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Court of Appeals
Division III
State of Washington

NO. 32440-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

FIRE CONTROL RESOURCES, LLC,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF
WASHINGTON

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

Under the plain language of RCW 51.52.112, an employer who appeals a decision of the Board of Industrial Insurance Appeals (Board) regarding an assessment of industrial insurance taxes to a superior court must either pay the assessed taxes, or obtain a finding that this requirement would be an undue hardship. Otherwise, the appeal must be dismissed. This statutory provision ensures that the Department of Labor and Industries' revenue stream, which is critical to it being capable of meeting its statutory obligation to provide benefits to injured workers, is not disrupted by the appeals process. Fire Control Resources, LLC (Fire Control) appealed a Board decision regarding an assessment of taxes, but failed to either pay the required taxes or obtain a finding of undue hardship. Therefore, the superior court properly dismissed its appeal, and this Court should affirm.

Fire Control agrees that it did not pay the assessed taxes, and it has not assigned error to the superior court's conclusion that Fire Control was not entitled to a finding of undue hardship. Instead, Fire Control argues that the superior court should have heard its appeal even though it failed to comply with the relevant statute. Fire Control fails to support its claim that the superior court should have heard its appeal despite its failure to

comply with RCW 51.52.112, and this Court should affirm the superior court's dismissal of its appeal.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the superior court properly dismiss Fire Control's appeal, when, under RCW 51.52.112, Fire Control was required to either pay the assessed taxes or obtain a finding of undue hardship, and when it is undisputed that Fire Control did not do either of those things?
2. Did Fire Control waive the right to argue that the superior court should have heard its appeal under the court's inherent authority to review arbitrary and capricious agency action, when Fire Control did not raise that as an issue when its case was before the superior court?
3. If Fire Control did not waive the argument, did the superior court err by not reviewing Fire Control's appeal under its inherent authority, when the courts only exercise their inherent authority to review agency action when an adequate statutory right to appeal the agency's action does not exist, and when, here a statutory appeal provision exists?
4. Did Fire Control's failure to either pay the assessed taxes or obtain a finding of undue hardship preclude the superior court from considering Fire Control's argument that the Department lacked either subject matter jurisdiction or personal jurisdiction to issue its order?
5. If the superior court could have considered this issue, did the Department have subject matter jurisdiction to issue a notice of assessment to Fire Control, when the Department has authority under the Industrial Insurance Act to assess premiums to Washington state employers and make assessments?
6. If the superior court could have considered this issue, did the Department have personal jurisdiction over Fire Control, when the Department has the statutory authority to assess premiums to all Washington state employers, when it is undisputed that Fire

Control was a Washington state employer, and when Fire Control was personally served with a copy of the notice of assessment?

7. In the event that it prevails on appeal, is Fire Control entitled to an award of attorney fees, when the Industrial Insurance Act does not provide for attorney fees to employers who prevail on appeal, when the Equal Access To Justice Act only provides for attorney fees in the event that a court reverses a decision of a state agency and concludes that that action was not substantially justified?

III. STATEMENT OF THE CASE

A. Fire Control Is a Washington State Employer That the Department Found to Be the Successor of FCR, Inc.

Fire Control is a Washington state employer that enters into contracts with state and federal agencies to provide fire control services. Certified Appeal Board Record (BR) 1, 29. Fire Control's managing member is Paul Fuchs. BR 11/1/12 at 8. The Department determined that Fire Control was the successor of FCR, Inc. (FCR), a defunct corporation that was also engaged in the business of providing fire control services to state and federal agencies and that was also managed by Fuchs. BR 36-39. RCW 51.16.200 authorizes the Department to collect premiums from a successor that were owed but never paid by a predecessor.

B. A Notice of Assessment Determining That Fire Control Was the Successor of FCR Was Served on Fire Control

The Department issued a notice of assessment to Fire Control in 2009, charging it with \$19,364.19 in industrial insurance premiums that were owed, but not paid, by FCR. BR 36-37. Under RCW 51.48.120, the Department may communicate a notice of assessment to an employer either by “mailing such notice to the employer by a method for which receipt can be confirmed or tracked to the employer’s last known address” or by “serv[ing] [the employer] in the manner prescribed for the service of a summons in a civil action.”

The Secretary of State’s records indicate that Fire Control’s address is 902 Cove Road, Tekoa WA. *See* BR Ex. 2, 11. In a filing he submitted to the Secretary of State, Fuchs indicated that his personal address, his wife’s address, and Fire Control’s address was 902 Cove Road, Tekoa, WA. BR Ex. 11. The Washington State Department of Revenue’s records also list the 902 Cove Road address as the business address of Fire Control. BR Ex. 35. Fuchs testified that 902 Cove Road, Tekoa, WA is the address of a residence owned by his father, Neil Fuchs. BR 11/5/2012 at 48. Fuchs acknowledged that “I do get my mail” at the 902 Cove Road address. BR 11/5/2012 at 8.

Fuchs was personally served with a February 2009 notice of assessment. BR Ex. 37. The declaration of service indicates that it was hand-delivered to him on February 17, 2009. BR Ex. 37. Fuchs requested that the Department reconsider the February 2009 assessment on March 2009, and Fuchs's letter listed the 902 Cove Road address as Fire Control's address. BR 34. The Department sent Fuchs a letter by certified mail in March 2009, which was addressed to the 902 Cove Road address, and which acknowledged receipt of Fuchs's request that the Department reconsider the February 2009 assessment. BR 35. The Department received a return receipt indicating that that letter had been claimed. BR 35.

In October 2011, the Department affirmed the February 2009 assessment. BR 52. The Department mailed the October 2011 decision to the Whitman County Sheriff's office, and the sheriff's office delivered the papers to the 902 Cove Road address, leaving the papers with Neil Fuchs, the father of Fuchs, and the owner of the residence at the 902 Cove Road address. BR 54-55.

Fuchs filed an appeal from the October 2011 decision with the Board. BR 32-39. Fuchs attached copies of the Department's February 2009 assessment, Fuchs's request for reconsideration of that assessment, and the Department's October 2011 decision to his notice of

appeal. BR 32-39, 134. Over the course of the appeal, the Board sent various notices to Fire Control at the 902 Cove Road address. *See, e.g.*, BR 31, 80, 85, 102. At no time did Fire Control argue that the Board should not mail those notices to the 902 Cove Road address.

C. The Board Affirmed the Department's Finding That Fire Control Was the Successor of FCR

The Board granted Fire Control's appeal, finding it to be timely. Several hearings were scheduled for the presentation of evidence. BR 84. At those hearings, Fire Control and the Department each presented evidence regarding the issue of whether Fire Control was the successor of FCR. *See generally* BR 11/1/12; BR 11/5/12; BR 11/19/12; BR 11/26/12.

The crux of Fire Control's case was that Fire Control was a distinct business with no relationship to FCR, aside from the fact that Fuchs was a managing member of both companies. BR 11/1/12 at 9. Fire Control contended that FCR primarily performed general construction work. BR 11/1/12 at 8. Fire Control claimed that FCR's primary tangible asset was a 1959 truck, which was never used by Fire Control Resources. BR 11/5/12 at 41-47. Fire Control generally denied that FCR had any assets that were used by Fire Control. BR 11/5/12 at 41-47.

The Department presented evidence that fire control activities were a major portion of the business performed by both FCR and Fire Control.

BR 11/26/12 at 155-56. Judy Cook, a revenue agent for the Department, testified that Fuchs himself was an intangible asset of FCR, in that his knowledge of performing and securing fire control contracts was critical to both FCR and Fire Control's ability to generate any income. BR 11/26/12 at 167-68. Fuchs conceded that FCR did business under the trade name Fire Control Resources. BR 11/5/12 at 34-35.

The Industrial Appeals Judge issued a proposed decision recommending that the Board affirm the Department's assessment of premiums based on Fire Control's status as the successor to FCR. BR 17-31. Fire Control petitioned for review of that decision (BR 4-8), but the Board denied his petition, thereby adopting the proposed decision as its own decision and order. BR 1; *see* RCW 51.52.106.

D. Fire Control Appealed to Superior Court, but the Superior Court Dismissed the Appeal Because Fire Control Failed to Either Pay the Assessed Taxes or Secure a Finding of Undue Hardship

Fire Control appealed the Board's decision to the Spokane County Superior Court. CP 1-3. Under RCW 51.52.112, an employer who appeals a decision of the Board regarding an assessment of industrial insurance premiums must, before commencing the appeal, either pay the assessed taxes or obtain a finding of undue hardship.

Fire Control did not pay the assessed taxes before commencing its appeal, but it did seek a finding of undue hardship. CP 42. Fire Control initially provided no evidence supporting its motion for that finding. *See* CP 42. Fuchs generally asserted that Fire Control had no assets and owed significant debts. CP 27-30, 44-58, 88-92, 93-112. Fuchs made no assertions regarding the probable cost of securing a bond in support of his request for a finding of undue hardship. *See* CP 27-30, 44-58, 88-92, 93-112.

The Department opposed Fire Control's motion, asserting that Fuchs's declarations were inadequate, since no recent financial records or other documentation was provided. CP 63-81. The Department also advised the superior court that Fire Control had failed to disclose that several fire control contracts were secured in 2012. CP 63-81; *see also* BR 9/27/12 at 2; BR 11/5/12 at 53-54 (responding to question, "So if I understand a number of your statements this year, 2012, Fire Control Resources, LLC, did go out and fight fires this summer. Is that correct, sir?" with statement, "We – we acquired three resource orders, yes").

During the hearing on the motion for a finding of undue hardship, Fire Control's counsel made an offer of proof based on representations of Fuchs regarding the amounts earned on the 2012 fire control contracts as compared to Fire Control's alleged debt. *See* CP 120-22. The court

rejected the offer of proof and denied Fire Control's motion for a finding of undue hardship. *See* CP 120-22. The court expressly found:

Throughout this process, Fire Control Resources, LLC has repeatedly advised the court it has no assets. However, it has failed to support its arguments with any recent documentary evidence. Although Fire Control Resources, LLC did make a verbal offer of proof regarding its income and expenses. Moreover, it is clear there has been a lack of candor by Mr. Fuchs with the court. Argument of counsel confirmed Plaintiff received income during the continuance of the motion of which he did not advise his counsel or the court.

CP 121. The court's order directed Fire Control to provide a surety bond in the amount of \$20,000 by January 31, 2014, or face dismissal of its appeal. CP 121-22.

Fire Control did not provide the surety bond by January 31, 2014 as the court had directed it to do. *See* CP 191-92. The court dismissed Fire Control's appeal. CP 191-92. The court incorporated its previous decision to deny Fire Control's request for a finding of undue hardship into its order of dismissal, finding "The Plaintiff did not establish undue hardship under RCW 51.52.112 and was ordered to post a bond in the amount of \$20,000 by January 31, 2014." CP 192.

Fire Control appealed to this Court. CP 194-95.

IV. STANDARD OF REVIEW

This Court reviews decisions of the Board in a premium assessment case under the judicial review provisions of the Administrative Procedures Act, RCW 34.05.510-.598. RCW 51.48.131; *R & G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). The party challenging the Board decision bears the burden of proof on appeal. RCW 51.48.131; RCW 34.05.570(1)(a); *R & G Probst*, 121 Wn. App. at 293.

Because the superior court dismissed Fire Control's appeal from the Board's decision based on Fire Control's failure to comply with RCW 51.52.112, the merits of the issue of whether Fire Control was the successor to FCR is not before this Court. But, assuming this Court reaches that issue, this Court would review the Board's findings of fact for substantial evidence in light of the Board record. RCW 34.05.570(3)(e). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *R & G Probst*, 121 Wn. App. at 293. Review under the substantial evidence standard is deferential, "requiring the appellate court to view the evidence and its reasonable inferences in the light most favorable to the prevailing party in the highest forum that exercised fact finding authority." *Johnson v. Dep't of Health*, 133 Wn. App. 403, 411, 136 P.3d 760 (2006). This Court does

not reweigh the evidence. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008).

This Court conducts a de novo review of questions of law that are raised by this appeal. *Macey v. Dep't of Emp't Sec.*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988). However, while this Court is not bound by the Department or Board's interpretation of the Industrial Insurance Act, the Court accords deference to both the Department and the Board's interpretations of it, as each of those agencies has expertise in construing that Act. *Macey*, 110 Wn.2d a 313.

V. ARGUMENT

A. **The Superior Court Properly Dismissed Fire Control's Appeal Because Fire Control Failed to Comply With RCW 51.52.112**

Under the plain language of RCW 51.52.112, an employer who has appealed a decision of the Board to a superior court regarding an assessment of industrial insurance taxes must, to perfect the appeal, either pay the assessed taxes or obtain a finding that such a requirement would result in an undue hardship. Fire Control neither paid the assessed taxes nor obtained a finding of undue hardship. The superior court properly dismissed its appeal, and this Court should affirm.

1. **RCW 51.52.112 Requires an Employer to Either Pay the Assessed Taxes or Obtain a Finding of Undue Hardship**

When an employer has appealed a Board decision that involves an issue of industrial insurance taxes, as Fire Control has done here, RCW 51.52.112 requires the employer to either pay the assessed taxes or obtain a finding of undue hardship. *Ash v. Dep't of Labor & Indus.*, 173 Wn. App. 559, 562-63; 294 P.3d 834 (2013); *Probst v. Dep't of Labor & Indus.*, 155 Wn. App. 908, 910, 230 P.3d 271 (2010). RCW 51.52.112 provides: "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." If an employer fails to do either of those things, as Fire Control failed to do here, the appeal must be dismissed. *See Probst*, 155 Wn. App. at 910; *see also Ash*, 173 Wn. App. at 562-63.

The *Probst* and *Ash* decisions confirm this rule. *Probst*, 155 Wn. App. at 910; *Ash*, 173 Wn. App. at 562-63. In *Probst*, the employer did not pay the assessed taxes and did not request a finding of undue hardship, and, therefore, the superior court dismissed its appeal, and the appellate court upheld this dismissal. *Probst*, 155 Wn. App. at 910, 914.

In *Ash*, an employer did not pay the assessed taxes, and sought a finding of undue hardship only after it had filed its appeal. *Ash*, 173 Wn. App. at 561. The superior court concluded that a finding of undue hardship had to be requested before the appeal was filed. *Id.* The *Ash* court disagreed, concluding that an employer could also seek a finding of undue hardship after filing the appeal. *Ash*, 173 Wn. App. at 560. Therefore, it remanded the case so that the superior court could make a new decision regarding the employer's request for a finding of undue hardship. *Id.* While the *Ash* decision clarifies that a finding of undue hardship can be sought after an appeal has been filed, it nonetheless stands for the conclusion that an employer must either obtain such a finding or pay the assessed taxes, or the appeal may not go forward. *Id.* at 562-63.

The prepayment requirement of RCW 51.52.112 helps ensure that the Department's ability to collect industrial insurance taxes – which are necessary to fund the industrial insurance benefits that the Department provides to injured workers – is not disrupted as a result of the appellate process. *See State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 203, 117 P.1101 (1911) (stating that the industrial insurance taxes paid by employers fund the industrial insurance program which is used to provide benefits to injured workers).

As the United States Supreme Court noted in the context of the federal tax system, which has a similar prepayment requirement in a suit involving a demand for a tax refund, “the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in District Court without paying [his or her] tax in full.” *Flora v. United States*, 362 U.S. 145, 177, 80 S. Ct. 630, 4 L. Ed. 2d 623 (1960). Furthermore, as the Washington courts have noted in the context of the excise tax law, the requirement to pay a tax in full before filing an appeal helps prevent the state’s prompt and orderly collection of taxes from being disrupted, which could have “catastrophic effects” on the state’s economy, and threaten “the solvency of the state government.” *See 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)). Similarly, RCW 51.52.112 helps ensure that the Department’s collection of industrial insurance taxes from employers – which is critical to protecting the solvency of the funds that the Department uses to provide benefits to injured workers – is not disrupted.

Here, Fire Control appealed a Board decision involving industrial insurance taxes to a superior court, and it is undisputed that the assessed taxes were not “paid in full” before Fire Control filed that appeal.

RCW 51.52.112. Furthermore, the superior court did not “determine[]” that requiring Fire Control to comply with the statute would result in an “undue hardship”. CP 120-22, 192; RCW 51.52.112. Indeed, it expressly found that Fire Control was not entitled to such a finding. CP 120-22, 192. After denying Fire Control’s request, it granted Fire Control another thirty days to obtain an appeal bond sufficient to cover the amount of the assessed taxes. CP 120-22. Because Fire Control failed to make the necessary payment or post a bond, its appeal was properly dismissed. *Probst*, 155 Wn. App. at 910.

2. Fire Control Has Not Challenged Either the Superior Court’s Finding That It Did Not Pay the Assessed Taxes or the Superior Court’s Determination That It Was Not Entitled To a Finding of Undue Hardship

Fire Control acknowledges that it has not paid the assessed taxes as required by RCW 51.52.112 (*see* App’s Br.¹ at 7), and has not assigned error to the superior court’s finding that compliance with the statute would not result in an undue hardship (*see* App’s Br. At 10-15). Fire Control has not challenged any of the findings or conclusions in the superior court’s order on motion for undue hardship, nor has it challenged the findings in the order of dismissal that reiterated the court’s determination that Fire Control was not entitled to a finding of undue hardship. *See* App’s Br. at

¹ The Department cites to the appellant’s brief as “App’s Br.”

10-15. Fire Control also does not argue, in the body of its appellate brief, that the superior court erred when it denied its request for a finding of undue hardship. *See generally* App's Br.

In order to preserve an issue for appeal, a party must both assign error to the relevant findings and conclusions and present argument – supported by citations to relevant authority – establishing that an error was committed. *See Satomi Owners Ass'n v. Satomi*, 167 Wn.2d 781, 807-08, 225 P.3d 213 (2009); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). As Fire Control has not done any of those things here with regard to the superior court's decision to deny it a finding of undue hardship, this Court has no question before it as to whether Fire Control should have received such a finding. *See Satomi*, 167 Wn.2d at 807-08.

Although the superior court expressly declined to find that Fire Control was entitled to a finding of undue hardship, the superior court nonetheless gave Fire Control a limited form of relief, in that it allowed Fire Control to post a bond in the amount of \$20,000 rather than pay the full amount of the assessed taxes and interest.² Fire Control did not

² It is debatable whether the superior court could properly grant Fire Control even this limited form of relief from the requirement under RCW 51.52.112 given the court's ruling that Fire Control was not entitled to a finding of undue hardship in the first place. RCW 51.52.112 on its face does not contemplate such an alternative. However, neither Fire Control nor the Department argued that the superior court lacked the

provide the court with the bond as directed, nor did it pay the full amount of the assessed taxes. CP 191-92. As Fire Control neither complied with the requirements of RCW 51.52.112 nor with the trial court's directive to post an appeal bond, its appeal was properly dismissed. RCW 51.52.112.

It is a verity on appeal that Fire Control is not entitled to a finding of undue hardship as Fire Control did not assign error to those findings. *See Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013). The closest Fire Control comes to suggesting that an error may have been made is its suggestion that the superior court was "confused" as to the requirements of a bond, based on Fire Control's counsel's colloquy with the superior court judge during the hearing on the Department's motion to dismiss. App's Br. at 33. Fire Control speculates that the court "might" have allowed it to post a bond for less than \$20,000 had it been aware of the cost of securing such a bond. App's Br. at 34.

This Court need not consider Fire Control's speculative remarks. First, by neither assigning error to the superior court's findings nor offering any argument that its findings were improper, Fire Control waived the right to argue that the superior court erred by directing it to

authority to allow Fire Control to post a bond in lieu of paying the full amount of the assessed taxes and interest. *See* RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (observing that the courts decline to consider arguments raised for the first time before an appellate court). Nor does Fire Control or the Department raise that argument on appeal to this court.

provide a bond in the amount of \$20,000 as a method of satisfying RCW 51.52.112. *See Nelson*, 175 Wn. App. at 723; *In re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998) (explaining that where a party purports to assign error to a finding of fact but fails to present clear argument as to how the finding was not supported by substantial evidence, the finding is a verity).

Second, speculation that the court might have done something different had it been provided with information earlier falls far short of offering reasoned argument, supported by a citation to legal authority, that the superior court committed error. And, here, Fire Control's speculation is rebutted by the fact that the superior court did not revise or reconsider its ruling regarding Fire Control's motion for a finding of undue hardship upon being told by Fire Control's counsel that an appeal bond would require a payment equal to the principal amount of the bond.

Third, Fire Control has offered nothing other than the unsworn statements of its counsel in support of its allegation that a party must pay the full amount of a bond in order to obtain such a bond. Assertions and arguments of counsel are not evidence and cannot properly be relied upon in making a finding, let alone serve as the basis for an argument that a trial court erred by making a contrary finding. *See Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998) (stating "Argument of counsel does

not constitute evidence.”) As Fire Control was the party seeking relief from the requirements of RCW 51.52.112, it was incumbent upon Fire Control to support its request for a finding of undue hardship with properly submitted evidence that supported its request. At the time that Fire Control sought a finding of undue hardship, it did not offer any evidence regarding the probable cost of obtaining an appeal bond.

Because Fire Control has not challenged the superior court’s determination that it was not entitled to a finding of undue hardship, and because it is undisputed that Fire Control did not pay the assessed premiums at any time before or after it filed its appeal, this Court may only properly conclude that the superior court properly dismissed Fire Control’s appeal.

B. By Not Raising the Issue at Superior Court, Fire Control Waived the Argument That the Superior Court Should Have Heard Its Appeal Pursuant to the Court’s Inherent Authority, and, in Any Event, It Has No Merit

In an attempt to overcome its failure to meet the requirements of RCW 51.52.112, Fire Control argues that the superior court should have heard its appeal under its inherent authority to review agency action. App’s Br. at 28-32. However, since Fire Control did not ask the superior court to exercise that authority when its case was before it, it waived the right to argue to this Court that the superior court should have reviewed

the case under that authority. *Buecking v. Buecking*, 179 Wn.2d 438, 454, 316 P.3d 999 (2013); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *see also* RAP 2.5(a).

The appellate courts typically decline to consider arguments that were not first presented to the superior court. *McFarland*, 127 Wn. 2d at 333. When this case was before the superior court, Fire Control did not raise any issue regarding a superior court's inherent authority to review arbitrary and capricious agency action, and, therefore, this Court need not consider whether the superior court could have theoretically reviewed the case under that authority. CP 126-33, 134-71. The superior court cannot properly be faulted for failing to exercise authority that it was never asked to exercise, yet Fire Control attempts to do exactly that. App's Br. at 28-32.

The narrow exception to the waiver rule – namely, that a party may raise an issue regarding a manifest constitutional error for the first time on appeal – does not apply here. This Court applies an exacting standard to litigants who attempt to raise a question of constitutional law for the first time on appeal. *See State v. Gordon*, 172 Wn.2d 671, 676-77, 260 P.3d 884 (2011). Among other things, such a litigant must establish that the error is “manifest” in the sense of it being “obvious” based on the record. *Id.* at 676. Furthermore, the litigant must establish that the

constitutional violation had “actual and practical” consequences on the litigant’s case. *Id.* Here, Fire Control has made no attempt to tie its novel constitutional arguments to the standard governing such newly-raised assertions (*see* App’s Br. at 28-32), and, for that reason alone, this Court should decline to review those arguments. *See In Re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), *superseded by statute on other grounds*, Laws of 1987, ch. 403, § 1 (observing that “[n]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion”) (internal quotations omitted).

In any event, Fire Control has not established constitutional error, let alone an “obvious” constitutional error of the type that it would need to show for it to raise this issue for the first time on appeal. *See Gordon*, 172 Wn.2d at 676. The courts do not exercise their inherent authority to review arbitrary and capricious agency action where a party had a statutory right to file a direct appeal from the agency’s decision to a superior court. *Stafne v. Snohomish Cnty.*, 174 Wn.2d 24, 38-39, 271 P.3d 868 (2012); *Torrance v. King Cnty.*, 136 Wn.2d 783, 787-88, 966 P.2d 891 (1998); *Coballes v. Spokane Cnty.*, 167 Wn. App. 857, 865-66, 274 P.3d 1102 (2012); *Snohomish Cnty. v. Shoreline Hearings Bd.*, 108 Wn. App. 781, 785-86, 32 P.3d 1034 (2001).

As *Coballes* explains, a superior court's inherent authority to review arbitrary and capricious action is "to enable limited appellate review of a judicial or quasi-judicial action *when the remedy of appeal is unavailable.*" *Coballes*, 167 Wn. App. at 865 (emphasis added). In other words, the courts have the inherent authority to review agency action in order to ensure that a citizen has a judicial forum of some kind in which to defend his or her constitutional right to be free of arbitrary and capricious agency action. Where a party has a statutory right to file a direct appeal from an agency's decision to a superior court and obtain full relief from the agency's allegedly erroneous decision, the courts do not review the case under their inherent authority to review agency action. *Stafne*, 174 Wn.2d at 38-39 (stating, "a constitutional writ [is] unavailable where a right to appeal exists and the failure to appeal is not excused.").

As *Snohomish County* explains, "A writ of review, either constitutional or statutory, *will not lie* when there is an adequate remedy at law, such as by direct appeal from the final judgment." *Snohomish County*, 108 Wn. App. at 785 (emphasis added). Furthermore, an appellant's desire "to avoid the delay and expense of a trial is insufficient" to justify the extraordinary remedy of a court exercising its inherent authority to review agency action. *Snohomish County*, 108 Wn. App. at 785. Moreover, the *Snohomish County* court expressly held that "[t]his is

true even when the party argues that the tribunal below lacked jurisdiction”, as the appellant argued in that case. *Id.* (emphasis added).

Fire Control’s argument (at App’s Br. 28-32) that it should have been allowed to challenge the Department’s jurisdiction over it in superior court without going through the expense of perfecting its appeal as required by RCW 51.52.112 by paying the assessed industrial insurance taxes is refuted by *Snohomish County*. *Snohomish*, 108 Wn. App. at 785-86. As *Snohomish County* held, the fact that a party wishes to question the jurisdiction of a lower tribunal does not allow the party to bypass a statutory right of appeal and to instead ask a court to exercise its inherent authority to review agency action. *Snohomish*, 108 Wn. App. at 785-86. The courts’ inherent authority to review agency action arises where a litigant has no other, adequate, means of obtaining court review over agency action; it does not exist merely to allow a litigant to reduce his or her litigation expenses. *See Snohomish*, 108 Wn. App. at 785-86.

Fire Control also broadly alleges that, by not exercising its inherent authority to review agency action, the superior court violated Fire Control’s constitutional right to reasonable access to the courts. App’s Br. at 31-32. Fire Control cites to cases that generally recognize a constitutional right to access to the courts, but it fails to provide either logical argument or a citation to legal authority that would support its

specific assertion that the right of reasonable access to the courts gave Fire Control the right to appeal the Board's decision to the superior court without complying with RCW 51.52.112. *See* App's Br. at 31-32.

As the Supreme Court observed in *Rosier*, "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Rosier*, 105 Wn.2d at 616. Here, Fire Control's arguments amount to just such naked castings, and they do not warrant consideration by this Court.

In any event, Fire Control was not denied access to the courts. Fire Control had the right to appeal the Board's decision to the superior court under RCW 51.52.110, and it did so. However, to perfect that appeal, RCW 51.52.112 required Fire Control to either pay the assessed taxes or obtain a finding of undue hardship, and Fire Control failed to do either of those things. As the *Probst* court held, requiring a party to comply with RCW 51.52.112 in order to pursue an appeal from a Board decision does not deprive the party of reasonable access to the courts. *Probst*, 155 Wn. App. at 275. Furthermore, it is a verity on appeal that Fire Control could have complied with RCW 51.52.112 without undue hardship, and, this, in turn, shows that Fire Control had a reasonable opportunity to appeal the Board's decision to the superior court. A party who fails to take advantage of its right to access the courts has not been deprived of

reasonable access to the courts. *See Probst*, 155 Wn. App. at 275 (concluding that employer was not denied reasonable access to the courts since the employer could have either paid the assessed taxes or attempted to obtain a finding of undue hardship). *Cf. In Re Dependency of M.S.*, 98 Wn. App. 91, 988 P.2d 488 (1999) (noting that while parents have a right to be heard before their parental rights are terminated, the right is not “self-executing” and parents must take reasonable and timely steps to exercise their right to be heard).

Fire Control waived the right to argue that its case should be heard pursuant to the superior court’s inherent authority to review arbitrary and capricious agency action, and, in any event, it was not entitled to such review as it had an adequate statutory remedy in the form of the right to directly appeal the Board’s decision to superior court. Fire Control was also not denied reasonable access to the courts; rather, its appeal was appropriately dismissed because it failed to comply with the statute governing such appeals. This Court should affirm.

C. The Superior Court Properly Declined to Consider Fire Control’s Argument That the Department Lacked Subject Matter Jurisdiction or Personal Jurisdiction Over It, and, in Any Event, Those Arguments Fail

- 1. Because Fire Control Did Not Pay the Assessed Taxes or Obtain a Finding of Undue Hardship, the Superior Court Properly Declined to Consider Fire Control’s**

Various Arguments, Including its Arguments Regarding the Department's Jurisdiction

In order for the superior court to be able to consider any of Fire Control's arguments as to whether the Board erred when it affirmed the Department's assessment of taxes in this case, Fire Control had to either pay the assessed taxes or obtain a finding of undue hardship. RCW 51.52.112. Where an employer has appealed a Board decision that is subject to RCW 51.52.112 but the employer fails to comply with RCW 51.52.112, the superior court does not obtain the authority to decide whether the Board's decision was erroneous, and, therefore, it cannot properly take any action aside from dismissing the employer's appeal from the Board's decision. *Probst*, 155 Wn. App. at 275; *see Ash*, 173 Wn. App. at 562-63.

Here, Fire Control appealed a Board decision involving industrial insurance taxes, and neither obtained a finding of undue hardship nor paid the assessed taxes. Fire Control contends, without authority, that, despite its failure to comply with RCW 51.52.112, the superior court should have decided that the Department had not properly obtained subject matter and personal jurisdiction over Fire Control, and, therefore, overturned the Department's decision. App's Br. at 34-40. However, in order to overturn the *Department's* decision, the superior court would also have to reverse

the *Board's* decision, which was the decision that Fire Control had appealed to the superior court.

Since Fire Control did not do what RCW 51.52.112 required it to do, the superior court never obtained the authority to overturn the Board's decision, and could not properly do anything other than dismiss Fire Control's appeal.³ *Probst*, 155 Wn. App. at 275; *see Ash*, 173 Wn. App. at 562-63. Further, where a superior court dismisses an employer's appeal based on its failure to comply with RCW 51.52.112, an appellate court will uphold the dismissal of the appeal, assuming the superior court correctly determined that the employer failed to comply with RCW 51.52.112. *Probst*, 155 Wn. App. at 275. Therefore, this Court should affirm the superior court's dismissal of Fire Control's appeal. *Probst*, 155 Wn. App. at 275.

2. Even Assuming the Superior Court Could Have Considered Fire Control's Argument That the Department Lacked Subject Matter Jurisdiction to Assess Premiums Against It, Fire Control's Argument Lacks Merit

Assuming for the sake of argument that this Court considers Fire Control's argument that the Department lacked subject matter jurisdiction to assess premiums against it even though Fire Control failed

³ Fire Control's failure to comply with RCW 51.52.112 also prevented the superior court from considering its arguments regarding laches and an alleged statute of limitations. *See* CP 192; App's Br. at 8. This Court should similarly decline to consider those arguments here.

to comply with RCW 51.52.112 in filing its appeal, Fire Control's argument that the Department lacked subject matter jurisdiction to issue a notice of assessment to it (App's Br. at 38) is unsupported.

In *Marley v. Department of Labor & Industries*, 125 Wn.2d 533, 542-44, 886 P.2d 189 (1994), the Supreme Court held that the Department has broad subject matter jurisdiction to adjudicate disputes under the Industrial Insurance Act. The Court explained that the Department acts within its subject matter jurisdiction whenever it makes a decision involving the "type of controversy" that the Department has the authority to address as a general matter, which includes all disputes regarding "worker's compensation" irrespective of whether the Department made a legal or factual error in a specific case. *Id.* at 542. Thus, even a clearly erroneous decision regarding workers' compensation benefits is, nonetheless, a decision that the Department has the subject matter jurisdiction to make. *Id.* at 543-44; *see also Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782-83, 271 P.3d 356 (2012)

Here, the Department assessed premiums against Fire Control, determining that Fire Control was the successor of FCR. RCW 51.16.200 gives the Department the legal authority to determine that an entity is the successor of an employer who owes unpaid industrial insurance taxes. Even assuming for the sake of argument that the Department erred in

determining that Fire Control was the successor of FCR, the Department acted within its subject matter jurisdiction when it made this decision, because decisions as to whether an entity is the successor of an employer under the Industrial Insurance Act is a “type of controversy” that the Legislature has empowered the Department to address.

Fire Control does not argue that decisions as to whether one employer is the successor of another employer do not involve a “type of controversy” that the Department can address as a general matter, nor could it plausibly argue that the Department does not have the general authority to make decisions about that issue. Instead, Fire Control argues that the Department lacked subject matter jurisdiction in this case because the record does not establish that Fire Control acquired more than fifty percent of FCR’s assets. App’s Br. at 38 (contending that showing that more than fifty percent of the assets were transferred is a “jurisdictional element[.]”); *see also* App’s Br. at 22. Fire Control suggests that *Orca Logistics v. Department of Labor & Industries*, 152 Wn. App. 457, 216 P.3d 412 (2009), supports the conclusion that showing that more than fifty percent of the assets were acquired is necessary for the Department to acquire subject matter jurisdiction to make a successorship determination. *See* App’s Br. at 38-39.

Fire Control's suggestion lacks merit, as it confuses the issue of whether the Department had subject matter jurisdiction to issue its order with the issue of whether the Department's decision was legally correct. The Department has subject matter jurisdiction to make decisions regarding essentially any issue that arises under the Industrial Insurance Act, including decisions as to whether Fire Control was the successor of FCR. *See Marley*, 125 Wn.2d at 542-44. Even assuming for the sake of argument that the Department erred in deciding that Fire Control was the successor of FCR, it had subject matter jurisdiction to make that decision because that is a "type of controversy" that the Department has the general authority to address. *See Marley*, 125 Wn.2d at 542-44; RCW 51.16.200.

Orca Logistics provides no support for Fire Control's argument that showing that more than fifty percent of the assets were transferred is a jurisdictional requirement, as nothing in that decision suggests that the Department lacks subject matter jurisdiction to find an entity the successor of an employer unless the Department demonstrates that a certain percentage of that employer's assets were acquired by the alleged successor. *See Orca Logistics*, 152 Wn. App. 457. Indeed, the word "jurisdiction" does not appear in that decision. *See id.*

Furthermore, contrary to Fire Control's assumption, *Orca Logistics* did not hold that an entity must acquire more than fifty percent of an

employer's business in order for the Department to correctly determine that that entity was its successor. *See id.* at 463-66. Rather, *Orca Logistics* cited the statutory definition of "successor" contained in RCW 51.08.177, which provides that a successor is one who acquires "a major part" of an employer's business, including intangible assets. *Id.* at 463-64. The court noted that the last sentence of WAC 296-16-31030(1) states that "[m]ajor does not mean more than half". *Orca Logistics*, 152 Wn. App. at 463-64. However, since the alleged successor in that case had plainly acquired more than half of its predecessor's assets, the court did not rely on the last sentence of WAC 296-16-31030(1) in reaching its decision. *Id.* at 463-64. Thus, *Orca Logistics* did not hold that the Department's statement that "[m]ajor does not mean more than half" in that regulation was incorrect, rather, the court simply noted that it need not rely on that sentence of that regulation in that particular case. *See Id.*

In any event, nothing in *Orca Logistics* suggests that showing that an alleged successor acquired more than fifty percent of an alleged predecessor's assets is necessary for the Department to acquire subject matter jurisdiction to issue an order regarding that issue. Such a proposed rule of law would be directly contrary to the holding of *Marley* that the Department acts within its subject matter jurisdiction whenever it makes a

decision regarding a “type of controversy” that it has the general authority to address. *See Orca Logistics*, 152 Wn. App. at 463-66; *Marley*, 125 Wn.2d at 542-44.

3. **Even Assuming This Court Considers Fire Control’s Argument That the Department Lacked Personal Jurisdiction Over Fire Control, Fire Control’s Argument Lacks Merit**

The superior court properly declined to consider Fire Control’s argument that the Department lacked personal jurisdiction over it, as the court could not do anything other than dismiss Fire Control’s appeal based on Fire Control’s failure to comply with RCW 51.52.112, and this Court should affirm that dismissal. *See Probst*, 155 Wn. App. at 916. However, in the event that this Court nonetheless considers Fire Control’s argument regarding personal jurisdiction, Fire Control’s argument must be rejected.

First, Fire Control is incorrect in assuming that the Department must personally serve it with an order in order to acquire personal jurisdiction over it. The Industrial Insurance Act granted the Department broad and sweeping jurisdiction to adjudicate disputes between workers and employers regarding their respective rights under that Act. RCW 51.04.010; *Marley*, 125 Wn.2d at 542-44; *Abraham v. Dep’t of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934). Numerous cases have held that the Department’s subject matter jurisdiction is broad

and sweeping, and that it extends to essentially any question that may arise under the Industrial Insurance Act. *See, e.g., Marley*, 125 Wn.2d at 542-44; *Singletary*, 166 Wn. App. at 782-83; *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 490-91, 288 P.3d 630 (2012). No cases have expressly addressed the scope of the Department's personal jurisdiction over workers and employers, as, in all cases involving challenges to the scope of the Department's subject matter jurisdiction, the parties conceded that the Department had personal jurisdiction over them. *See, e.g., Marley*, 125 Wn.2d at 539; *Singletary*, 166 Wn. App. at 782.

However, based on the logic of the cases discussing the scope of the Department's subject matter jurisdiction, it can be inferred that the Department's personal jurisdiction over individuals is similarly broad. *Marley*, 125 Wn.2d at 539; *Singletary*, 166 Wn. App. at 782. As those cases show, the Department's "jurisdiction" is not like that of a court: its jurisdiction comes from the Legislature, which, by adopting the Industrial Insurance Act, charged the Department with making decisions regarding entitlements and responsibilities of workers and employer under that Act. Just as the Department must have broad and sweeping subject matter jurisdiction regarding questions arising under the Industrial Insurance Act to fulfill its statutory duties, the Department must also have a concomitantly broad grant of personal jurisdiction over Washington state

workers, employers, and the other individuals who have rights or responsibilities under the Industrial Insurance Act. *See Marley*, 125 Wn.2d 539-40 (stating that the Department has “original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred,” quoting *Abraham*, 178 Wash. at 163.)

The Department is required, by statute, to provide workers, employers, and other affected individuals with notice of its decisions. *See* RCW 51.52.050; RCW 51.48.120. However, this is properly viewed not as a prerequisite to acquiring personal jurisdiction over the entity, but as notice that is required in order to ensure that the affected individual receives notice of the Department’s decision and an opportunity to appeal that decision. *See Shafer v. Dep’t of Labor & Indus.*, 140 Wn. App. 1, 6-7, 159 P.3d 473 (2007) (stating, in case where a Department’s order was not communicated to all of the necessary parties, “jurisdiction is not the issue here”), *aff’d*, 166 Wn.2d 710 (2009).

In *Shafer*, the Department issued an order that closed an injured worker’s claim, and communicated that order to the injured worker and to the employer, but not to the injured worker’s attending physician. *Id.* at 4-5. The worker appealed the order to the Board, but did so more than sixty days after the worker had received it, and, under RCW 51.52.050, an

appeal must be filed within 60 days of the communication of that order. *Shafer*, 140 Wn. App. at 4-5. The parties disputed whether the failure to communicate the order to the attending physician was a jurisdictional defect that excused the seemingly late appeal. *Id.* at 6. The *Shafer* court stated that “jurisdiction is not the issue here” and instead viewed the case as presenting a question of whether, under RCW 51.52.050, the Department was required to communicate the order to the attending physician and, if it did not, if that prevented the order from becoming final and binding, thereby precluding the worker’s appeal. *Shafer*, 140 Wn. App. at 6-11. The court concluded that the statute did require the Department to communicate the order to the physician, and that, therefore, the order did not become final, and the worker’s appeal from the order had to be granted even though the appeal was filed more than sixty days after the worker received the Department’s order. *Id.* at 11.

Here, Fire Control is a Washington state employer. By acting as an employer in the state of Washington, Fire Control came within the purview of the Industrial Insurance Act, and the Department acquired personal jurisdiction to make decisions involving Fire Control’s responsibilities under that Act, including its duty to pay industrial insurance taxes it owed as the successor to FCR. RCW 51.16.200. While the Department was required to give Fire Control notice of its decisions so

that Fire Control would have an opportunity to appeal them, this notice was not a prerequisite to acquiring personal jurisdiction over that Fire Control, but a separate legal duty of the Department's. *See Shafer*, 140 Wn. App. at 6-11. Assuming for the sake of argument that the Department failed to properly communicate the notice of assessment to Fire Control as required by RCW 51.48.120, this might prevent the Department's notice of assessment from becoming final even if it was not timely appealed, but it would not deprive the Department of jurisdiction over Fire Control. *See Shafer*, 140 Wn. App. at 6-11.

Fire Control's incorrect argument that the Department lacked personal jurisdiction over it is based on case law involving private lawsuits that were filed by one party against another in superior court. App's Br. at 34-38. However, that case law is inapposite. It is true that, in order for a plaintiff to properly invoke the superior court's personal jurisdiction over another person (that is, a defendant), the plaintiff must properly serve the defendant with the summons and complaint. *See Scanlan v. Townsend*, ___ Wn.2d ___, 336 P.3d 1155, 1159 (2014). However, here, the Department did not attempt to invoke the jurisdiction of the courts over Fire Control by serving Fire Control with a complaint; the Department exercised its statutory duty to make decisions regarding what taxes are owed by a Washington state employer by sending a notice

of assessment to Fire Control. Rather, it is Fire Control who sought superior court review over this matter.

In any event, even assuming for the sake of argument that the Department had to properly serve Fire Control with a notice of assessment in order to acquire jurisdiction over it, Fire Control was properly served. RCW 51.48.120 provides that if an employer owes taxes to the Department, the Department shall communicate a notice of assessment “by mailing such notice to the employer by a method for which receipt can be confirmed or tracked to the employer’s last known address” *or* by serving the notice “in the manner prescribed for the service of a summons in a civil action.” RCW 51.48.120.

Fuchs, a member of Fire Control, was personally served with a copy of the 2009 notice of assessment of taxes. BR Ex. 37. In response to Fuchs’s request that it reconsider its decision, the Department issued a decision in 2011 that affirmed the 2009 notice of assessment. BR 38-39. The Department mailed the 2011 notice to the sheriff’s office, and asked it to deliver the notice to Fire Control’s business address at 902 Cove Road, Fire Control’s business address. BR 54. The sheriff’s office delivered it to that address, leaving it with Neil Fuchs, the father of Fuchs and the

owner of the residence at the 902 Cove Road address.⁴ BR 55. The sheriff's office returned a declaration to the Department indicating that the 2011 notice was delivered to Fire Control's address at the 902 Cove Road address. BR 55.

The most reasonable inference to draw from the record is that the sheriff's office delivered the 2011 notice to Fuchs's father, and Fuchs's father handed that notice to Fuchs, the managing member of Fire Control. This can be inferred from the fact that the 2011 notice was hand delivered to Fuchs's father (BR 55) and from the fact that Fuchs plainly received a copy of the 2011 order, as Fuchs attached a copy of the 2011 order to his notice of appeal when he appealed the 2011 decision to the Board. BR 32-39, 134. Furthermore, Fuchs used the 902 Cove Road address as Fire Control's business address, even though Fuchs's father owned that residence, and Fuchs testified that he receives his own mail at the 902 Cove Road address, which further supports the inference that Fuchs accepted mail that was delivered to his father's address on behalf of Fire Control. BR Ex. 2, 11, 35; BR 11/5/2012 at 8, 48.

In *Scanlan*, the Supreme Court held that the defendant was properly served when the plaintiff had the complaint delivered to

⁴ Fire Control suggests that the declaration of service is insufficient on the grounds that it contains hearsay, but provides no support for its suggestion that a declaration of service can be rejected on those grounds. *See* App's Br. at 34-35.

defendant's father through a professional process server, and the defendant's father in turn handed the complaint to the defendant, because the person who delivered the complaint to the defendant (the defendant's father) met all of the requirements of being a proper process server: he was over the age of eighteen, he was competent to testify, and he was not a party to the appeal. *Scanlan*, 336 P.3d at 1159-64. The *Scanlan* Court emphasized that this is not a form of "substitute service", it is personal service. *Id.* at 1164 (stating, "Substitute service is not at issue here.")

The *Scanlan* Court also noted that it is not necessary that the person who delivered the summons to the defendant fill out a certificate of service: rather, all that is necessary is that the record as a whole supports the inference that the defendant was in fact served with the summons. *Scanlan*, 336 P.3d at 1160. A certificate of service is one form of information that supports the conclusion that service occurred, but it is only one way of establishing that that occurred. *See Id.*

Here, Fuchs's father is over the age of 18. BR 11/5/2012 at 39. He is not a party to the appeal. Finally, adult witnesses are presumed competent to testify, and, here, there is no evidence that Fuchs's father was incompetent. *See State v. Johnston*, 143 Wn. App. 1, 14, 177 P.3d 1127 (2007). Thus, Fuchs's father meets all of the requirements to qualify

as a server of process, and his delivery of the 2011 decision to Fuchs was legally sufficient. *Scanlan*, 336 P.3d 1159.

Scanlan noted that in some prior cases, including the cases Fire Control cites here, the courts had held that a plaintiff's delivery of a complaint to a person who in turn delivered the complaint to the defendant had not established proper service of the pleadings on the defendant under the theory that the plaintiff had constructively served the defendant. *Scanlan*, 336 P.3d at 1161-62. However, *Scanlan* explained that, in those cases, the plaintiffs did not argue that the service of the complaint on the defendant *by the person who actually handed the complaint to the defendant* established service. Instead, in each of those cases the plaintiffs argued that they had constructively served the defendant based on the fact that the defendant ultimately received the complaint. *Id.* Under *Scanlan*, one cannot *constructively* serve the defendant by delivering the pleadings to a person who in turn delivers them to the defendant, but a defendant can be *personally served* in this fashion, so long as the person who actually handed the pleadings to the defendant is over the age of 18, is competent, and is not a party to the appeal. *Id.*

The Supreme Court's decision in *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 477-480, 680 P.2d 55 (1984), provides another basis for concluding that Fire Control was personally served with the 2011

decision even though Fuchs's father is not a member of Fire Control. In *Reiner*, a plaintiff filed a suit against a foreign corporation. *Reiner*, 101 Wn.2d at 476-77. The plaintiff's process service delivered the complaint to the wife of an agent of the foreign corporation. *Reiner*, 101 Wn.2d at 476. There is no indication that the agent's wife was, herself, an agent of that corporation. Under RCW 4.28.080(10), service on a foreign corporation can be made "to any agent . . . thereof". RCW 4.28.080(10) does not mention the spouses of agents of corporations, nor does it mention leaving a complaint at the abode of an agent of a corporation.

The Supreme Court nonetheless ruled that the defendant had been properly served. *Reiner*, 101 Wn.2d at 476. The Court reasoned that statutes providing for a form of constructive service are strictly construed, while statutes providing for a form of actual service are satisfied by substantial compliance. *Id.* at 479. The Court concluded that RCW 4.28.080(10) provided for a form of actual service rather than constructive service, as it requires that the pleadings reach the hands of a person who can act on behalf of the corporation. *Id.* at 479-80. The *Reiner* Court concluded that the plaintiff had substantially complied with RCW 4.28.080(10) by delivering the complaint to the usual abode of an agent of the corporation, and leaving the pleadings with a person of suitable age and discretion who was a resident at that abode. *Id.*

Here, the relevant subsection is RCW 4.28.080(9) rather than RCW 4.28.080(10), but the reasoning underlying the *Reiner* decision applies with equal force here. As with RCW 4.28.080(10), RCW 4.28.080(9) contemplates actual service of a complaint on a person rather than constructive service. Thus, it should be reviewed for substantial compliance. Just as RCW 4.28.080(10) is satisfied by service on an agent of a corporation by delivering the pleadings to the agent's residence and leaving them with a person of suitable age and discretion, RCW 4.28.080(9) is satisfied by leaving the pleadings by delivering the pleadings to an address used by the managing agent of an LLC and leaving them with a person of suitable age and discretion (Fuchs's father) who lived at that address. As noted, Fuchs not only used his father's residence as Fire Control's business mailing address, he also testified that he receives his own mail at that address. BR Ex. 2, 11, 35; BR 11/5/2012 at 8, 48.

D. Fire Control Should Not Receive an Award of Fees

Finally, Fire Control argues that, if it prevails on appeal, it is entitled to an award of attorney fees under the Equal Access to Justice Act (EAJA) for both the superior court appeal and the current litigation. App's Br. at 46-47. It is not entitled to such an award.

First, Fire Control should not prevail on appeal, and, therefore, it should not receive an award of fees on appeal.

Second, Fire Control did not request an award of fees under the EAJA when its case was before the superior court, and, therefore, it has waived the right to request such fees with regard to the superior court appeal. *See* CP 126-33, 134-171 (requesting fees, but not mentioning the EAJA); *Davis v. Sill*, 55 Wn.2d 477, 481, 348 P.2d 215 (1960) (noting that party may not raise new issue on appeal).

Finally, this Court should not grant Fire Control an award of fees under the EAJA in any event, because the Department's position in this case is substantially justified. *See Alpine Lakes Protection Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 18-19, 979 P.2d 929 (1999). Where the state's position on appeal is one that "could satisfy a reasonable person," its position is substantially justified, and no fee award is proper, even if a court concludes on appeal that the agency was incorrect. *Alpine Lakes*, 102 Wn. App. at 18-19. Here, a reasonable person could agree with the Department's argument that Fire Control's failure to comply with RCW 51.52.112 mandated dismissal of its appeal. Therefore, no fees are proper under the EAJA, even assuming Fire Control prevails in this appeal.

Fire Control also argues that it should receive a fee under RCW 51.52.130. App's Br. at 40. However, on its face, that statute only authorizes an attorney fee award when an injured worker or beneficiary prevails on appeal, not when an employer does so. Fire Control's suggestion that it may receive fees under RCW 51.52.130 is meritless.

Fire Control also argues that it should receive a fee award on an equitable basis because it is making arguments in this case that will benefit the general public, contending its counsel acted as "a private attorney general, protecting constitutional principles, ignored by the Washington Attorney General's Office", citing *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974) and *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994). App's Br. at 41. Neither case supports Fire Control's argument here.

In *Dempere*, the court denied an equitably grounded request for an award of attorney fees, questioning whether "bad faith" was a basis for seeking an award of fees. *Dempere*, 76 Wn. App. at 407; *but see Wright v. Dave Johnson Indus. Inc.*, 167 Wn. App. 758, 783-84, 275 P.3d 339 (2012) (stating that bad faith is a basis for an award of fees). *Dempere* does not support Fire Control's argument here. In any event, there is no basis for Fire Control's broad allegation that the Attorney General's office has acted in "bad faith" in defending the Department's decision in this

case. The Attorney General's Office, on behalf of the Department, sought dismissal of Fire Control's appeal based on its failure to comply with RCW 51.52.112. Fire Control does not contend that RCW 51.52.112 does not apply to appeals from Board decisions regarding taxes, nor that that statute is unconstitutional, nor that Fire Control complied with RCW 51.52.112. There is no merit to Fire Control's suggestion that the Attorney General's Office behaved improperly in seeking to enforce a statute that is plainly applicable, particularly where there is no claim that that statute is unconstitutional.

In *Weiss*, the party seeking an award of attorney fees had successfully challenged an unconstitutional attempt to expend public money, thereby saving taxpayers from an unlawful disbursement of public funds. *Weiss*, 83 Wn.2d at 917. Here, in contrast, Fire Control is attempting to obtain reversal of a Department decision that directed Fire Control to pay money into public funds. Thus, Fire Control is seeking to deprive public funds of income, not to stop the Department from improperly disbursing public funds. Therefore, unlike the litigants in *Weiss*, Fire Control is not attempting to aid the public by protecting it from an unlawful expenditure of public money, and *Weiss* does not support its argument here. *See Weiss*, 83 Wn.2d at 917.

Finally, Fire Control argues that it should receive an award of its fees under 42 U.S.C. § 1988(a) & (b). However, Fire Control provides neither legal argument nor any authority for the proposition that 42 U.S.C. § 1988(a) or (b) support an award to an employer in a worker's compensation appeal of this kind. Fire Control has not initiated a 42 U.S.C. § 1988 complaint in superior court and cannot now claim fees under it. Fire Control's request for an award of fees under that federal statute appears to be based on its allegation that it was unconstitutionally denied access to the courts when the superior court did not review its appeal under. However, as Fire Control's argument that it was unconstitutionally denied access to the courts lacks merit, its request for fees under the federal statute fails as well.

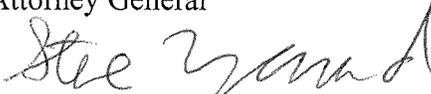
VI. CONCLUSION

Fire Control failed to either pay the assessed taxes or obtain a finding of undue hardship as RCW 51.52.112 required it to do in order for its appeal to go forward. Its appeal was properly dismissed. Fire Control was not entitled to have the court hear the case under the court's inherent authority to review agency action, as Fire Control had an adequate remedy at law in the form of a statutory appeal right. Fire Control has also failed to establish that the Department lacked either subject matter jurisdiction or personal jurisdiction over it, and it has also not shown that it was deprived

of reasonable access to the courts. The superior court properly dismissed its appeal, and this Court should affirm.

RESPECTFULLY SUBMITTED this 20 day of January, 2015.

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NO. 32440-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

FIRE CONTROL RESOURCES, LLC,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES, STATE OF
WASHINGTON,

Respondent.

**DECLARATION OF
MAILING**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Motion for Extension of Time to File Respondent's Brief, Declaration in Support of Motion, and this Declaration of Mailing to all parties on record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

Michael J. Beyer
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DATED this 20th day of January, 2015, at Tumwater, Washington.



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