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NO. 36219-1-III

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

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PERRENOUD ROOFING, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

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**DEPARTMENT'S BRIEF**

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## I. INTRODUCTION

When an appealing party fails to secure appellate jurisdiction by not following mandatory statutory requirements, its appeal of an agency order should be dismissed. Perrenoud Roofing, Inc. failed to meet the express, statutory requirements for perfecting an appeal of a Board of Industrial Insurance Appeals decision. Perrenoud did not serve its appeal on the Board within 30 days, as required, and the trial court properly dismissed its appeal as untimely.

Under RCW 49.17.150, a party must both file and serve a superior court appeal on the Director of Labor & Industries and on the Board within 30 days of communication of the Board's order. The appellate courts recognize that failure to follow statutory requirements to invoke appellate jurisdiction necessitates an appeal's dismissal.

Perrenoud does not dispute that it failed to serve the Board within 30 days as RCW 49.17.150 requires. Perrenoud argues instead that it substantially complied with the statute because Perrenoud eventually served the Board. But noncompliance with a deadline is not substantial compliance. Since Perrenoud failed to perfect its appeal by timely serving its appeal on the Board, the superior court properly dismissed the appeal. This Court should affirm.

## II. ISSUES

RCW 49.17.150 requires a party who appeals a Board's decision under the Washington Industrial Safety & Health Act (WISHA) to perfect its appeal by serving the Board with notice of the appeal within 30 days of its receipt of the Board's decision. Perrenoud failed to timely serve the appeal on the Board within 30 days. Did the superior court properly dismiss Perrenoud's appeal?

## III. FACTS

### A. The Department Cited Perrenoud for Violating WISHA, and the Board Affirmed that Citation

The Department issued a citation alleging that Perrenoud violated WISHA. Certified Appeal Board Record (AR) 62-66. Perrenoud appealed the Department's citation to the Board. AR 60-66. The Board issued a final decision affirming the citation on August 9, 2017. *See* AR 3-14.

### B. The Superior Court Dismissed Perrenoud's Appeal, Finding That It Failed To Perfect Its Appeal Within 30 Days as Required by Statute

Perrenoud filed a notice of appeal in superior court on August 22, 2017. CP 79-91. The Department received notice of Perrenoud's appeal on August 23, 2017. CP 33. Perrenoud served notice of its appeal on the Board on November 17, 2017, almost three months after Perrenoud filed its appeal with the superior court. CP 35. The Department filed a motion to dismiss on November 29, 2017, because Perrenoud did not timely serve the notice of appeal on the Board, as required by RCW 49.17.150. CP 18-46.

The superior court granted the Department's motion. CP 127-9.  
Perrenoud appeals. CP 154-62.

#### IV. STANDARD OF REVIEW

The court reviews a dismissal for failure to perfect the appellate jurisdiction of an administrative appeal de novo. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 71, 170 P.3d 10 (2007); *Krawiec v. Red Dot Corp.*, 189 Wn. App. 234, 238, 354 P.3d 854 (2015).

#### V. ARGUMENT

To perfect its appeal under RCW 49.17.150, Perrenoud had to serve the Board and Department within 30 days of its receipt of the Board's final order. While Perrenoud served the Department within that time period, Perrenoud did not timely serve the Board, and therefore did not perfect its appeal within the statutory deadline. Because Perrenoud did not timely serve the Board and perfect its appeal, the superior court properly dismissed the appeal.

##### A. **RCW 49.17.150 Mandates That an Appealing Party Must Both Timely File an Appeal and Serve It on the Department and the Board**

RCW 49.17.150 provides the exclusive procedure a party must follow to perfect an appeal from a Board's decision under WISHA. The plain language of RCW 49.17.150(1) rebuts Perrenoud's argument that

perfection can occur outside of the 30-day requirement in RCW 49.17.150(1). Appellant’s Brief (AB) 1.

RCW 49.17.150’s plain language requires a party to timely serve the Board as well as the Department in order to perfect the appeal. A court interprets a statute to discern and implement the intent of the Legislature. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168 Wn.2d 421, 433, 228 P.3d 1260 (2010). When the meaning of a statutory provision is plain from reading the statute as a whole and related statutory provisions, the court’s “inquiry is at an end” and the court follows the statute’s plain meaning. *Id.* The court gives meaning to all of a statute’s related terms for a harmonious reading. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013).

The first four sentences of RCW 49.17.150(1) compel the conclusion that RCW 49.17.150(1) requires an aggrieved party to file and serve notice of its appeal within 30 days following communication of the Board’s order. The first sentence states, “Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) may obtain a review of such order . . . by filing in such court within 30 days following the communication of the board’s order . . . , a written notice of appeal praying that the order be modified or set aside.” RCW 49.17.150(1). The second sentence states, “Such appeal *shall be perfected* by filing with

the clerk of the court and by serving a copy thereof by mail, or personally, on the director and on the board. *Id.* (emphasis added). The court in *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 198, 796 P.2d 412 (1990), construed almost identical language in RCW 51.52.110 to require perfection within 30 days of the Board’s order.<sup>1</sup> The Court held that the statutory language required a party to “file and serve notice within the 30-day appeal period.” *Id.*<sup>2</sup>

The first sentence of RCW 49.17.150(1) requires an aggrieved party to file its notice of appeal in superior court within 30 days. This sentence sets the timeframe for an aggrieved party to take procedural steps required to successfully preserve its appeal.

The second sentence establishes how a party “perfect[s]” an appeal: by serving it on both the Department and the Board. To perfect means “[t]o take all legal steps needed to complete, secure, or record (a claim, right, or

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<sup>1</sup> RCW 51.52.110 provides:

Within thirty days after a decision of the board . . . [a] 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.

<sup>2</sup> One appellate court, albeit in an unpublished decision, looked to the cases examining RCW 51.52.110’s analogous workers’ compensation statute’s perfection requirements to conclude that there is a requirement to serve the Director and Board within 30 days under RCW 49.17.150. *See Performance Contracting Inc. v. Dep’t of Labor & Indus.*, No. 32377-3-III, 2015 WL 5564853, at \*5, 6 (Wash. Ct. App. Sept. 22, 2015) (unpublished) (GR 14.1(a) provides that “unpublished opinions of the Court of Appeals filed on or after March 1, 2013 may be cited as nonbinding authorities” and “may be accorded such persuasive value as the court deems appropriate.”)

interest.)” BLACK’S LAW DICTIONARY 1318 (10th ed. 2014). The appellant *shall* perfect its appeal “by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and on the board.” RCW 49.17.150(1). (emphasis added). “Shall” imposes a mandatory requirement unless a contrary legislative intent is apparent. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 894, 176 P.3d 577 (2008). No contrary intent is shown in RCW 49.17.150(1).

The next sentence of the statute provides that upon receiving a copy of the appeal, “[t]he board shall thereupon transmit a copy of the notice of appeal to all parties who participated in proceedings before the board, and shall file in the court the complete record of the proceedings.” This sentence reveals why the appeal must be served on the Board: so it can transmit its record to the superior court. Failure to serve an appeal on the Board undermines the Board’s ability to fulfill its statutory duties.

The fourth sentence of the statute then says, “*Upon such filing* the court shall have jurisdiction of the proceeding and the question determined therein, and shall have power” to grant relief to the appealing party. RCW 49.17.150(1). The superior court takes jurisdiction over the case—and gains the power to grant the appealing party relief—only when all of the actions mandated by the first three sentence of the statute take place: the appealing party must file the appeal with the superior court *and serve it*

*on the Department and the Board*, so that the Board can file its records with the court. This is because the statute conditions the superior court's authority over the case "upon such filing," meaning the filing required by the preceding sentences of the statute.

The plain language reading of the statute requires service on the Board and Director within 30 days, which Perrenoud did not do. Therefore, Perrenoud did not comply with the statute.

**B. If a Party Fails to Invoke the Appellate Jurisdiction of the Court, Its Appeal Must Be Dismissed**

The appellate courts have consistently recognized a party must comply with service requirements to perfect appellate jurisdiction over an agency appeal, and that failure to comply with those service requirements mandates dismissal of the appeal. *See Krawiec*, 189 Wn. App. at 239-42; *Fay*, 115 Wn.2d at 199-201; *Corona v. Boeing Co.*, 111 Wn. App. 1, 8, 46 P.3d 253 (2002); *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 193-94, 196, 26 P.3d 977 (2001); *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 410-11, 842 P.2d 1006 (1992). The courts have followed this requirement under the Administrative Procedure Act and the Industrial Insurance Act.

Under the Administrative Procedure Act, recently the Supreme Court upheld dismissal of a case where the party did not perfect service. *Stewart v.*

*Dep't of Empl. Sec.*, 191 Wn.2d 42, 52-54, 419 P.3d 838 (2018); “By failing to serve its [appeal] within the 30 day time limit, a party fails to invoke the superior court’s appellate jurisdiction.” *Id.* at 54. Jurisdictional requirements cannot be waived—courts lacking jurisdiction must dismiss. *Id.* at 53; *see also Sprint Spectrum LP v. Dep't of Revenue*, 156 Wn. App. 949, 951, 961, 235 P.3d 849 (2010) (affirming dismissal when party did not serve Board of Tax Appeals as required under the Administrative Procedure Act).

Case law under the Industrial Insurance Act also shows that failure to timely comply with the Industrial Insurance Act’s service requirements necessitates dismissal of the appeal. *See Fay*, 115 Wn.2d at 199-201; *Corona*, 111 Wn. App. at 8; *Hernandez*, 107 Wn. App. at 193, 196; *Petta*, 68 Wn. App. at 410-11. In *Krawiec*, the party failed to serve the Board, and this required dismissal of the appeal because the party failed to perfect the appellate jurisdiction of the court. *Krawiec*, 189 Wn. App. at 239-40. Likewise, in *Hernandez*, the party did not serve the Board, necessitating dismissal. *Hernandez*, 107 Wn. App. at 196, 199.

Because Perrenoud failed to perfect its appeal by timely serving the Board, it did not invoke the appellate jurisdiction of the Court and its appeal must be dismissed. *See Stewart*, 191 Wn.2d at 52-54; *Krawiec*, 189 Wn. App. at 239-40.

Perrenoud argues that the appeal should not be dismissed because the Department was not prejudiced by Perrenoud's failure to comply with the statute. AB 4, 8-11. But failure to invoke the appellate jurisdiction of the superior court is fatal to a party's appeal of an agency order and it is not necessary to show prejudice. *See, e.g., Fay*, 115 Wn.2d at 199; *Krawiec*, 189 Wn. App. 239. RCW 49.17.150(1), like RCW 51.52.110, does not contemplate that there may be another remedy or an analysis of whether there was prejudice, unlike other statutory schemes where the Legislature specifically provides for a remedy short of dismissal for late service.

In *Dougherty*, the Court held that RCW 51.52.110's location of filing an appeal was a venue requirement and not a jurisdictional requirement. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 313, 76 P.3d 1183 (2003). Contrary to Perrenoud's implication, *Dougherty* does not create a rule that the statutory requirements in RCW 51.52.110 are only followed if prejudice has been established. *See* AB 4. Rather, *Dougherty* established that RCW 51.52.110's location of filing was a venue requirement not a jurisdictional requirement. *Dougherty*, 150 Wn.2d at 313. In fact, the worker in that case perfected the appeal by timely filing it with a superior court and timely serving the necessary parties. *See id.* Because the civil rules allowed for transfer of venue, and there was no prejudice, the court did not dismiss the case for filing in the wrong venue, as the failure to

file the appeal in the correct venue could be cured by a change of venue. *Id.* at 320. Conversely, there is no motion that Perrenoud can file that would cure a failure to timely perfect an appeal; failure to perfect an appeal necessitates its dismissal. *See, e.g. Fay*, 115 Wn.2d at 199. Both RCW 51.52.110 and RCW 49.17.150(1)'s filing and service provisions do not provide a prejudice standard; rather they require timely perfection of an appeal.

The superior court properly dismissed Perrenoud's appeal.

**C. Perrenoud Did Not Substantially Comply with RCW 49.17.150's Service Requirements, as a Failure to Timely Serve the Board Is Not Substantial Compliance with the Service Requirements**

Perrenoud seeks to invoke the doctrine of substantial compliance to excuse its late service. To determine whether there is substantial compliance with a service requirement "the relevant inquiry is whether the party to be served has received actual notice of appeal or the notice was served in a manner reasonably calculated to give notice . . . ." *Skinner v. Civil Serv. Comm'n*, 168 Wn.2d 845, 855, 232 P.3d 558 (2010). The fact that Perrenoud eventually served the Board with the appeal—long after the deadline to serve it had elapsed—does not establish substantial compliance. As *Fay* explains, attempted service beyond the 30-day deadline is noncompliance with the perfection requirements. *Fay*, 115 Wn.2d at 199;

*Krawiec*, 189 Wn. App. at 241-42; *Corona*, 111 Wn. App. at 9; *Hernandez*, 107 Wn. App. at 196-97; *Petta*, 68 Wn. App. at 409. In *Krawiec*, *Petta*, and *Hernandez*, the court rejected the substantial compliance argument because the Board was not properly served. See *Krawiec*, 189 Wn. App. at 241-42; *Hernandez*, 107 Wn. App. at 196-97; *Petta*, 68 Wn. App. at 409-10. Perrenoud admits it did not timely serve the Board, and non-compliance is not substantial compliance. See *Hernandez*, 107 Wn. App. at 196-97; *Petta*, 68 Wn. App. at 409-10.

Perrenoud argues that it substantially complied with the perfection requirements because, even though it failed to serve the Board within 30 days, it served the Board before the Department filed its motion to dismiss, noting that, in *Fay*, the worker did not serve the Director until after the Department filed its motion to dismiss. AB 11. This is a distinction without meaning. While Perrenoud is correct that the worker in *Fay* served the Director only after the Department filed a motion to dismiss the appeal, the Court did not rely on the timing of the motion in concluding that the appeal had to be dismissed. *Fay*, 115 Wn.2d at 199; AB 11. The Court explained:

In the present case, [the worker] failed to strictly or substantially comply with the statute's jurisdictional requirements. While Fay properly filed in the superior court and served notice upon the Board and her employer within the time period, the Director did not receive actual notice of the appeal from Fay *until after the expiration of the 30 days*. Further, Fay did not serve notice in a manner reasonably

calculated to give notice to the Director. We affirm the trial court's dismissal of Fay's appeal for lack of jurisdiction.

*Fay*, 115 Wn.2d at 199 (emphasis added). In *Fay*, the Court dismissed the worker's appeal because the worker did not serve the Director within 30 days. *See id.* The worker's failure to comply with the statutory deadline was the dispositive issue in the case. *See id.*

In *Krawiec*, the worker, like Perrenoud, argued it substantially complied with the statute because it served the Board after the 30-day deadline but before the employer's motion to dismiss. *See Krawiec*, 189 Wn. App. at 236, 241-2. The Court did not find substantial compliance and reiterated that the worker "failed to comply with the statutory requirement that she timely serve the Board with a copy of her notice of appeal." *Id.* at 242. *Fay* and *Krawiec* make clear that the Court does not look to timing of a motion, but looks to timing of service on a party in evaluating if there has been substantial compliance.

Perrenoud argues it substantially complied with the statute because it served the Board late and the Board filed a certified appeal board record in superior court. AB 7, 8-9, 10. Perrenoud argues that the purpose in notifying the Board of the appeal is to allow the Board to file the certified appeal board record before trial and notify the Department of the appeal. AB 8-9. But while Perrenoud is correct that one of the objectives of the

statute is to ensure that the record is transmitted, Perrenoud is wrong that the statute provides an optional time frame for service of the appeal on the Board.

In *Sprint Spectrum*, the court recognized that the purpose of serving the board in that case was to ensure that the agency transmitted the record for review. *Sprint Spectrum*, 156 Wn. App. at 957. The statute required that such notice be given to the agency within 30 days of the agency order. *Id.* at 954. Failure to follow that deadline was noncompliance with the statute, and substantial compliance did not apply. *Id.* at 958. The *Sprint Spectrum* Court said it “would not substitute our judgment for that of the legislature on the proper method of ensuring timely transmittal of the administrative record to a court for judicial review.” *Id.* at 957.

The superior court properly dismissed Perrenoud’s appeal because it did not substantially comply with the perfection requirements in serving the Board. Perrenoud made no attempt to serve the Board until well after the 30-day deadline had passed. And the Board did not receive notice of Perrenoud’s appeal until almost three months after the appeal had been filed. *See* CP 35, 79-91. Perrenoud’s appeal was properly dismissed.

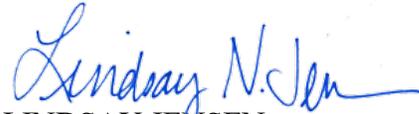
## **VI. CONCLUSION**

RCW 49.17.150 imposes a mandatory 30-day deadline to file and serve notice of appeal. Because Perrenoud failed to comply with this

requirement, the trial court properly dismissed its appeal. Perrenoud argues that it substantially complied with the statute, but failure to timely serve a necessary party is not substantial compliance. The superior court properly dismissed the appeal and this Court should affirm.

RESPECTFULLY SUBMITTED this 9th day of January, 2019.

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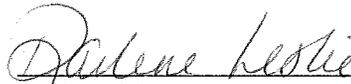
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