No. 45776-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIA KRAWIEC

Appellant,

v.

RED DOT CORPORATION AND
DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondents.

REPLY BRIEF OF APPELLANT, MARIA KRAWIEC

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I. REPLY ARGUMENT

A. STANDARD OF REVIEW

The Department of Labor & Industries in its Responsive Brief cites to the case of *Allen* and suggests that in this case the court is to accord, "deference to the agency's interpretation of the Industrial Insurance Act." *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000); Resp't Dep't Br. at 4. It is true that the courts generally defer to the Department's interpretation of Title 51 RCW. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.,* 74 Wn. App. 420, 423, 873 P.2d 583 (1994). But this Court recently reaffirmed that, "This deference has limits however, and where the Department's reading 'conflicts with a statutory mandate,' deference is 'inappropriate.'" *Crabb v. Dep't of Labor & Indus., 326 P.3d 815, 820 (2014)*, (citing *Cockle v. Dep't v. Labor & Indus.*, 142 Wn.2d at 812, 16 P.3d 583) (quoting *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)). In *Crabb*, the court further went on to reaffirm the liberal construction doctrine of the Industrial Insurance Act in that, "The legislature has declared that the provisions of Title 51 RCW 'shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/ or death occurring in the course of employment.'" *Crabb*, at 819 (citing RCW 51.12.010); *Cockle*, 142 Wn.2d at 811, 16 P.3d 583. Further, "The Supreme Court has

commanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker." *Crabb*, at 819 (citing *Clauson v. Dep't of Labor & Indus.,* 130 Wn.2d 580, 586, 925 P.2d 624 (1996)). The *Crabb* court, as to the facts of that case, stated, "Because Crabb makes at least a reasonable case for his entitlement to the higher benefit rate, we must resolve the Department's appeal in his favor, despite the canons of construction invoked by the Department." *Crabb*, 326 P.3d at 819 (citing *Cockle,* 142 Wn.2d at 811-13, 16 P.3d 583).

B. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION TO DISMISS BECAUSE UNDER THE ACT AND APPLICABLE CASE LAW THE COURT HAS DISCRETION TO ALLOW A TIMELY APPEAL TO PROCEED ON THE MERITS WHEN THE BOARD IS NOT AN INTERESTED PARTY AND MS. KRAWIEC SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF THE STATUTE.

1. <u>A Failure To Timely Serve The Board With Notice Of Appeal Does Not Require Dismissal Because Ms. Krawiec Timely Served The Interested Parties.</u>

In reply to the Department of Labor & Industries responsive brief, while the court in *Hernandez* referenced the Board of Industrial Insurance Appeals (Hereinafter "Board") as a required party under the statute, the failure to timely serve the Board should not prove fatal because, contrary to the respondents' assertion, the Board is not an interested party.

Hernandez v. Dep't of Labor & Indus., 107 Wn. App. 190, 26 P.3d 977 (2001). *See also* Resp't Dep't Br. at 7.

Although the statute at issue, RCW 51.52.110, does not distinguish between interested parties and the Board, the Washington State Supreme Court has held that "[t]he requirement of notice contained in RCW 51.52.110 is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions." *In re Saltis,* 94 Wn.2d 889, 895, 621 P.2d 716 (1980). An interested party is defined as "[a] party who has a recognizable stake (and therefore standing) in a matter." Black's Law Dictionary (9th ed. 2009). Thus, because the Board does not have a recognizable stake in the matter, the Board cannot be considered an interested party. Furthermore, the Board cannot be an interested party as it would conflict with the Board's function and duty, which is "'[t]o review all orders issued by the supervisor of industrial insurance under the workmen's compensation act when appeals are taken to the Board by interested parties.'" *Parks v. Dep't of Labor & Indus.,* 46 Wn.2d 895, 896, 286 P.2d 104 (1955); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 155.04 (6th ed.)).

Therefore, in compliance with the purpose of the service requirement announced in *Saltis*, Ms. Krawiec complied with the "substance essential to every reasonable objective of [the] statute" by

timely serving the interested parties with notice of her appeal. *See Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 602, 910 P.2d 1284 (1996) (quoting *City of Seattle v. Public Employment Relations Comm'n,* 116 Wn.2d 923, 928, 809 P.2d 1377 (1991).

2. Ms. Krawiec Meets The Substantial Compliance Standard Because The Courts Have Only Required That The Board Receive Actual Notice Or Service By A Method Reasonably Calculated To Succeed.

The minimum requirement for substantial compliance with the statutory requirement of serving the Board of Industrial Insurance Appeals with notice of appeal is that the Board must receive: (1) actual notice of the appeal to superior court or (2) service by a method reasonably calculated to succeed. *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 26 P.3d 977 (2001). In similar cases addressing substantial compliance, courts have placed emphasis on the fact that the Board was not served at all or not served before a motion to dismiss had been filed or granted. *See Sprint Spectrum, LP v. State, Dep't of Revenue,* 156 Wn. App. 949, 953, 235 P.3d 849 (2010); *Hernandez*, 107 Wn. App. at 177; *Banner Realty, Inc. v. Dep't of Revenue,* 48 Wn. App. 274, 277, 738 P.2d 279 (1987).

In *Hernandez*, the claimant did not serve the Board with notice of her appeal until after a motion to dismiss for lack of jurisdiction was filed.

Hernandez, 107 Wn. App. at 197. The court concluded that, because Hernandez made no attempt to serve the Board before the motion to dismiss was filed, she did not substantially comply with the requirements of RCW 51.52.110, rather this was a case of noncompliance. *Id.*

Likewise, in *Banner*, the court concluded that the taxpayer's service on the Board after the Department filed a motion to dismiss and almost two months after the court entered its order granting the motion to dismiss did not qualify as substantial compliance. *Banner*, 48 Wn. App. at 277. Additionally, in *Sprint Spectrum*, the court noted that the taxpayer did not serve the Board of Tax Appeals with a copy of its petition for review "[e]ither within the 30–day period after service of the Board's final order *or at any time thereafter.*" *Sprint Spectrum*, 156 Wn. App. at 953 (emphasis added). While the taxpayer did not assert that it substantially complied with requirements of RCW 34.05.542, the court held that the taxpayer's failure to *ever* serve the Board amounted to noncompliance. *Id.* at 958.

In contrast, here, the Board did receive actual notice both months prior to the filing of a motion to dismiss *and* nine months prior to trial, CP 21, 442, Appellant's Br. at 3, thus, meeting the requirement of substantial compliance. Furthermore, the courts in both *Banner* and *Sprint Spectrum* noted that the requirement of service on the Board of Tax Appeals was "a

prerequisite to and triggers transmittal of the administrative record to the court [and] . . . [w]ithout such service, there is no record before the superior court and thus, no basis for review." *Id.* at 957 (quoting *Banner*, 48 Wn. App. at 278). Here, because the superior court actually received the record, Ms. Krawiec complied with the requirement of serving the Board so as to trigger transmittal of the record to the court and providing a basis for review.

3. The Term "Shall" Should Have The Same Meaning As It Does With The Venue Requirement When Applied To The Service Requirement.

As discussed in Ms. Kraweic's opening brief to this Court, "it is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976). Moreover, "when the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning." *Medcalf v. State Dep't of Licensing,* 133 Wn.2d 290, 300-301, 944 P.2d 1014 (1997).

Accordingly, here, the term "shall" should be have the same meaning when applied to the venue and service requirements because the legislature chose to include both in the second paragraph following the filing deadline stated in the first. Likewise, the fact that both are non-

jurisdictional and procedural in nature, and are set apart in a separate paragraph from the filing requirement provides further support that the word "shall" should have the same meaning for the venue and perfection requirements when reading the statute as a whole. Also, both venue and filing and service requirements are procedural in nature and the court has held that "[S]tatutory procedural requirements must be satisfied. . . . *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999)); If both are procedural requirements, why should the court allow "shall" to be permissive and not require dismissal as to one but require dismissal when the other is not met? *See Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003).

Unlike the Administrative Procedure Act, which was at issue in *Banner* and *Sprint Spectrum*, the Industrial Insurance Act specifically states that, as a whole, it "[s]hall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010.

4. The Requirements Of Substantial Compliance And Lack Of Serious Prejudice Already Prevent A Claimant From Waiting *Any* Period Of Time Before Serving A Required Party.

Respondent Red Dot's argument that not requiring dismissal for a claimant's failure to serve the Board within 30 days would effectively allow a claimant to wait any period of time to serve a defendant is erroneous. *See* Resp't Red Dot App. Br. at 7. As stated previously, courts have dismissed claims when the claimant failed to serve the Board at all or if service was made after the matter was before the court on a motion to dismiss. *See Sprint Spectrum*, 156 Wn. App. at 953; *Hernandez*, 107 Wn. App. at 177; *Banner*, 48 Wn. App. at 277. In such cases, noncompliance with the requirement that the Board be served notice of the appeal could result in dismissal. First, a complete lack of service would prevent the Board from fulfilling its function of transmitting the record to the superior court. Second, a claimant who waits until shortly before trial to serve the Board would prevent the court from obtaining a copy of the record so as to allow adequate time for judicial review prior to trial.

In contrast, the facts of this case reach a narrow sets of circumstances where the notice was timely filed and served on interested parties within 30 days and was served on the Board both months prior to the filing of a motion to dismiss and nine months prior to trial. In this case, a later service on the Board results in a minor defect of the sort that does not create "substantial prejudice to other parties." *Dougherty,* at 320; *see also Black v. Dep't of Labor & Indus.,* 131 Wn.2d 547, 552, 933 P.2d

1025 (1997). Here, Ms. Krawiec's timely filing and service on interested parties and later service on the Board effecting the court's receipt of the Board record satisfies the "spirit" of the procedural requirements. *Black*, at 552. Ms. Krawiec invoked the jurisdiction of the trial court sitting in its appellate capacity when she timely filed under RCW 51.52.110, and it is Ms. Krawiec's position that the trial court does not lack the discretion to fashion less severe remedies and is within its power to do so.

5. The Holdings In *Fay v. Northwest Airlines, Inc, Petta v. Dep't Of Labor & Indus.*, And *Hernandez v. Dep't Of Labor & Indus.* Are Inapplicable To The Case At Hand Because The Courts In Those Cases Did Not Address The Remedies Available Under The Act For A Delay In Service.

The Department's reliance on *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990), *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 842 P.2d 1006 (1992), and *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 26 P.3d 977 (2001) is misplaced because, although the courts in those cases construed RCW 51.52.110 as containing a requirement of timely service, the courts did not address the issue before this Court, specifically, what remedies were available under the Act for a delay in service.

In all three cases, the courts dismissed on the grounds that the superior court lacked jurisdiction as a result of a party's failure to perfect the appeal. *See Fay,* 115 Wn.2d at 198-199 (holding that failure to serve

the notice of appeal on the Director within 30 days of Board's decision deprived the Superior Court of jurisdiction); *Petta,* 68 Wn. App. at 408 (holding that superior court lacked jurisdiction in absence of service of actual notice of appeal upon Board and Director); *Hernandez,* 107 Wn. App. at 199 (affirming the trial court's dismissal on jurisdictional grounds when claimant failed to both file and serve her appeal within 30 days). Because the courts reasoned that each party failure to invoke the court's subject matter jurisdiction due to a failure to perfect the appeal, the courts did not reach a determination of any possible remedies for a claimant's delay in service. Therefore, since jurisdiction is not at issue here, the holdings in *Petta*, *Hernandez*, and *Fay* are inapplicable and fail to recognize that the court has discretion to allow a timely filed appeal to proceed on the merits.

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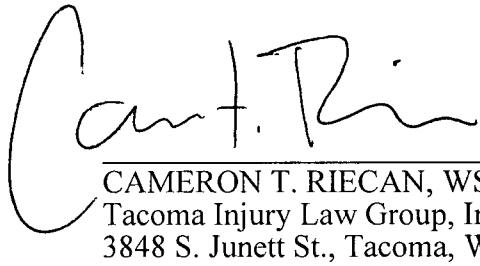
VI. CONCLUSION

For the reasons stated above, Ms. Krawiec respectfully requests that the Court reverse the trial court's December 13, 2013 Findings of Fact, Conclusions of Law, and Judgment that dismissed Appellant Maria Krawiec's workers' compensation appeal, and to remand this action back to superior court to be heard on its merits. In doing so, as stated in the opening brief, Ms. Krawiec also respectfully asks this Court to grant her an award for attorney's fees for the work done before this Court under the provisions of RAP 18.1 and RCW 51.52.130.

Respectfully submitted this 22nd day of August, 2014.

TACOMA INJURY LAW GROUP, INC., P.S.



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SARA M. WOOD, being first duly sworn on oath, deposes and says: That she is a Legal Assistant employed by TACOMA INJURY LAW GROUP, INC., P.S., Attorneys for Appellant/Plaintiff in the above-entitled matter, and that on the 22nd day of August, 2014, she caused to be served, by E-File, Email, Legal Messenger, Certified Mail, or First Class Mail, as indicated, Reply Brief of Appellant to the following:

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DATED this 22nd day of August, 2014.

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SUBSCRIBED AND SWORN to before me this 22nd day of August, 2014.

VICKI L. RUPERT NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 07-30-15

NOTARY PUBLIC in and for the State of Washington, residing at Tacoma. My Commission expires 7-30-15.