

FILED

No. 356124

APR 18 2018

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

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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Waste Connections of Washington, Inc. d/b/a Lakeside Disposal &  
Recycling Company,

Appellant,

v.

Department of Labor & Industries, State of Washington,

Respondent.

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APPELLANT'S REPLY BRIEF

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## I. ARGUMENT

Waste Connections'<sup>1</sup> appeal was timely pursuant to (1) the plain text of the law and (2) equitable legal principles. Respondent Labor and Industries' ("Respondent" or the "Department") Brief ("Respondent's Brief") advances multiple arguments to obfuscate the issue of whether or not the Department's own regulation was followed based on the plain language of the regulation at issue: WAC 296-900-17005(2). Respondent's Brief includes two main arguments. First, the Department argues that Waste Connections' appeal allegedly did not "notify" the Department of the appeal. Respondent's Brief ("RB"), pp. 4-10. Second, the Department argues that Waste Connections did not satisfy both elements of equitable tolling. RB, pp. 10-15. Both arguments are flawed for the reasons stated in Appellant's Opening Brief and as demonstrated below.

### **A. Waste Connections "Notified" the Department Director Pursuant to the Department's Own Regulation.**

The Department claims that an appeal is untimely unless the Department Director ("Director") is actually notified of an employer's intent to appeal before the expiration of the 15-working day deadline.

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<sup>1</sup> As noted in Appellant's Opening Brief, Respondent cited the wrong entity. The proper entity is Lakeside Disposal & Recycling Co., not Waste Connections, Inc. Appellant will further contest the incorrect designation in a hearing on the merits in this case.

RB, pp. 4-10. The Department attempts to needlessly complicate the regulation to somehow claim it means something different than what it says. Rather than follow the plain language of the regulation and statute, the Department attempts to parse words from the law such as “submission,” “mail,” and “notify” in an attempt to escape its own regulation. The Department’s arguments are unconvincing for several reasons.

**1. The Director Specifically Determined How He Would be “Notified” Under RCW 49.17.140.**

First, the Washington State Legislature, in enacting the Washington Industrial Safety and Health Act (“WISHA”), provided the Department Director authority to draft specific regulations concerning what acts constitute “notice” to the Director under RCW 49.17.140(1). RCW 49.17.010, .040, .050, and .060. Pursuant to this statutory authority, the Director promulgated WAC 296-900-17005. This regulation allows an appealing party to mail, fax, hand-deliver, or email a notice of appeal. WAC 296-900-17005(2). When sending the appeal by mail, the Director determined that the date of the postmark would be considered that date the Director was “notified.” The regulation provides that “[t]he postmark is considered the submission date of a mailed request.” WAC 296-900-17005.

The Department essentially argues that the Director's determination that "notification" occurs on the date of the postmark should be ignored. Instead, the Department argues that the Director must actually be "notified" before the 15-working day deadline passes, rather than allow the postmark to be the date of notification. The Department claims that the Director must actually *receive* the appeal before the 15-working day deadline. For example, the Department argues:

The plain language of RCW 49.17.140(1) requires actual notice to the Director of an intent to appeal. "If, within fifteen working days from the communication of the notice issued by the director the employer *fails to notify* the director," the citation becomes final.

RP, p. 6 (citation omitted, emphasis original). In fact, when following the regulation and mailing an appeal, the Director can be actually "notified" of the appeal after the 15-working day deadline. However, the Director determined, pursuant to the Legislature's delegation of authority, that when a party mails an appeal, "notification" occurs on the date of the postmark. As a result, the Director may receive the appeal after the 15-working day deadline. The Director must be held to his own regulation.

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## **2. The Department's Argument that the "Mailbox Rule" Supports its Position is Without Merit.**

Second, rather than defend the specific language of its own regulation, the Department attempts to claim the "mailbox rule" supports its claim that Waste Connections' appeal was not "mailed." RB, p. 7. Although the Director's regulation specifically provides that the appeal is considered submitted as of the date of the postmark, Waste Connections will address the legal authority cited by the Department concerning its "mailbox rule" argument. *See Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn. App. 886, 790 P.2d 1254 (1990).

The *Kaiser Aluminum* case concerned whether an employer's protest of a workers' compensation decision was timely. 57 Wn. App. at 887-88. The employer claimed that it mailed its protest of the workers' compensation decision, but did not have any postmark or copy of the letter that was allegedly mailed. *Id.* Instead, the employer attempted to prove it mailed the letter through evidence of its "practice" of mailing letters. *Id.* at 888. The employer presented testimony that the customary practice of the author of the protest letter was to write the letter, and place it in his "out" basket for mailing. *Id.* However, the employer was

unable to provide testimony that anyone “actually picked up the letters that day and placed them in the mailbox.” *Id.*

The court held that the employer did not mail the protest letter. *Kaiser Aluminum*, 57 Wn. App. at 893. The employer’s appeal was denied. *Id.* Division III of the Court of Appeals ruled that the employer did not demonstrate that it actually mailed the protest letters. *Id.* at 892. The Court reasoned that, “[u]pon proof of mailing, it is presumed the mail proceeds in due course and the letter is received by the person or entity to whom it is addressed.” *Id.* at 889, citing *Avgerinion v. First Guar. Bank*, 142 Wn. 73, 78, 252 P. 535 (1927). However, the employer in *Kaiser Aluminum* did not satisfy the threshold issue of whether or not the protest was ever placed in the mail. *Id.* Citing the Washington State Supreme Court’s decision in *Farrow*, the court required that the employer demonstrate proof of mailing by proving both “(a) an office custom with respect to mailing; [and] (b) compliance with the custom in the specific instance.” *Id.*, citing *Farrow v. Department of Labor & Indus.*, 179 Wn. 453, 455, 38 P.2d 240 (1934)(emphasis original). The court held that the employer in *Kaiser Aluminum* did not satisfy both prongs of *Farrow*, in part, because, “[t]here is no evidence any envelopes were prepared, sufficient postage stamps placed thereon, or

what happened to the letters after they left Mr. Stuart's 'out' basket." *Id.*, at 892.<sup>2</sup>

The Department claims that *Kaiser Aluminum* demonstrates that "a party does not prove mailing when a party presents no evidence of 'sufficient postage stamps placed thereon.'" RB, p. 7. However, as demonstrated above, the court in *Kaiser Aluminum* was analyzing whether the employer had even demonstrated that the appeal was placed in the mail pursuant to custom. The court was not analyzing whether an appeal with insufficient postage was considered "mailed" for the purpose of a statute.

Moreover, even if *Kaiser Aluminum* were applicable here, the facts in this case demonstrate that the appeal was "mailed" consistent with *Kaiser Aluminum* and *Farrow*. Jason Hudson, Division Vice-President of Waste Connections, drafted Waste Connections' appeal and directed the front desk receptionist, Bonita Erickson to mail the appeal to the Department. CP 97-98, 110:11-112:5. Ms. Erickson prepared the envelope to be mailed via certified mail. CP 100, 124:22-125:3. Ms. Erickson then sent the envelope with the appeal to the mail room for proper postage to be affixed. CP 125:4-7. Katie Rowe, another Waste

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<sup>2</sup> The other case cited by the Department in support of its "mailbox rule" argument, *Lieb v. Webster*, similarly concerns the issue of whether or not custom was established and followed. RB, p. 7; 30 Wn. 2d 43, 47, 190 P.2d 701 (1948).

Connections employee (whose job duties included affixing proper postage), affixed first class postage to the envelope. CP 125:8-10, 126:11-22. The appeal was postmarked and actually “mailed,” contrary to the employer in *Kaiser Aluminum*. The Department’s own cases provide further support that the Waste Connections’ appeal was properly “submitted” and “mailed.”

**3. The Department’s Reference to the Texas *Wesco* Case is not Relevant to this Appeal.**

The Department cites the *Wesco Distribution Inc. v. Westport Group, Inc.* case and claims it supports the Department’s argument that a Texas court rejected Waste Connections’ argument concerning proper postage. RB, pp. 9-10. 150 S.W. 3d 553, 556 (Tex. 2004). Besides the fact that *Wesco* is not binding on this Court, *Wesco* is not relevant to Waste Connections’ case for the reasons set forth below.

The *Wesco* case concerned much different facts and legal issues. The issue in *Wesco* was notice of a pre-lien to interested private parties: not notice of an appeal to a state agency. 150 S.W. 3d at 556. The Texas Court reasoned that actual notice was “critical” in *Wesco* to effectuating the purposes of the pre-lien statute. *Id.* at 559. Notice was designed in the Texas statute to (1) give the parties entitled to a pre-lien notice an opportunity to protect their interest and (2) prevent surprise to

parties with other interests in the property. *Id.* In contrast, the “notice” to the Director in Waste Connections’ case is not “critical” for the purposes of the statute because no third-party interests are at issue.

The only issue in Waste Connections’ case is notice to the Department of an appeal. The Department received this notice. Notice is not “critical” in Waste Connections’ case for private parties to protect their interests or prevent surprise concerning property interests. Instead, the Department is attempting to use *Wesco* to deny a citizen, Waste Connections, its due process rights to a hearing on the merits in this case.

**B. Equitable Principles Support Waste Connections’ Appeal.**

The Department argues that equitable principles do not support Waste Connections’ appeal. RB, pp. 10-15. However, as demonstrated in the record and prior briefing, this Court must allow Waste Connections’ appeal to be heard on the merits consistent with elementary principles of equity.

Initially, the Department claims that Waste Connections “waived its equitable relief argument because it did not sufficiently argue it below.” RB, p. 10. This is not accurate. The Department claims that Waste Connections’ equity argument was only found in a single sentence at oral argument. *Id.* This is not accurate. The record includes multiple

instances of Waste Connections' equity argument being advanced, both in briefing, and oral argument. *See e.g.*, Notice of Appeal to Superior Court (CP 9-11), Appellant's Trial Brief (CP 169-170), RP 23:16-22. Waste Connections previously addressed and briefed the ways equity supports its appeal in this matter. Appellant's Opening Brief, pp. 18-20.

Second, the Department attempts to reframe Waste Connections' equity argument by claiming Waste Connections is required to meet the elements of "equitable tolling." RB, p. 11. Not surprisingly, the Department makes this argument to raise the threshold for Waste Connections' equitable argument: by claiming Waste Connections must prove "bad faith, deception, or some other action by the defendant that confused or misled" Waste Connections. *Id.* As provided in Waste Connections' Opening Brief, basic principles of equity are relevant to this case based on the clear intent to appeal, and innocent mistake made by Waste Connections. Appellant's Opening Brief, pp. 18-20. The rules of civil and appellate procedure allow allegedly untimely appeals to be heard on the merits under basic principles of fairness. Washington Rule of Appellate Procedure 18.8(b); Superior Court Civil Rules 1, 5(d)(2), and 6(b)(2). Contrary to the Department's dismissal of *Scannell v. State*, this Washington Supreme Court case is applicable because it demonstrates Courts follow equitable principles based on the good

behavior of the Appellant and in the interests of allowing a party to receive a hearing on the merits. 128 Wn.2d 829, 834, 912 P.2d 489, 491 (1996)(cited by RB, p. 12).

Third, the Department argues the civil rules describing fundamental principles of equity do not apply to statutory deadlines or the Department. RB, pp. 13-14. However, the *Kaiser Aluminum* case cited by the Department (above) demonstrates that Washington courts do in fact allow statutory appeals to proceed even when an employer cannot present proof that a physical appeal was mailed. The Court in *Kaiser Aluminum*, citing the Washington Supreme Court, examined whether an appeal was filed, pursuant to a statutory deadline, even in the absence of proof of an appeal. 57 Wn. App. at 887-88. The court examined the employer's "custom" to determine if statutory appeal deadlines were met. *Id.* As demonstrated above, Waste Connections demonstrated substantial proof that its appeal was timely filed pursuant to the law – beyond that required in *Kaiser Aluminum*. In addition, the Department cites *B&J Roofing, Inc. v. Bd. Of Indus. Ins. Appeals*, as allegedly reasoning that the "RCW 49.17.140 deadline [is] a statutory deadline not extended by CR 6." RB, p. 14; 66 Wn. App. 871, 876, 832 P.2d 1386 (1992). However, the court in *B&J Roofing* held that the deadline in RCW 51.52.104 – not RCW 49.17.140 – wouldn't be extended under the

facts of the case. RCW 49.17.140 is mentioned in *B&J Roofing*, but not for the reasons provided in the Department's Brief. In any event, equitable principles apply to deadlines provided by statute and Department regulations.

Finally, the Department claims that reversing the decision below and allowing Waste Connections a hearing on the merits "would frustrate worker safety." RB, pp. 14-15. Further, the Department claims, without authority, that "[c]onsistent deadlines ensure worker safety by providing finality to workplace-safety citations." *Id.* at 15. There is no issue of worker safety in this matter. As the Department is aware, Waste Connections "promptly addressed all of the safety concerns at issue in the citations and provided prompt notice of the corrective and/or prudent actions taken." CP 81. Worker safety is not an issue in this case. The Department cannot claim that worker safety is better served by denying Waste Connections a hearing on the merits. Equity compels a hearing in this case.

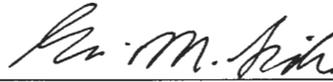
## **II. CONCLUSION**

For all the foregoing reasons, this Court should rule that Waste Connections' appeal was timely filed. The Board of Industrial Insurance Appeals ("BIIA") does have jurisdiction to hold a hearing on the merits. The Grant County Superior Court's Order affirming and incorporating

the BIIA's Order should be appropriately overturned and this matter remanded for a hearing on the merits before the BIIA.

Dated this 17th day of April, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2018, the foregoing “Appellant’s Reply Brief” was duly filed with the Clerk of Court via FedEx Priority Overnight, and a true and correct copy further served upon Respondent via ABC Legal Services hand-delivery, to the following address:

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