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

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

Appellant,

v.

Department of Labor & Industries, State of Washington,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Waste Connections of Washington, Inc. d/b/a Lakeside Disposal & Recycling Company (“Waste Connections”¹ or “Appellant”), submits this Opening Brief to ultimately obtain a hearing on the merits in this Washington Industrial Safety and Health Act (“WISHA”) case. The Department of Labor and Industries (the “Department”) denied Waste Connections’ right to a hearing on the merits in this case based on the incorrect conclusion that Waste Connections’ appeal was untimely. Waste Connections submitted an appeal with postage prepaid that was postmarked three days before the appeal deadline. Unfortunately, the appeal was sent via certified mail, but postage was prepaid for only first class mail. The day after the appeal was returned for insufficient postage, Waste Connections informed the Department of the innocent mistake. Waste Connections then resent the appeal with sufficient postage.

Waste Connections’ appeal was timely under the plain

¹ The Department of Labor and Industries cited the wrong entity in this matter. Appellant reserves its right to contest the Department of Labor and Industries’ incorrect designation of the alleged employer at a hearing on the merits in this case.

language of WAC 296-900-17005, promulgated pursuant to RCW 49.17.140 of the WISHA. WAC 296-900-17005 clearly provides that “[t]he postmark is considered the submission date of a mailed request.” Waste Connections met this requirement. The appeal was postmarked three days before the appeal deadline. In addition, equitable principles compel a hearing on the merits because the insufficient postage was an innocent mistake and once the appeal was returned, it was immediately resent to the Department.

In sum, Waste Connections has been wrongfully denied its due process rights to a hearing based on a technicality that Waste Connections satisfied.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- A. Did the Superior Court misapply the governing law in affirming the BIIA’s decision that Waste Connections’ appeal was untimely even though the appeal met the specific requirements of WAC 296-900-17005?

- B. Did the Superior Court misapply the law by refusing to allow Waste Connections' appeal to proceed based on elementary equitable principles?

Issues Pertaining to Assignments of Error

- A. Whether an appeal to a Citation and Notice mailed within the statutory appeal period but with insufficient postage for certified mail is a timely appeal pursuant to RCW 49.17.140 and WAC 296-900-17005?
- B. Whether equitable principles compel the BIIA to hold a hearing on the merits where Waste Connections' innocent mistake of affixing insufficient postage did not cause prejudice to the Department?

III. STATEMENT OF THE CASE

A. Procedural Background

This appeal originated from the Department's denial of Waste Connections appeal of a Citation and Notice issued on February 9, 2015. CP 58. On March 2, 2015, Waste Connections mailed its appeal of the Citation and Notice. CP 97-98, 110:11-

112:5, 125:8-10, 126:11-22. On March 13, 2015, Waste Connections resent its appeal after it was returned for insufficient postage. CP 101, 113:20-114:10, 125:19-126:3.

After initially denying Waste Connections' appeal, on April 3, 2015, the Department forwarded Waste Connections' appeal to the BIIA for a decision. CP 87, 115:19-116:3. BIIA Industrial Appeals Judge ("IAJ") Marnie Sheeran signed a Proposed Decision and Order on December 31, 2015 that ruled Waste Connections' appeal was untimely. CP 47-52. On January 30, 2016, Waste Connections filed a timely Petition for Review to the BIIA. CP 32-43. The BIIA denied Waste Connections' Petition for Review and adopted IAJ Sheeran's Proposed Decision and Order on February 8, 2016. CP 30-31. Waste Connections filed a timely Notice of Appeal to the Grant County Superior Court on March 10, 2016. CP 1-23.

The Grant County Superior Court denied Waste Connections' appeal through a written opinion filed on September 5, 2017. CP 186-187. In order to preserve its appeal rights, Waste Connections filed a Notice of Appeal on October 4, 2017. CP 188-193. On October 12, 2017, the Grant County Superior Court

issued its judgment in this case. CP 194-199. The Superior Court adopted and incorporated by reference the BIIA's Findings of Fact and Conclusions of Law. *Id.* In order to preserve its appeal rights, Waste Connections filed a Notice of Appeal incorporating the Superior Court's September 5, 2017 written decision and the Superior Court's October 12, 2017 judgment to this Court. CP 200-209. This Opening Brief is being timely filed pursuant to RAP 10.2(a).

B. Factual Background

The relevant facts in this matter are not in dispute. The only issues before this Court are issues of law.

1. Waste Connections Deposited Its Appeal in the Mail Three Days Before the Appeal Deadline.

The Department issued a Citation and Notice against Waste Connections on February 9, 2015. CP 58. Waste Connections did not receive the Citation and Notice until February 11, 2015. CP 65. Therefore, the 15 working day appeal deadline ended on March 5, 2015. CP 110:1-10. This calculation excluded weekends and the Presidents' Day Holiday. *Id.*

On March 2, 2015, Jason Hudson, Division Vice-President of Waste Connections, drafted Waste Connections' appeal. CP 97-98, 110:11-112:5. Mr. Hudson directed that the appeal be mailed to the Department. *Id.* The front desk receptionist, Bonita 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 Connections employee (whose job duties included affixing proper postage), affixed first class postage to the envelope. CP 125:8-10, 126:11-22.

2. The Appeal Was Returned for Insufficient Postage for Certified Mail. Waste Connections Immediately Contacted the Department and Mailed the Appeal Again.

Although the appeal was placed in the mail with first class postage before the appeal deadline, it was returned to Waste Connections due to insufficient postage for certified mail. CP 100, 113:6-25, 125:13-18. Sending a letter via certified mail was more expensive than sending a letter via first class mail. CP 113:6-11. After the appeal was returned for insufficient postage on March 12, 2015, Mr. Hudson immediately sent an email with the attached

appeal and left a voicemail for Steve Yunker at the Department to discuss the appeal. CP 113:12-19. Mr. Hudson and Mr. Yunker soon discussed the circumstances that led to the returned appeal and that the appeal was being mailed a second time. CP 117:3-118:6. Mr. Yunker said “Okay” and that the Department would “take a look” at the appeal. *Id.* Mr. Hudson immediately had the appeal resent via certified mail on March 13, 2015. CP 101, 113:20-114:10, 125:19-126:3.

3. The Department Refused to Schedule an Informal Conference or Forward the Appeal to the BIIA.

On March 18, 2015, the Department sent Mr. Hudson a letter informing him that despite his original postmark and efforts to contact the Department, the Department considered the appeal untimely. CP 84, 114:14-22. The Department provided no recourse to Waste Connections. *See id.* The Department did not schedule an informal conference to discuss the appeal. *See id.* The Department did not inform Waste Connections that it could still file an appeal with the BIIA. *See id.* The Department instead directed Waste Connections to pay the penalty and comply with the Citation and Notice. *See id.*

Mr. Hudson was “disappointed” once he received this letter. CP 116:5-11. Mr. Hudson believed the returned letter was an “innocent mistake.” *Id.* The Department knew the original postmark was three days before the appeal deadline. *Id.* Yet, the Department refused to accept the appeal. *Id.*

On March 26, 2015, Mr. Hudson sent a response to the Department. CP 85-86, 114:23-115:18. Mr. Hudson communicated Waste Connections’ position that the appeal was timely because it was postmarked before the March 5 appeal deadline. *Id.* Mr. Hudson requested that the Department either (1) schedule an informal conference or (2) forward Waste Connections’ appeal to the BIIA. *Id.*

4. The Department Forwarded the Appeal to the BIIA. After a Timeliness Hearing, Waste Connections Filed a Petition for Review to the BIIA.

On April 3, 2015, the Department informed Waste Connections that it forwarded Waste Connections’ appeal to the BIIA. CP 87, 115:19-116:3. IAJ Marnie Sheeran held a timeliness hearing via teleconference on December 1, 2015. CP 106. On December 31, 2015, IAJ Sheeran issued a Proposed Decision and

Order denying Waste Connections' appeal. CP 47-52. The Proposed Decision and Order was received by Waste Connections on January 4, 2016. CP 33.

Waste Connections filed a timely Petition for Review with the BIIA on January 20, 2016. CP 32-43. The BIIA denied Waste Connections' Petition for Review and adopted the Proposed Decision and Order on February 8, 2016. CP 30-31. Waste Connections received the Order on February 10, 2016 and filed a timely Notice of Appeal to the Grant County Superior Court. CP 1-23. Waste Connections appealed the BIIA's order in its entirety. CP 2. Waste Connections specifically contested the following legal conclusions in the BIIA's order:

Conclusion of Law #1: Waste Connections Inc.'s appeal from the Department's Citation and Notice No. 317616928, was not timely filed as required by RCW 49.17.140.

Conclusion of Law #2: The Board does not have jurisdiction over the subject matter of this appeal. The appeal is dismissed.

Finding of Fact No. 7 (which is a legal conclusion and incorrectly designated as a "Finding of Fact"): Waste Connections Inc.'s appeal was not filed within 15 working days of the date the Citation and Notice was received.

CP 2.

Following oral argument on July 24, 2017, Judge Knodell of the Grant County Superior Court affirmed the BIIA's order and denied Waste Connections' appeal. CP 204-209. The Superior Court reasoned that:

Notice is required to be accomplished in a manner reasonably calculated to give notice to the Director. *In re Saltis*, 94 Wash. 2d 889, 898, 621 P.2d 716 (1980). Even if the mailing here could be said to comply with a literal reading of the WAC, the court should avoid such a reasoning because it would be contrary to this purpose.

CP 209. The Superior Court's October 12, 2017 judgment adopted and incorporated by reference the BIIA's order. CP 194-199. Waste Connections filed a timely notice of appeal to the Washington State Court of Appeals, Division III. CP 188-193, 200-209.

IV. ARGUMENT

A. Standard of Review.

On appeal of BIIA Orders under the Washington Industrial Safety and Health Act ("WISHA") the superior court and appellate court review the record that was before the BIIA and the Superior Court. RCW 49.17.140(1). On appeal, there are two different

standards of review. The first standard of review addresses findings of fact. The second standard of review addresses conclusions of law. This appeal only concerning issues of law, and therefore, only the second standard will be addressed here.

The BIIA's and the Superior Court's interpretations of law are reviewed "under an error of law standard, which allows an appellate court to substitute its own interpretation of the statute or regulation for the Board's interpretation." *St. Francis Extended Health Care v. Dep't of Social & Health Services*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990). The appellate court reviews the superior court's interpretations of a statute or regulation *de novo*. *Cobra Roofing Service, Inc., v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004), *aff'd on other grounds sub nom.*, 157 Wn.2d 90, 135 P.3d 913 (2006)(citing, *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996)).

The portions of the statute (RCW 49.17.140) and the regulation (WAC 296-900-17005) at issue are merely jurisdiction and timeliness issues, and therefore not within the BIIA's and/or the Department's "area of expertise." However, if this Court determines that they are within the BIIA's and/or the Department's "area of

expertise,” the agency’s interpretation must still “reflect a plausible construction of the language” and not be contrary to “the legislative intent” to be provided “substantial weight.” *Cobra Roofing Service, Inc.*, 122 Wn. App. at 409; *Seatoma Convalescent Center v. Dep’t of Social & Health Services*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996). The court must ensure that the agency applies and interprets its regulations consistently with the enabling statute.

As demonstrated below, Waste Connections’ appeal was timely pursuant to (1) the plain text of the law and (2) equitable legal principles. Both bases are issues of law that are reviewed by this Court under the “error of law” standard *de novo*.

B. Waste Connections’ Appeal Was Timely Under the Specific Wording of the Law.

Waste Connections’ appeal was timely because it was postmarked before the appeal deadline. This meets the requirements of WAC 296-900-17005. This regulation provides that “[t]he postmark is considered the submission date of a mailed request.” WAC 296-900-17005. WAC 296-900-17005’s statutory authority is RCW 49.17.140. RCW 49.17.140 sets forth the 15 working day appeal deadline. RCW 49.17.140 provides no other

requirements concerning what constitutes sufficient mailing of an appeal. Such specific requirements are found in WAC 296-900-17005. Waste Connections met its burden that the appeal was timely because it met the requirements of WAC 296-900-17005.

Waste Connections' appeal met the specific requirements of the law. The law requires the appeal be postmarked before the deadline. The Department certainly could have drafted WAC 296-900-17005 to provide additional requirements, such that sufficient postage must be prepaid. *See e.g.*, CR 5 (“If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid” (emphasis added)).

In its own regulation, the Department omitted wording specifically requiring that postage be prepaid. The Department could have copied the language of CR 5. The Department did not do so. By ruling that Waste Connections' appeal was untimely despite the fact that the specific requirements of the regulation were met, the BIIA and Grant County Superior Court erroneously supplemented the statute and regulation with language that is simply not present.

**1. The Grant County Superior Court
Erroneously “Interpreted” a Law that
was Clear on its Face.**

The Grant County Superior Court ignored the plain language of WAC 296-900-17005 and erroneously proceeded to “interpret” the law even when the language was clear. The Superior Court reasoned that:

Notice is required to be accomplished in a manner reasonably calculated to give notice to the Director. *In re Saltis*, 94 Wash. 2d 889, 898, 621 P.2d 716 (1980). Even if the mailing here could be said to comply with a literal reading of the WAC, the court should avoid such a reasoning because it would be contrary to this purpose. It would lead to and even reward an unlikely, absurd and strained consequence. *See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 59 P.3d 655 (2002).

CP 209. As a matter of law, the Superior Court cannot “interpret” a regulation to require more than is written in the clear language.

The Superior Court’s ruling is also contrary to the governing law concerning statutory and regulatory interpretation. The Washington State Supreme Court has recently articulated the controlling law for regulatory interpretation:

We interpret regulations using the same rules we use to interpret statutes. First, we examine the plain language of the regulation; if that language is

unambiguous, it controls. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn. 2d 868, 881, 154 P.3d 891 (2007) (plurality opinion). Language is unambiguous if it has only one *reasonable* interpretation. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

...
Yet even if [the regulation] were ambiguous, we resolve ambiguities in ways that “further, not frustrate, the[] intended purpose” of the regulation.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (quoting *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994)).

Lopez Demetrio v. Sakuma Bros. Farms, Inc., 183 Wn.2d 649, 655-56, 355 P.3d 258, 262 (2015)(emphasis original). Therefore, only if the regulation is ambiguous is the court permitted to determine how to resolve the ambiguity in a way that furthers the purpose of the regulation. *See id.*

The Superior Court in Waste Connections’ case erroneously interpreted an unambiguous regulation. The plain language of WAC 296-900-17005 is unambiguous: the postmark is the submission date of a mailed appeal. No further interpretation is required. The plain language controls. The regulation does not require sufficient postage be affixed to the appeal. The Superior Court was not “interpreting” the regulation but adding language that is not present in the regulation to Waste Connections’

detriment. The Superior Court's erroneous legal reasoning and conclusion must be overturned.

2. The only alleged legal basis cited by the Decision and Order that was affirmed by the Superior Court in support of its finding of untimeliness is not applicable to Waste Connections' case.

Based on a review of BIIA and Washington case law, the issue of whether an appeal is timely if it is postmarked before the appeal deadline – but returned for insufficient postage for certified mail – was an issue of first impression. Because of this fact, the only case that the Decision and Order cites to allegedly support its decision is a non-WISHA case. The case cited in the Decision and Order is *In Re: Elmer P. Doney* (“Doney”). BIIA Dec., 86 2762 (1987). In *Doney*, the claimant was appealing an order by the Department which denied reopening the claim for aggravation of a condition and denied responsibility for an unrelated glaucoma condition. *Id.* at 1. The Department argued that the claimant's appeal was untimely because he had received an order denying his prior application. *Id.* The claimant argued he never received the order denying his prior application. *Id.* The Department argued that he did receive the order. *Id.* at 1-2. However, the Department

did not present any proof of mailing. *Id.* at 2. In fact, the Department admitted that it did not place the order in the mail. *Id.* at 2-3. For these reasons, the BIIA ruled the previous Department order was void and the claimant could pursue his appeal on the merits. *Id.* at 3-4.

The *Doney* appeal is distinguishable from Waste Connections' appeal for several reasons. First, the party seeking to establish proof of mailing in *Doney* admitted it never placed the document in the mail. In Waste Connections' case, it is undisputed that the appeal was placed in the mail and postmarked before the appeal deadline. Second, the decision in *Doney* is in a workers' compensation case, not a WISHA case. The two statutes have different rules, requirements, and appeal deadlines (*e.g.* 30 days vs. 60 days). Third, in *Doney*, there was no evidence that the document ever reached the claimant within a reasonable time. In Waste Connections' case, there is uncontested evidence that the appeal actually reached the Department within a reasonable time after the appeal deadline. Finally, the BIIA in *Doney* had no specific statute or regulation that specified when an appeal was perfected. In contrast, the regulation applicable in this case (WAC

296-900-17005) specifically requires the appeal be postmarked before the deadline in order to be perfected. *Doney* does not apply to Waste Connections' case.

C. Elementary Principles of Equity Compel Allowing the Appeal to Proceed With a Hearing on the Merits.

Even if this Court determines that the appeal was not timely filed under applicable regulations and statutes, Waste Connections' appeal should be considered timely under basic principles of equity.² This Court must allow Waste Connections' appeal to be heard on the merits consistent with basic principles of equity demonstrated in appellate and superior court civil rules and case law.

The rules of civil and appellate procedure allow allegedly untimely appeals to be heard on the merits under basic principles of fairness. For example, under RAP 18.8(b), an appellate court

² The Superior Court's decision included a sentence that "Waste Connections failed to argue for an extension of time or waiver of RCW 49.17.140(1)." CP 209. However, Waste Connections did make this argument by arguing equitable principles favored allowing an appeal on the merits to proceed in this case. RP 23:16-22 ("I am arguing [the] equity argument to the extent that it's the right thing to do, your Honor, to allow my client to be able to have a hearing on the merits here."); *see also* the Notice of Appeal to Superior Court at CP 9-11 ("Waste Connections demonstrated 'good cause' for allowing the appeal to be perfected by substantially complying with the text and intent of the law").

can “extend the time within which a party must file a notice of appeal...” in “extraordinary circumstances” to “prevent a gross miscarriage of justice.” This rule has been applied to a *pro se* appellant³ who submitted a notice of appeal late due to his own “innocent mistake” misinterpreting an amended rule. *Scannell v. State*, 128 Wn.2d 829, 834, 912 P.2d 489, 491 (1996). Basic principles of fairness allow untimely appeals to proceed even at the appellate level.

Similarly, Washington Superior Court Civil Rules allow untimely filings to proceed under the equitable principle of “good cause.” *See* CR 5(d)(2), 6(b)(2). Under CR 5(d)(2), the trial court may strike a late filing “unless good cause is shown for, or justice requires, the granting of an extension of time.” These considerations are essential to fulfilling the civil rules’ purpose of ensuring the trial court justly, speedily, and inexpensively determines every action, preferably on the merits rather than technicalities. *See* CR 1; *Hessler Construction Co. v. Looney*, 52 Wn. App. 110, 112, 757 P.2d 988 (1988)(citing *Rinke v. Johns-*

³ As highlighted by the Superior Court, at the time Waste Connections’ filed its appeal, it was acting as a *pro se* appellant. RP 5:24-6:21, 19:3-5; CP 53-54.

Manville Corp., 47 Wn. App. 222, 227, 734 P.2d 533 (1987)); *Fox v. Sackman*, 22 Wn. App. 707, 709, 591 P.2d 855 (1979). These superior court civil rules concerning “good cause” are also applicable in BIIA proceedings pursuant to WAC 263-12-125.

Equitable principles compel Waste Connections’ appeal to be heard in this matter even if this Court determines Waste Connections did not meet specific statutory or regulatory requirements. Waste Connections’ intent to appeal was clear. Mr. Hudson and Ms. Erickson caused Waste Connections’ appeal to be filed 3-days before the deadline. They were not attempting to file the appeal at the last minute. Instead, Mr. Hudson and Ms. Erickson filed the appeal early. Moreover, Waste Connections’ agents have been candid throughout the entire appeal process. When the appeal was returned for insufficient postage, Mr. Hudson immediately informed the Department of the appeal and sent another copy. Finally, there was no prejudice to the Department from the fact that Waste Connections’ appeal was received just over a week after the appeal deadline. Waste Connections’ appeal should be heard on the merits under basic equitable principles of fairness.

V. CONCLUSION

For all the foregoing reasons, this Court should rule that Waste Connections' appeal was timely filed. The 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 January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, I caused to be filed with the Clerk of Court, Division III, the above and foregoing “*Appellant’s Opening Brief*” via FedEx First Overnight delivery, and further caused to be served a true and correct copy of the same by hand delivery via ABC Legal Messenger upon Respondent to the following address:

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