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NO. 358933-III

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

OLGA KOZUBENKO,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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

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I. INTRODUCTION

Parties need to comply with statutory requirements to perfect an appeal. Olga Kozubenko failed in three ways to perfect her appeal. First, she failed to timely petition the Board of Industrial Insurance Appeals to review the Board judge's proposed decision, so she failed to preserve the right to appeal the decision to superior court. Second, she did not perfect her appeal because she untimely filed her notice of appeal in superior court more than 30 days after the Board's decision, contrary to RCW 51.52.110. And third, she failed to serve the Board or the Department (or its attorney) with her appeal, even though RCW 51.52.110 requires the petitioner to serve the Department and the Board with copies of the notice. Failure to do any of these things is a failure to comply with the statute, requiring dismissal of the appeal. Kozubenko fails to address her failure to file a timely petition for review or a timely appeal, and instead attempts to argue the merits of the case. But her failure to preserve the right to appeal is dispositive and precludes consideration of her arguments. This Court should affirm the superior court's dismissal.

II. ISSUES

1. RCW 51.52.104 requires that a party file a petition for review within 20 days of communication of a proposed decision and order to appeal that decision to the courts. Kozubenko did not file a petition for review within 20 days of communication of the proposed

decision. May Kozubenko contest the merits of that decision to the courts?

2. A Board order becomes final when a worker does not appeal the order to superior court within 30 days of communication of that order. RCW 51.52.110. Kozubenko filed an appeal from the Board's decision on August 28, 2017. Allowing for a three-day period for receipt, the thirty-day time period to appeal to superior court expired on August 21, 2017. Did Kozubenko file a timely appeal?
3. A party has to serve a copy of its notice of appeal to the Department and the Board within thirty days of communication of the Board's order to perfect the party's appeal. Kozubenko did not serve the Department or the Board with a copy of her appeal. Did Kozubenko perfect her appeal?

III. FACTS

A. **The Industrial Appeals Judge Affirmed a Department Order Denying Time Loss Compensation Benefits to Kozubenko in a Proposed Decision and Order**

The Department issued an order denying time loss compensation benefits to Kozubenko. BR 444.¹ Kozubenko appealed this order to the Board, and both parties moved for summary judgment. BR 34-42, 83-274, 307-330, 442-43. The hearing judge granted the Department's motion, issuing a proposed decision and order affirming the denial of time loss benefits. BR 5-29.

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

B. Kozubenko Filed a Petition for Review More Than 20 Days After the Proposed Decision and Order Was Issued, and After the Board Had Issued An Order Adopting the Proposed Decision and Order

Kozubenko received the proposed decision and order on June 24, 2017. CP 30. On July 19, 2017, more the twenty days after Kozubenko received the proposed decision and order², the Board had not received a petition for review, so it issued an order adopting the proposed decision and order. BR 1. The next day, Kozubenko filed a petition for review with the Board of the proposed decision and order—six days late. CP 30-33.

C. Kozubenko Filed an Appeal in Superior Court More Than 30 Days After the Board’s Decision, Did Not Serve the Department or the Board, and the Court Dismissed

On August 28, 2017, more than 30 days after the Board entered its order, Kozubenko dated and filed her appeal to the Board’s decision in Spokane County Superior Court³. CP 36-37. Neither the Department nor the Board received notice of the appeal. CP 38; CP 39-42.

The Department moved to dismiss the appeal, attaching affidavits from Erin Santos and Roxanne Yaconetti and a declaration of Marcie Bergman that neither the Department nor Board had received service of the notice of appeal. CP 38, 39, 41-42. The Department served Kozubenko a copy of the motion and note for hearing by U.S. mail. CP 7; CP 46.

² Under RCW 51.52.104, the deadline to file a petition for review is 20 days.

³ Under RCW 51.52.110, the deadline to appeal the Board’s decision is 30 days.

Kozubenko submitted no response or contrary evidence and failed to appear at the scheduled hearing. RP 2, 3. The superior court dismissed Kozubenko's appeal, finding that Kozubenko did not timely petition for review, did not timely appeal to superior court, and did not serve the necessary parties within 30 days of the Board's order. Supp. CP 47-48. Kozubenko appeals.

IV. STANDARD OF REVIEW

This Court applies the ordinary civil standards of review to appeals from a superior court's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. An appellate court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. This Court's review of the superior court decision is limited to examining the record to see if substantial evidence supports the findings made after the trial court's de novo review, and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Applying the deferential substantial evidence standard, the Court views the evidence in the light most favorable to the prevailing party.

Rogers, 151 Wn. App. at 180. Credibility determinations are solely for the trier of fact and are not reviewable on appeal. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006).

V. ARGUMENT

Kozubenko did not preserve her appeal rights, failing on three accounts. First, she failed to file a timely petition for review, thus foreclosing further attempts to challenge the merits of the Board's decision in superior court. Second, she failed to timely file her notice of appeal in superior court within 30 days. Third, Kozubenko failed to serve both the Board and the Department, thus the appeal was not timely perfected. Each of these three defects provides an independent basis for dismissing the appeal. Kozubenko fails to address her failure to timely petition for review, file an appeal, or serve the Department and the Board, and instead jumps to the merits of her case. But her failure to preserve her right to appeal is dispositive and mandates dismissal of her case. The superior court properly dismissed Kozubenko's appeal.

A. **Kozubenko Did Not Preserve Her Appeal Rights When She Did Not Timely File Her Petition for Review to the Board**

Kozubenko failed to exhaust her administrative remedies when she did not timely file a petition for review. RCW 51.52 sets forth the mandatory administrative remedies that workers and employers must exhaust before

seeking superior court review of any industrial insurance order issued by the Department. If a worker is dissatisfied with an industrial appeal judge's proposed decision and order, the worker may appeal that decision to the full three-member Board by filing a petition for review. RCW 51.52.104. A worker has 20 days in which to file a petition for review to the Board. RCW 51.52.104. "In the event no petition for review is filed as provided herein by any party, the proposed decision and order of the industrial appeals judge shall be adopted by the board and become the decision and order of the board, *and no appeal may be taken therefrom to the courts.*" *Id.* (emphasis added).

If the Board does not receive a timely petition for review, it sends a confirming order adopting the proposed decision and order previously issued by the hearing's judge. *See* CP 28, 35.

Kozubenko did not timely petition for review, depriving the Board of its review function in the administrative process. Here, the Board issued the proposed decision and order on June 20, 2017, and Kozubenko received it on June 24, 2017. BR 27; CP 30. This means that the 20-day time period expired on July 14, 2017. The Board issued its Order Adopting Proposed Decision and Order on July 19, 2018. CP 28. Kozubenko did not file her petition for review until July 20, 2017. CP 33.

Sound principles support that “[a]gency action cannot be challenged on review until all rights of administrative appeal have been exhausted.” *Dils v. Dep’t of Labor & Indus.*, 51 Wn. App. 216, 219, 752 P.2d 1357 (1988) (citing *South Hollywood Hills Citizens Ass’n for the Preserv. of Neighborhood Safety and the Env’t v. King Cty.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)). The rule prevents interruption of the administrative process, allows development of a factual record, facilitates the exercise of administrative expertise, allows correction of errors, and prevents circumvention of procedures by resorting to the courts. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). And the plain language of RCW 51.52.104 precludes a party from appealing a decision to superior court if the party failed to file a timely petition for review.

Kozubenko failed to file a timely petition for review from the Board judge’s decision. And Kozubenko does not claim, nor could she based on the record, that she filed a timely petition for review from the Board’s decision. Because she failed to do that, the superior court could not consider her appeal from the Board’s order adopting the proposed decision as the Board’s decision. The superior court properly dismissed Kozubenko’s appeal because she did not timely file a petition for review.

B. Kozubenko Failed to Timely File Her Superior Court Appeal and Failed to Serve It on Necessary Parties

Kozubenko failed to timely file and serve her notice of appeal to superior court and this mandates dismissal of her appeal. 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). Superior courts have no appellate jurisdiction unless a law invokes this authority. *Id.* Jurisdictional requirements cannot be waived—courts lacking jurisdiction

must dismiss. *Stewart v. Dep't of Empl. Sec.*, ___ Wn.2d ___, 419 P.3d 838, 843-44 (2018) (reconsideration denied); *Conom v. Snohomish Cty.*, 155 Wn.2d. 154, 157, 118, P.3d 344 (2005).

1. Kozubenko Failed to File Her Appeal to Superior Court Within 30 Days, so the Superior Court Properly Dismissed Her Appeal

Kozubenko failed to timely appeal to superior court. RCW 51.52.110 limits an aggrieved party to 30 days in which to file a notice of appeal from a Board decision to superior court. *See Vasquez v. Dep't of Labor & Indus.*, 44 Wn. App. 379, 382, 722 P.2d 854 (1986). Compliance with the statutory time limits of RCW 51.52.110 is mandatory. *Id.* at 381.

Here, the Board issued its final decision and order on July 19, 2017. BR 1. Allowing for a three-day time period for receipt of the Board's decision, the 30-day time period expired on August 21, 2017. CR 5(b)(2)(A).

Kozubenko's appeal was dated and filed August 28, 2017—six days past the statutory deadline. CP 36. A statutory time limit is either complied with, or it is not. *City of Seattle v. Pub. Employment Rel. Comm.*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991). The appeal to superior court was untimely, requiring the superior court's proper dismissal.

2. Kozubenko Failed to Serve the Department or Its Attorney and the Board, so the Superior Court Properly Dismissed Her Appeal

Under RCW 51.52.110, a party must both file and serve a superior court appeal on the director of the Department and on the Board within 30 days of communication of the Board's order. RCW 51.52.110; *Fay v. NW Airlines, Inc.*, 115 Wn.2d 194, 198, 796 P.2d 412 (1990). The failure to timely serve the required parties with a notice of appeal of a Board decision requires dismissal of the appeal. *Krawiec v. Red Dot Corp.*, 189 Wn. App. 234, 239-40, 354 P.3d 854 (2015). A party can timely serve the Department by serving the Department's attorney to perfect the appeal, but here Kozubenko did not serve either the Department or the Office of the Attorney General. CP 38-42; *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 553-56, 933 P.2d 1025 (1997). 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*, 189 Wn. App. at 239-240; *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

[appeal] within the 30 day time limit, a party fails to invoke the superior court's appellate jurisdiction." *Stewart*, 419 P.3d at 843-44.

Neither the Department nor the Board were timely served. CP 38-42. And Kozubenko does not claim that she served the Department or the Board. Because Kozubenko failed to perfect the appeal by both filing and serving the notice of appeal on the Board and the Department, the appeal was properly dismissed.

Nonservice is not compliance with the statute. *See, e.g., Hernandez*, 107 Wn. App. at 197 (party did not attempt to serve the Board until after the motion to dismiss). The remedy where parties are not provided notice is to dismiss. *See Krawiec*, 189 Wn. App. at 242; *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 953, 963, 235 P.3d 849 (2010). In *Krawiec*, this Court construed RCW 51.52.110 to unambiguously require service within 30 days to the Board. *Krawiec*, 189 Wn. App. at 239. The Court held that "failure cannot constitute substantial compliance with the statute" and dismissal of the appeal is appropriate. *Id.* at 242.

Here, the affidavit of Erin Santos established that the Board was never served at all. CP 38. Failure to serve the Board, alone, is sufficient basis to find a failure to perfect and thus dismiss an appeal. *Krawiec*, 189 Wn. App. at 242.

Kozubenko also failed to serve either the Department or the Attorney General's Office with the notice of appeal. CP 39-40, 41-42. Kozubenko's appeal was properly dismissed due to non-service of both the Department and the Board.

C. Kozubenko's Arguments Lack Merit

Kozubenko raises several meritless challenges to the proceedings below that have no connection to the issue of whether she timely petitioned for review or timely filed and served a notice of appeal. Kozubenko argues she was not properly advised of the Department's motion to dismiss. AB 24-25. While it is true that Judge Hazel signed the scheduling order, Kozubenko is wrong that this assigned the case to him or foreclosed the possibility that motions could be seen in front of other judges. CP 1. Judge Cooney presided over the motion hearing 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 24. Kozubenko cites no law or procedure precluding Judge Cooney from deciding the motion to dismiss.⁴

Kozubenko is also under the mistaken impression that the Department's motion moved the trial date, based on the idea that this

⁴ Kozubenko states in her brief that Judge Please replaced Judge Hazel. AB 24-25. The Department's understanding based on the clerk's papers is that Judge Cooney heard the motion to dismiss. *See* RP 1; CP 47-48.

canceled Judge Hazel's order. AB 25. But the Department did not ask the Court to strike the trial, it noted a hearing on the superior court's motion calendar. If the superior court had denied the Department's motion, the trial would have occurred. And whether the trial date had been canceled is immaterial to whether the superior court properly dismissed Kozubenko's appeal: given Kozubenko's failure to timely petition for review, timely file her appeal, or timely serve the Department or the Board, the case had to be dismissed whether the trial was canceled or not.

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 24, 25. No evidence in the record supports her assertion. Kozubenko 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 8, 46.

D. The Court Should Disregard Kozubenko's Arguments That Never Reached the Superior Court

The Superior Court dismissed Kozubenko's appeal on the Department's motion and did not consider the merits of Kozubenko's appeal. CP 47. The appellate court reviews only the decisions of the trial court. *See Rogers*, 151 Wn. App. at 179-81. The Court should not consider Kozubenko's arguments regarding the merits of the case given her failure

to preserve the right to appeal. Kozubenko attempts to raise several arguments that are unrelated to whether her appeal was properly dismissed, but none merits review.

First, Kozubenko appears to argue she was denied an interpreter at a hearing on December 5, 2017, where Judge Ridley granted a continuance for the hearings from January 4 to May 2017. AB 11. Nothing in the record supports this argument. At a December 13, 2016 hearing, a Russian interpreter was present, and Kozubenko's hearing was set for May 17, 2017. BR Tr. 12/13/16 at 4. Furthermore, this argument is immaterial as to whether the superior court properly dismissed Kozubenko's appeal.

Kozubenko next argues that the Industrial Appeals Judge misled her about her burden of proof. AB 13. The Board dismissed Kozubenko's appeal on a motion for summary judgment, making the burden of proof irrelevant. BR 1, 5-11. Kozubenko's argument is immaterial as to whether the superior court properly dismissed Kozubenko's appeal.

Kozubenko further argues that the Industrial Appeals Judge showed bias by not "ask[ing] questions necessary to elicit a prima facie case" and thereby failed to follow the law. AB 15, 16. Since the case was decided on summary judgment, there was no opportunity for the Industrial Appeals Judge to ask any questions of witnesses. BR 1, 5-11. No statute or rule precludes the Board from deciding a case on summary judgment when the

facts are not in dispute and a party is entitled to judgment as a matter of law. Kozubenko shows no error. In any event, this argument is immaterial as to whether the superior court properly dismissed Kozubenko's appeal.

Kozubenko argues that the Industrial Appeals "Judge 'cover[ed] up' Department's unlawful contact with Pro Se witnesses." AB 16. RCW 51.52.063(3)(a) does not allow the Department to contact medical providers, named as witnesses by a worker, "to discuss the issues in question in the appeal" With respect to Dr. Sayers, there is no evidence that the Department discussed the issues in question in the appeal. The Department scheduled Dr. Sayers to testify and named him as a witness. BR 376-377. Dan McKinney was not subject to the restrictions of RCW 51.52.063(3)(a) because he was a vocational counselor and not a medical provider. BR Tr. 3/21/17 at 7-8. Even though Dan McKinney was not subject to the restrictions of the statute, the Industrial Appeals Judge struck Mr. McKinney's affidavit for the appearance of fairness. BR Tr. 3/21/17 at 8-9. And the Industrial Appeals Judge discussed this conduct on the record, which is contrary to a "cover up." BR Tr. 3/21/17 at 7-9. This argument is immaterial as to whether the superior court properly dismissed Kozubenko's appeal.

Kozubenko also argues that the Board improperly granted the Department's motion to dismiss. AB 20-23. Again, this argument is

immaterial as to whether the superior court properly dismissed Kozubenko's appeal.

VI. CONCLUSION

The Superior Court properly dismissed Kozubenko's appeal. First, Kozubenko lost the right to appeal to superior court under RCW 51.52.104 when she did not timely file a petition for review. Second, Kozubenko did not appeal to superior court within 30 days as required by RCW 51.52.110. Third, Kozubenko did not serve the Department or the Board with the notice of appeal to superior court. Each provides an independent basis providing support for the superior court's dismissal of her appeal. Kozubenko does not claim that she complied with any of these procedural requirements to preserve her appeal, and the record shows that she did not. The superior court properly dismissed the appeal and this Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of September, 2018.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Brief and this Certificate of Service in the below described manner:

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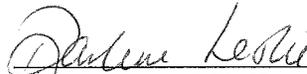
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