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Division III
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NO. 35892-5-III

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

OLGA KOZUBENKO,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

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

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I. INTRODUCTION

Olga Kozubenko failed to serve the notice of appeal of a Board of Industrial Insurance Appeals decision on the Department of Labor & Industries or its attorney, so her case cannot proceed. Though Kozubenko timely filed her notice of appeal with the superior court, she failed to perfect it by serving the required parties. RCW 51.52.110 requires that the petitioner serve the Department and the Board with copies of the notice. Failure to both file and serve the notice of appeal is a failure to comply with the statute, requiring dismissal of the appeal. Since the undisputed facts show Kozubenko failed to serve the Department or its attorney the notice of appeal, she failed to timely perfect her appeal. This Court should affirm the superior court's dismissal.

II. ISSUE

Kozubenko did not properly serve her appeal on the Department or its attorney as required by RCW 51.52.110. The Department served the motion and notice of hearing on Kozubenko, but she failed to respond to the motion or appear at the hearing. Did the superior court properly dismiss the appeal for failing to serve the Department?

III. STATEMENT OF THE CASE

A. **The Department Informed Kozubenko That She Was Ineligible for Vocational Benefits, and the Board Denied Her Appeal**

The Department sent a secure message to Kozubenko that her workers compensation claim was not eligible for vocational benefits. BR

12.¹Kozubenko appealed that message to the Board of Industrial Insurance Appeals but the Board denied her appeal, finding that the secure message was not an appealable order because it was not a final decision of the Department. BR 3, 13. Kozubenko filed a motion that the Board interpreted as a motion to vacate, which it denied. BR 3, 5.

B. Kozubenko Filed an Appeal in Superior Court but Did Not Serve the Department or its Attorney and the Court Dismissed

In August 2017, Kozubenko filed an appeal with the superior court, but she failed to serve the Department or its attorney (the assistant attorney general at the Board). CP 21. The Department first learned about the appeal when a judicial assistant emailed an assistant attorney general to see if the case was assigned to her. CP 29. The next day, the Attorney General's Office received a letter from the Board acknowledging the appeal, attaching a copy of the notice of appeal. CP 27. Neither the Department nor its attorney ever received service of the notice of appeal from Kozubenko. CP 27, 29.

Nearly four months later in December 2017, the Department moved to dismiss the appeal, attaching declarations from the Department and the Attorney General's Office that neither had received service of the notice of appeal. CP 2-5, 27, 29. Kozubenko submitted no response or contrary evidence and failed to appear at the scheduled hearing. The superior court

¹This brief refers to the certified appeal board record as "BR."

dismissed Kozubenko's appeal, determining she had not timely perfected her appeal because she failed to serve the necessary parties within 30 days of the Board's order. CP 30. Kozubenko appeals.

IV. STANDARD OF REVIEW

This Court applies the ordinary civil standards of review to appeals originating before the Board. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. Superior courts only exercise their appellate function when the appealing party complies with the requirements set forth in RCW 51.52.110. *See Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990). Superior courts dismiss appeals if the court has no jurisdiction over the subject matter or the person, there was insufficiency of process or service of process, or the appealing party failed to state a claim upon which relief can be granted. CR 12(b). When there are no factual disputes on a motion to dismiss, appellate courts review the superior court's dismissal de novo. *Wells v. Olsten Corp.*, 104 Wn. App. 135, 139, 15 P.3d 652 (2001).

V. ARGUMENT

A. Appeals to Superior Court Must be Timely Perfected by Serving Either the Department or its Attorney

RCW 51.52.110 provides the exclusive means to perfect an appeal of a workers' compensation matter from the Board to superior court. It requires

that appeals from Board decisions to superior courts be filed with the superior court and served on the Department and the Board:

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer, or other person aggrieved by the decision and order of the board may appeal to the superior court.

...

Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board.

RCW 51.52.110. "Shall" imposes a mandatory requirement that the appealing party complete all the steps to perfect its appeal. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 894, 176 P.3d 577 (2008). A party can timely serve the Department's attorney (here, an assistant attorney general) to perfect the appeal. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 553-56, 933 P.2d 1025 (1997). But superior courts must dismiss the case when an appellant fails to timely serve the notice of appeal on the required parties, even if the appellant timely filed its notice of appeal in superior court. *Fay*, 115 Wn.2d at 199-201; *Krawiec v. Red Dot Corp.*, 189

Wn. App. 234, 239-240, 354 P.3d 854 (2015); *Hernandez v. Dep't. of Labor & Indus.*, 107 Wn. App. 190, 195, 26 P.3d 977 (2001).

The Supreme Court requires timely service to perfect an appeal and has affirmed the trial court's dismissal when a worker fails to serve the Department's director. *Fay*, 115 Wn.2d at 196, 201. "By failing to serve its petitions within the 30 day time limit, a party fails to invoke the superior court's appellate jurisdiction." *Stewart v. Dep't of Empl. Sec.*, ___ Wn.2d ___, 419 P.3d 838, 843-44 (2018) (reconsideration pending) (internal citations and quotations omitted). Superior courts have no appellate jurisdiction unless a law invokes this authority. *Id.* Jurisdictional requirements cannot be waived—courts lacking jurisdiction must dismiss. *Conom v. Snohomish Cty.*, 155 Wn.2. 154, 157, 118, P.3d 344 (2005).

B. Kozubenko Failed to Serve the Department or Its Attorney, So the Superior Court Properly Dismissed Her Appeal

The superior court correctly dismissed Kozubenko's appeal because she failed to timely serve the Department. Marcie Bergman and Roxanne Yaconetti offered undisputed declarations that Kozubenko failed to serve either the Department or its attorney. To contest this, Kozubenko had to provide "independent proof" of "evidence of mailing apart from [her] own self-serving testimony." *Olson v. The Bon, Inc.*, 144 Wn. App. 627, 634, 183 P.3d 359 (2008). Yet Kozubenko offered no evidence whatever, nor did she appear at the hearing on the motion.

Kozubenko had to serve *both* the Board and the Department (or its attorney). She did not do so. As in *Fay, Hernandez* and *Krawiec*, the superior court had to dismiss her appeal. Kozubenko failed to properly invoke the superior court's appellate jurisdiction when she failed to comply with procedural rules. *Stewart*, 419 P.3d at 843-44. Since there is no factual dispute that Kozubenko failed to timely serve the Department, she failed to perfect her appeal, so the superior court correctly dismissed.

C. Kozubenko Failed to Substantially Comply with Procedural Requirements

Nor did Kozubenko substantially comply with the procedural requisites. Substantial compliance may be adequate to perfect an appeal when the Department has reasonable and timely notice of an aggrieved worker's appeal. *Black*, 131 Wn.2d at 553. But "substantial compliance does not encompass noncompliance." *Sprint Spectrum LP v. Dep't of Rev.*, 156 Wn. App. 949, 958, 235 P.3d 849 (2010); see *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 409-10, 842 P.2d 355 (1992); *Hernandez*, 107 Wn. App. at 197 (party attempted to serve the Board after the motion to dismiss).

For substantial compliance, there must be actual compliance with the reasonable objectives of the statute. See *Humphrey Indus., Ltd. v. Clay St. Assocs., L.L.C.*, 170 Wn.2d 495, 504, 242 P.3d 846 (2010). Statutes with procedural requirements exist to limit prejudice to the parties and ensure that parties are properly put on notice regarding actions in which they have an

interest. *Black*, 131 Wn.2d at 552. Utter noncompliance with procedural requirements fails to accomplish these objectives. *Id.*

Here, Kozubenko did not even *partially* comply, as neither the Department nor its attorney were ever served. Kozubenko's proof of service lists the Department, but not the Attorney General's Office. CP 22. Yet the Department and Attorney General's Office testified neither was served. It is not enough that there is a certificate of service—Kozubenko must put independent proof showing she attempted service. *Olson*, 144 Wn. App. at 634. Kozubenko offers no evidence to dispute these facts. The superior court was right to dismiss her appeal.

D. Kozubenko's Other Arguments Lack Any Merit

Kozubenko raises several meritless, unrelated challenges to the proceedings below. First, Kozubenko appears to argue she was not properly advised of the correct judge assigned to the case. AB 3.² While Judge Triplet signed the briefing schedule, Kozubenko is wrong that this assigned the case to him or foreclosed the possibility that motions could be seen in front of other judges. Judge Plese presided over the motion hearing

² Kozubenko also appears to be making an unsubstantiated due process claim under Washington's Constitution. AB 3. But after quoting Article I, Section 3, she makes no further mention of any due process violations and fails to provide any additional support for that claim. *See In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *U.S. v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)) (“[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.”).

in January, consistent with the local rules setting a court calendar to decide motions. *See* Spokane Cty. Local Civ. R. 40(a). Contrary to Kozubenko's complaints, the superior court followed its procedures. AB 4. And Kozubenko can cite no law or procedure precluding Judge Plese from deciding the motion to dismiss.

Kozubenko improperly takes issue that the Order of Dismissal states that it resulted "after the parties' oral argument." AB 4. Kozubenko neglected to appear for the motion hearing or conduct her oral argument, but the assistant attorney general appeared and presented the motion before the court. CP 30. And even assuming the order incorrectly suggested that both parties presented argument, any such error is harmless.

Kozubenko is similarly under the mistaken impression that the Department's motion moved the trial date. AB 4. Rather than cancel the trial date, the Department noted a hearing on the superior court's motion calendar. If the superior court denied the motion, the trial would have occurred. A hearing for a dispositive motion is different from a trial. And whether the trial date had been cancelled is immaterial to whether the superior court properly dismissed Kozubenko's appeal.

Next, Kozubenko posits that she received no notice of the Department's motion to dismiss and did not know about the January 2018 hearing. AB 4, 5. But no evidence in the superior court record supports her

assertion, and she has consistently received her mail at 1221 East 36th Avenue, Spokane, WA 99203, the same address the Department mailed the notice of motion and motion hearing. CP 2-6, Supp. CP 1-2.

Finally, Kozubenko's request that she be provided with a vocational evaluation is not before the Court. *Contra* AB 5. She failed to perfect her appeal of the Board's decision, so the Court cannot review the merits of the Board's or Department's decisions.

VI. CONCLUSION

Kozubenko failed to perfect her appeal by complying with the procedural requirements of RCW 51.52.110. The superior court correctly dismissed her appeal, so this Court should affirm.

RESPECTFULLY SUBMITTED this 8th day of August, 2018.

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CERTIFICATE OF
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served the Brief of Respondent Department of Labor and Industries and this Certificate of Service to counsel for all parties on the record in the below described manner:

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DATED this 8th day of August, 2018.



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