, 158 Wn. App. 84, 89, 241 P.3d 439 (2010) (quoting *Ziegler v. Indiana Dep’t of State Rev.*, 797 N.E.2d 881, 889 (Ind. Tax 2003)).

The objectives of RCW 51.52.112 support these same policy considerations. An assessment for industrial insurance premiums, interest, and penalties is a cost imposed on employers throughout Washington for the privilege of doing business in the state. The premiums are vital to the state’s ability to fulfill its responsibility to provide injured workers with medical treatment and other benefits as prescribed by the Industrial Insurance Act. Allowing employers to file continuous appeals without prepayment of the underlying assessment allows the employer to avoid paying such taxes during the pendency of an appeal and diminishes the Department’s ability to collect unpaid premiums.

Prepayment is not an undue burden on an employer. An employer has several opportunities to contest the industrial insurance assessment before appealing to superior court, and Ash took advantage of this entire range of opportunities. The employer may request the Department to reconsider the assessment. RCW 51.48.131. If the employer disagrees

with the Department's subsequent decision, it can appeal to a separate state agency, the Board. RCW 51.48.131. Payment of the underlying premiums is not required to institute such an appeal. The employer is then entitled to a hearing before an industrial appeals judge, who issues a proposed decision and order. RCW 51.52.104. If the employer disagrees with this determination, it may file a petition for review with the Board. RCW 51.52.104. Assuming the Board grants the petition, the Board subsequently issues a decision and order. RCW 51.52.106. It is only at this point, if the employer disagrees with the final Board order, the underlying assessment must be paid as a condition precedent to filing a petition for review with a superior court. The employer has already had three opportunities to present its position without any payment. The legislature has determined, at this point, once the administrative remedies have been exhausted, the employer must pay the underlying premiums or obtain a hardship waiver as a condition precedent to appealing to superior court.

The payment of an underlying assessment or judgment is also a typical procedure for appeals in civil cases generally. For example, a party must post a supersedeas bond to delay the enforcement of a trial court decision during the appeal of a civil case. *See* RAP 7.2(c), 8.1(b)(1), 8.1(c). The amount of the supersedeas bond is the amount of the

judgment, estimated interest to accrue during the appeal, and the attorney fees, costs, and expenses likely to be awarded on appeal. RAP 8.1(c)(1). This type of appeal bond “serves the interest of the judgment creditor by ensuring that the judgment debtor’s ability to satisfy the judgment will not be impaired during the appeal process.” *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769, 27 P.3d 1233 (2001). The bond ensures “a secure source of reimbursement for any loss incurred” by the judgment creditor “as a result of its inability to enforce the judgment during review.” *Id.*

Similarly, RCW 51.52.112 protects the state industrial insurance program by enhancing the Department’s ability to collect the underlying assessment, interest, and penalties during what could be a lengthy appeal process. Otherwise, an employer’s assets could be substantially depleted, if not destroyed, by the time the appeal process ends. The employer is compensated for providing this security. In the event the employer prevails on appeal, it is entitled to the amount it paid plus interest. RCW 51.52.112.

In summary, prepayment of an industrial insurance assessment ensures the Department’s ability to collect the underlying assessment is not diminished or destroyed during the appeal process, protects the stream of income necessary to fund the industrial insurance program, ensures a speedy appeal process, and prevents harassment by lengthy litigation.

These are the reasonable objectives of the statute. Like the United States government in *Flora*, the state has a substantial interest in protecting the industrial insurance fund and its interest would be substantially impaired if the court were to disregard the legislative directive of requiring prepayment or a finding of undue hardship prior to filing a petition for review. Allowing a petitioner to disregard RCW 51.52.112's requirements for 182 days would thwart the objectives of this explicit statutory requirement. Ash's dilatoriness should not be excused under the doctrine of substantial compliance.

D. The Department Has Not Waived Application Of RCW 51.52.112

Ash argues the Department should be equitably estopped from using RCW 51.52.112 because a cover letter that Ash alleges was from the Department did not list the statute in question. Br. of Appellant at 23. Even assuming this letter could possibly meet the test for equitable estoppel against the government, which it does not, Ash's argument suffers from a fatal flaw in that this cover letter was from the Board, not the Department. *See* CP at 12-13.

Generally, to successfully establish grounds for equitable estoppel, three elements must be met: “(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other

party on the faith of such admission, statement, or act, and, (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.” *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 340, 779 P.2d 249 (1989) (quoting *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987)). Every element must be established by clear, cogent, and convincing evidence. *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703 (1987).

Ash’s argument fails on the first element as there was no statement by the Department inconsistent with its position that a hardship waiver must be obtained prior to filing a superior court appeal. To support his position, Ash points to a cover letter sent by the Board along with its final Decision and Order. CP at 12-13. This letter is a statement by the Board, not the Department. The Board and the Department are two separate state agencies. *Compare* RCW 51.52.010, *with* RCW 43.22. “The Board is an independent agency and is not a part of, or connected with, the Department of Labor and Industries.” *City of Spokane v. Dep’t of Labor & Indus.*, 34 Wn. App. 581, 583, 663 P.2d 843 (1983). Communications from the Board cannot be used to estop the Department.

Equitable estoppel against the government is not favored, especially when the state’s power to collect taxes is in question. *Dep’t of Revenue v. Martin Air Conditioning*, 35 Wn. App. 678, 683, 668 P.2d

1286 (1983); see *Finch v. Matthews*, 74 Wn.2d 161, 169-70, 443 P.2d 833 (1968). Accordingly, when a party claims equitable estoppel against the government, two *additional* requirements must be met: (1) equitable estoppel must be necessary to prevent a manifest injustice; and (2) the exercise of governmental functions must not be impaired as a result of the estoppel. *Shafer v. State*, 83 Wn.2d 618, 622, 521 P.2d 736 (1974).

Ash provides no argument as to how the application of equitable estoppel in this situation would prevent a manifest injustice. The burden is on him to demonstrate manifest injustice. *Mercer*, 48 Wn. App. at 500. He has not met that burden, and his request for the application of equity should be disregarded.

Ash also argues his failure to follow RCW 51.52.112 should be excused because the Department did not inform him of this requirement. Br. of Appellant at 8-10, 23. Ash provides no support for his implicit assertion that the Department (or the Board, for that matter) is required to provide him with legal advice. Instead, he points to a cover letter from the Board. The Board's letter is informational and intended to point litigants in the right direction; it is not legal advice. Furthermore, ignorance of the law is no excuse. "[P]ro se litigants are bound by the same rules of procedure and substantive law as attorneys." *Westberg v. All-Purpose*

Structures Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997); *see also In re Martin*, 154 Wn. App. 252, 265, 223 P.3d 1221 (2009).

Related to his equitable estoppel argument, Ash also argues the Department is precluded from raising the prepayment issue because it was not raised at superior court. Br. of Appellant at 22. Ash relies on *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n. 29, 122 P.3d 161 (2005), where the court declined to consider an issue raised by an amicus for the first time on appeal. *See* Br. of Appellant at 23. This case does not involve an issue raised by an amicus. Rather, the issue was addressed by the superior court and is properly before this Court.

The Department requested denial of Ash's motion for undue hardship and dismissal of his appeal. CP at 204. Even if the Court were to construe the Department's response to Ash's motion as requesting dismissal because Ash failed to establish undue hardship rather than failure to comply with RCW 51.52.112, the superior court properly considered whether Ash had perfected his appeal. *See Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970) ("Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent."). Additionally, an appellate court may consider issues sua sponte "when the question raised affects the right to maintain the action." *Ives v. Ramsden*,

142 Wn. App. 369, 388-89, 174 P.3d 1231 (2008) (internal quotations omitted). It was proper for the superior court to ensure compliance with statutory requirements, especially those affecting perfection of an appeal. The court properly dismissed the appeal for failure to comply with RCW 51.52.112. It is proper for the Department to defend the superior court's determination during this appeal.

E. The Requirements Of RCW 51.52.112 Do Not Violate Due Process

Ash argues the superior court's enforcement of RCW 51.52.112 violated his right to procedural due process because he claims he was denied a "full and meaningful hearing." Br. of Appellant at 27. Due process is a flexible concept and calls for different procedural protections depending on the situation. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Procedural due process essentially requires notice and an opportunity to be heard. *Id.* at 333. To determine what process is due, courts consider three factors: (1) the private interests that will be affected by the official action; (2) the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, (3) the governmental interest, including the function involved and the

fiscal and administrative burden that additional process would entail. *Id.* at 335.

As an initial matter, Ash was not deprived of an opportunity to be heard. He was accorded a full evidentiary hearing before an industrial appeals judge and an opportunity to appeal the hearing judge's determination to the Board. Due process does not guarantee a civil litigant the right to appeal further. *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973); *In re Dependency of Grove*, 127 Wn.2d 221, 238-39, 897 P.2d 1252 (1995). Ash does not have a due process right to appeal the Board's decision to superior court.

In support of his argument, Ash cites *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). Br. of Appellant at 27. In the *Boddie* line of cases, the United States Supreme Court determined monetary prerequisites, such as filing fees, to court access are permissible unless the right attempted to be vindicated is a fundamental right and the court system provides the only means through which vindication of such right may be obtained. *See Boddie*, 401 U.S. at 382-83 (filing fee for marriage dissolution violated due process as it involved a fundamental right and dissolution could be obtained only through a court proceeding); *United States v. Kras*, 409 U.S. 434, 446, 450, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) (bankruptcy filing fee did not violate Fourteenth Amendment

as it merely implicated financial interests); *Ortwein*, 410 U.S. at 660 (fee to file an appeal from welfare decision did not violate due process as appellants were provided with an evidentiary hearing at the administrative level). These principles have been adopted and followed by Washington courts. See, e.g., *Morrison v. Dep't of Labor & Indus.*, ___ Wn. App. ___, 277 P.3d 675, 677-78 (2012), *petition for review filed* (June 13, 2012); *Bowman v. Waldt*, 9 Wn. App. 562, 567-70, 513 P.2d 559 (1973).⁴

Boddie is distinguishable from the present case as, under the first *Mathews* factor, it involved a fundamental right. *Boddie*, 401 U.S. at 382-83. Ash's interest is solely monetary in nature and does not rise to the level of a fundamental right. See *Kras*, 409 U.S. at 446 (financial interests implicate the areas of economics and social welfare, not fundamental rights).

Additionally, the statutory procedures for appealing an assessment adequately protect Ash's financial interests. Under the second *Mathews* factor, the risk at stake is that an appellant may not successfully perfect an appeal if he or she fails to either pay the assessment in question or obtain

⁴ In *Downey v. Pierce County*, 165 Wn. App. 152, 163, 267 P.3d 445 (2011), the Court of Appeals determined a county code requiring a 250 dollar fee for an administrative review of a dangerous animal declaration violated due process as "due process requires access to an initial evidentiary hearing without charge." Unlike the code in question in *Downey*, Ash was provided with an evidentiary hearing before the Board without having to pay the assessment in question and, consequently, *Downey* does not support Ash's due process contention. Additionally, *Downey* involved possession of pets, something more than a mere financial interest, which does not by itself trigger due process. See *Morrison*, 277 P.3d at 677-79.

an undue hardship waiver before filing the notice of appeal. *See Mathews*, 424 U.S. at 533. Essentially, Ash asks this Court to strike out the timing requirement of RCW 51.52.112 and replace it with a much more lax standard, allowing appellants to avoid the statutory requirements until immediately before trial. This alternative procedure provides very little in the way of additional procedural safeguards, merely extending the appellant's time to act. Ash has made no showing that the time provided by the statute is inadequate for its purpose.

The final *Mathews* factor is the governmental interest, including the increased burden an additional process might entail. *Mathews*, 424 U.S. at 533. In this situation, there are a number of identifiable governmental interests as outlined above. First, there is the interest of the state in ensuring funds exist to pay the underlying assessment. Like a supersedeas appeal bond, RCW 51.52.112 ensures the Department's ability to enforce the assessment, which has already been upheld on administrative review by the Board, is not impaired during the pendency of the appeal. The Department's ability to collect industrial insurance premiums is vital to the continued viability of the industrial insurance system, which is of great importance to employers and employees throughout the state. Second, RCW 51.52.112 increases judicial efficiency by ensuring all parties are interested in having the appeal

resolved, rather than delaying proceedings to delay or avoid payment of the underlying assessment. Finally, requiring an appellant to either pay the underlying assessment or obtain an undue hardship waiver before filing a petition for review increases efficiency. If an appellant is allowed to file the hardship motion at any time before trial, he or she could do so strategically to substantially delay payment, even if there was no question of a possible undue hardship.

The current statutory procedures for appealing industrial insurance assessments provide adequate notice and opportunity to be heard. Ash is not entitled under due process to the right to appeal to superior court and his ability to do so is constrained by statutory requirements, including the need to either pay the assessment or move for an undue hardship waiver before filing his petition for review. Ash is not entitled to a more lax procedure simply because he failed to comply with the statute in question.

F. Ash Is Not Entitled To Attorney Fees And Sanctions Under CR 11

Ash's request for attorney fees and sanctions under Superior Court Civil Rule (CR) 11 is meritless. *See* Br. of Appellant at 28-29. Ash essentially argues the Department's position is untenable and "unconscionable" because he disagrees with the superior court's determination and the statutory requirements for filing an appeal. *See* Br.

of Appellant at 28-29. Ash bears the burden of justifying his request for sanctions. *Skimming v. Boxer*, 119 Wn. App. 748, 754-55, 82 P.3d 707 (2004). CR 11 indicates an attorney's signature on a pleading, motion, or legal memorandum includes an assertion that such argument is, among other things, "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" CR 11(a). Sanctions should be imposed "only when it is patently clear that a claim has absolutely no chance of success." *Skimming*, 119 Wn. App. at 755.

Ash fails to meet his burden. Ash is unable to identify how the Department violated CR 11 because at the time of Ash's request for sanctions the Department had not even filed a pleading containing its position. Even assuming Ash's request was preemptive and applies to this brief, the Department's position complies with CR 11 as it is based on the superior court's decision, RCW 51.52.112, and *Probst II*. Ash's assertion to the contrary is meritless and CR 11 sanctions are inappropriate.

G. If The Superior Court's Dismissal Is Reversed, The Appropriate Remedy Is For The Matter To Be Remanded To The Superior Court To Rule On Ash's Motion For Undue Hardship

This Court should affirm the superior court's dismissal of Ash's appeal. If the Court were to determine that the superior court erred in

dismissing the appeal, the matter should be remanded for the superior court to consider whether Ash's motion for undue hardship should be granted.

Ash argues this Court could decide the undue hardship issue. Br. of Appellant at 27-28. The Court should disregard this argument, which is unsupported by authority. *See Spokane Research & Def. Fund v. West Ctr. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 606, 137 P.3d 120 (2006) (appellate court disregards arguments lacking supporting authority). Moreover, his request is contrary to the statute. RCW 51.52.112 provides that "the court", meaning the superior court, must determine whether prepayment constitutes an undue hardship. This provision is directed to the superior court as petitions for review from the Board are filed in superior court. *See* RCW 34.05.514; RCW 51.48.131. Therefore, assuming without conceding that Ash timely sought a determination from the superior court under RCW 51.52.112, remand would be required for a factual determination whether payment of the underlying assessment constitutes an undue hardship for Ash. *See State v. Marchand*, 62 Wn.2d 767, 770-71, 384 P.2d 865 (1963) (when trial court has not made required findings of fact, such findings cannot be made by an appellate court and matter must be remanded to trial court).

VI. CONCLUSION

For the reasons stated above, the Department respectfully requests the Court affirm the superior court order dismissing Ash's appeal.

RESPECTFULLY SUBMITTED this 29th day of June, 2012.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2012, at Spokane, WA.


TRACY AYERS