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Division III  
State of Washington  
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STATE OF WASHINGTON  
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**No. 362191**

97838-7

**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.

---

**APPELLANT PERRENOUD ROOFING, INC.'s  
PETITION FOR REVIEW**

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**PERRENOUD ROOFING, INC.**

**v.**

**DEPARTMENT OF LABOR AND INDUSTRIES**

**Court of Appeal, Division III**

**Case No. 362191**

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## **I. IDENTITY OF PETITIONER**

The petitioner is PERRENOUD ROOFING, INC., a Washington corporation, that performs new and replacement roofing construction. Perrenoud Roofing, Inc., asks this Court to accept review of the Court of Appeals Division III Decision, which affirmed the Superior Court's entry of summary judgment and order of dismissal of Perrenoud Roofing, Inc.'s appeal from the Board of Industrial Appeals.

## **II. COURT OF APPEALS' DECISIONS**

The Court of Appeals filed an Unpublished Decision in this matter on August 29, 2019. A copy of that Decision is attached hereto as Appendix "A". Additionally, the Court of Appeals filed an Order Denying Motion for Reconsideration on October 10, 2019. A copy of that Order is attached hereto as Appendix "B".

## **III. ISSUES FOR REVIEW**

1. Does the doctrine of "substantial compliance" apply to appeals from BIIA decisions under RCW 49.17.150 when all requirements set forth in the statute and Notice of Appeal are met prior to Motion for Dismissal based on late perfection.
2. Existing case law regarding the perfection deadline of RCW 49.17.150 created by case law should be revised to indicate that the Washington legislature failed to place a deadline on perfecting the Appeal.

## **IV. STATEMENT OF THE CASE**

On August 9, 2017 the Board of Industrial Insurance Appeals (hereafter "Board") issued its Decision in this matter. (CP 81-90)

On August 22, 2017 the Notice of Appeal of the Board's Decision was filed with this Superior Court. (CP 79-80)

On September 12, 2017 the Department of Labor and Industries (hereafter “Department”) filed a Notice of Appearance with the Spokane County Superior Court. (CP 16-17)

The case was assigned to Judge Triplet and a Motion for disqualification was filed by Perrenoud Roofing, Inc., which resulted in the reassignment to Judge Clary on October 3, 2017.

Due to the request for reassignment, on November 1, 2017, a request for a copy of the record was requested from the Board of Industrial Appeals. (CP 95)

On October 20, 2017 the Spokane County Superior Court issued a Scheduling Order indicating the Appellant’s Brief and the Transcript of Record to be filed by November 28, 2017.

On November 8, 2017 the Board of Industrial Appeals mailed a letter requesting a copy of the Notice of the Appeal, to verify the appeal. (CP 97)

Also, on November 8, 2017, a letter was mailed to the Board of Industrial Appeals with a copy of the Notice of Appeal filed in this Superior Court. (CP 99)

On November 17, 2017 a confirmation letter was sent by the Board of Industrial Appeals, indicating the Certified Appeal Board Record would be mailed to the Superior Court. (CP 101)

The Department of Labor and Industries filed its motion for dismissal on November 29, 2017, three months after receiving the Notice of Appeal, 20 days after Notice of Appeal was sent to the Board of Industrial Appeals, and three days after receiving Notice the Certified Record was being sent to the Spokane County Superior Court. (CP 45-46)

The Spokane County Superior Court entered its Order Dismissing the Appellant's case on February 6, 2018. (CP 19)

On February 12, 2018 the Appellant filed a Motion for Reconsideration. (CP 20)

On July 11, 2018 the Spokane County Superior Court entered its Order denying the Appellant's Motion for Reconsideration. (CP 24)

On July 18, 2018 Notice of Appeal to this Court was filed by the Appellant. (CP 25)

## V. ARGUMENT

### **Standard of Review for Motion for Discretionary Review.**

There are four (4) grounds for a grant of discretionary review by the Supreme Court set forth in RAP 13.4. This matter meets the public interest test for discretionary review.

### **The petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4)**

The action at bar denies the Appellant the right to challenge a decisions of the Board of Industrial Appeals and the Department of Labor and Industries. Certainly there is a public interest in the resolution of disputes related to the Board of Industrial Appeals and the Department of Labor and Industries being on the merits as opposed to a dismissal when no prejudice is shown. The test for "substantial public interest" contains one of five core issues: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; (3) whether the issue is likely to recur. (4) the "level of genuine adverseness and the quality of advocacy

of the issues; and (5) "the likelihood that the issue will escape review because the facts of the controversy are short-lived. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

The Petitioner believes the case at bar meets all of these tests and surely must satisfy at least one. The first 3 tests are considered preeminent and will be addressed here: Whether the issue is of a public or private nature. The case at bar involves at its core the denial of the employer to appeal the decision of the Board of Industrial Appeals regarding citations issued to employees and the statutory defense of employee misconduct. The Court of review found a lack of substantial compliance although all requirements of RCW 49.17.150 were met for the appeal except for the failure to meet the deadline established by case law for perfection of the appeal.

This Court's ruling can give guidance to the BIIA in the appeal requirements identified in its Notice of Appeal. See Appendix "C"

The State of Washington has tens of thousands of employers who may find themselves similarly situated to Appellant. It is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion as alleged herein

In addition, "as applied" challenges to governmental activities have been deemed to involve a "substantial public interest." *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345,352,932 P.2d 158 (1997). This Court's review of the interaction of statute and case law provides future guidance as in this case to employers, Washington State agencies and the trial courts. The



record indisputably shows that the appellant's case was dismissed by the trial court and upheld on appeal in light of complete lack of prejudice to the parties. Due to a failure to meet a perfection deadline created by case law for appeals from the BIIA not identified in the statute or the Notice of Appeal by the Department of Labor and Industries. See Appendix "C" Notice of Appeal.

It is easy to imagine the issue at bar is likely to recur.

The Supreme Court should accept this Petition for Review because it involves a matter of substantial public interest. RAP 13.4(b)(4) states a petition for review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Such is the case here. The Washington legislature created the ability to appeal the decisions of the BIIA review of the Decisions by the Department of Labor and Industries.

RCW 49.17.150 which governs appeals to the Superior Court from BIIA citations for safety violations does not identify a deadline for perfection of the appeal.

The pertinent part of RCW 49.17.150 read:

(1) 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 in the superior court for the county in which the violation is alleged to have occurred, by filing in such court within thirty days following the communication of the board's order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside. **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.** *Emphasizes Added*

The Appellant has if not actually complied with the wording of RCW 49.17.150 has substantially complied with the plain meaning of the statute.

Modern courts, in the absence of serious prejudice to other parties, are to allow appeals to proceed. *Dougherty v. Department of Labor and Industries for State*, 112 Wn.App. 322, 327, 48 P.3d 390, (2002). With this spirit in mind, the appeal courts in civil appeals have treated the error of filing a timely notice of appeal with the Court of Appeals instead of with the trial court may be cured by filing a notice in the right place after the 30-day filing period has elapsed. *Weeks v. Washington State Patrol*, 96 Wash.2d 893, 895-96, 639 P.2d 732 (1982).

In this case, no prejudice was asserted by the Department nor was prejudice found by the Superior Court. The procedural effect of mailing a copy of the Notice of Appeal to the Board of industrial Appeals is simply that the Board then mails a copy of the Notice of Appeal to the Department and forwards a copy of the hearing record to the Superior Court. In this case, a copy of the Notice of Appeal was mailed directly to the Department of Labor and Industries' attorney; as such they received actual notice. The Notice was received by the Department of Labor and Industries as soon as, or earlier, as if no delay in the mailing to the Board of Industrial Appeals had occurred. The only effect of the delayed mailing to the Board of Industrial Appeals was a delay in the Board's mailing of its certified appeal record to the Superior Court. However, at the time of the Department of Labor and Industries' Motion to Dismiss for the Delayed perfection, the Superior Court had received the record.

RCW 49.17.150 only specifies filing in superior court, within thirty days following the Board's order, a written notice of appeal praying that the order be modified or set aside. That specifically complies within the stated deadline. The

notification letter received from the Board only indicates a 30-day deadline for filing with the Superior court.

RCW 49.17.150 further states that the appeal will be perfected by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and the Board.

In this case, all requirements of RCW 49.17.150 were fulfilled thus perfecting the Notice of Appeal. Upon perfection of the Notice of Appeal, the Spokane County Superior Court had proper jurisdiction over the Appeal of the Board's decision, as it is acting in its appellate capacity of limited statutory jurisdiction. *Fay v. Northwest Airlines, Inc.* 115 Wn.2d 194, 197, 796 P.2d 412 (1990).

The only effect of the Board receiving the copy of the Notice of Appeal pursuant to RCW 49.17.150(1) is twofold:

The 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.

As to the delay in notifying the Board, there was no prejudice to the Department. The procedural effect of mailing a copy of the Notice of Appeal to the Board of industrial Appeals is simply that the Board then mails a copy of the Notice of Appeal to the Department and forwards a copy of the hearing record to the Superior Court. In this case, a copy of the Notice of Appeal was mailed directly to the Department of Labor and Industries' attorney; as such they received actual notice. The notice was received by the Department of Labor and Industries as soon as, or earlier, as if no delay in the mailing to the Board of Industrial Appeals had occurred. The only effect of the delayed mailing to the Board of Industrial Appeals was a delay in the Board's

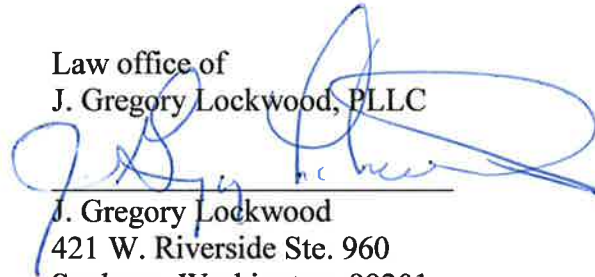
mailing of its certified appeal record to the Superior Court. However, at the time of the Department of Labor and Industries' Motion to Dismiss for the Delayed perfection the Superior court had received the record.

## VI. CONCLUSION

It is respectfully requested that the Court accept review as the effect of a delayed perfection affects the public interest and the court readdressing the issue of RCW 49.17.150 being silent on the issue of perfection affects the public interest as well.

Dated this 7<sup>th</sup> day of November 2019.

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CERTIFICATE OF SERVICE

I, Vickie Fulton, do declare that on November 7, 2019, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Lindsay Jensen, AAG  
Office of the Attorney General  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104-3188

U.S. Mail  
 Facsimile  
 Hand Delivery  
 E-Filing via Portal

Board of Industrial Appeals  
2430 Chandler Ct SW  
P.O. Box 42401  
Olympia, WA 98504-2401

U.S. Mail  
 Facsimile  
 Hand Delivery  
 E-Filing via Portal

DATED November 7, 2019.

  
\_\_\_\_\_  
Vickie Fulton

# APPENDIX "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

PERRENOUD ROOFING, INC.,	)	
	)	No. 36219-1-III
Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF LABOR AND	)	UNPUBLISHED OPINION
INDUSTRIES,	)	
	)	
Respondent.	)	

FEARING, J. — A construction contractor appealed to the superior court an order of the Board of Industrial Insurance Appeals (BIIA) affirming a safety citation issued by the Department of Labor & Industries (DLI). The superior court dismissed the appeal because of lack of timely service on BIIA. We affirm because the contractor did not substantially comply with the service statute and the BIIA need not show any prejudice to secure a dismissal of the appeal.

FACTS

The underlying facts bear little importance to this appeal. On November 7, 2015, an inspector with DLI visited a Spokane worksite of Perrenoud Roofing, Inc. (Perrenoud). At the site, the inspector spotted safety violations. DLI later cited

No. 36219-1-III  
*Perrenoud Roofing v. Dept. of L&I*

Perrenoud, issued corrective notices for the violations, and assessed \$17,600 in penalties.

#### PROCEDURE

Perrenoud appealed DLI's citation to the Board of Industrial Insurance Appeals. On August 9, 2017, BIIA issued a final decision affirming the citation. Perrenoud filed a notice of appeal with the superior court on August 28, 2017. On August 23, Perrenoud served a copy of the notice of appeal on the assistant attorney general handling the case for DLI. Perrenoud did not then serve BIIA.

On November 1, Perrenoud requested a copy of the record from BIIA. On November 8, BIIA mailed a letter to Perrenoud requesting a copy of the notice of appeal to verify that Perrenoud filed an appeal. On the same day, Perrenoud sent notice of its appeal to BIIA.

On November 29, 2017, DLI filed a motion to dismiss Perrenoud's appeal to the superior court for failure to timely serve notice of the appeal. The superior court granted DLI's motion and dismissed the appeal.

#### LAW AND ANALYSIS

On appeal to this court, Perrenoud argues that the superior court mistakenly dismissed the appeal to the superior court because of two flaws in the superior court's analysis. First, the superior court applied a strict compliance standard rather than a substantial compliance standard. Second, the superior court failed to insist that DLI show prejudice because of late notice.



Title 49 RCW codifies the Washington Industrial Safety and Health Act of 1973.

RCW 49.17.150 governs appeals to the superior court from BIIA citations for safety violations. The statute reads:

(1) 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 in the superior court for the county in which the violation is alleged to have occurred, *by filing in such court within thirty days* following the communication of the board's order or denial of any petition or petitions for review, *a written notice of appeal* praying that the order be modified or set aside. *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.* The 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.* Upon such filing the court shall have jurisdiction of the proceeding and of the question determined therein.

(Emphasis added.) The term “director” in the statute refers to the director of DLI.

RCW 49.17.020(2). In summary, the party appealing from a decision of the BIIA perfects the appeal by filing a notice of appeal with the clerk of the court and by serving a copy of the notice on DLI and BIIA within thirty days of BIIA's order.

Perrenoud argues that the superior court erred in failing to apply a substantial compliance standard to Perrenoud's procedural defects. The courts excuse imperfections when substantial compliance satisfies the spirit of a procedural requirement. *Black v. Department of Labor & Industries*, 131 Wn.2d 547, 552, 933 P.2d 1025 (1997).

A plethora of cases address substantial compliance within the context of RCW 51.52.110, a statute that governs the procedures for filing an appeal from BIIA for

No. 36219-1-III

*Perrenoud Roofing v. Dept. of L&I*

workers' compensation awards or the denial thereof. *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980); *Hernandez v. Department of Labor & Industries*, 107 Wn. App. 190, 196, 26 P.3d 977 (2001). RCW 51.52.110 echoes the requirements of RCW 49.17.150 for perfecting an appeal. Nevertheless, we need not decide whether the same substantial compliance standard applies to appeals from BIIA decisions under RCW 49.17.150. Perrenoud did not substantially comply with service requirements.

Noncompliance with an appeal procedure does not constitute substantial compliance no matter how inadvertent the noncompliance may be. *Hernandez v. Department of Labor & Industries*, 107 Wn. App. 190, 196 (2001); *Petta v. Department of Labor & Industries*, 68 Wn. App. 406, 409-410, 842 P.2d 1006 (1992). For a party to benefit from substantial compliance with service demands, the party to be served must receive actual notice of the appeal to the superior court or service by a method reasonably calculated to succeed. *Hernandez v. Department of Labor & Industries*, 107 Wn. App. at 196. Perrenoud attempted no service on BIIA within thirty days of BIIA's decision.

Perrenoud relies on *Black v. Department of Labor & Industries*, 131 Wn.2d 547 (1997) when arguing it substantially complied with service requirements because it served the assistant attorney general assigned to assist DLI. *Black* held that service on the attorney general assigned to the case is reasonably calculated to give notice to DLI's director. By so arguing, Perrenoud addresses the wrong question. DLI does not dispute that Perrenoud properly and timely served it. The dismissal of the appeal results from

No. 36219-1-III

*Perrenoud Roofing v. Dept. of L&I*

failure to timely service BIIA. Perrenoud does not argue and cites no law that an appellant perfects service on BIIA by serving the assistant attorney general assigned to DLI. DLI and BIIA are two distinct government entities.

Perrenoud next contends that DLI suffered no prejudice by its mailing of the notice of appeal only to DLI's assistant attorney general. Again, Perrenoud focuses on the wrong party. DLI concedes proper service on it. BIIA argues lack of timely service.

Perrenoud cites no law supporting the notion that noncompliance with statutory service requirements is excusable when no prejudice results. Perrenoud only cites *Black v. Department of Labor & Industries*, 131 Wn.2d 547 (1997) for the proposition that service on the assigned assistant attorney general suffices for notice on DLI. This court generally does not review unsupported arguments that lack citation to relevant law. RAP 10.3(a)(6).

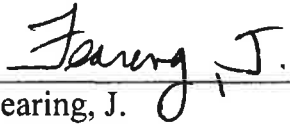
In *Hernandez v. Department of Labor & Industries*, 107 Wn. App. 190 (2001), the court ended its inquiry after concluding that the party appealing a decision did not comply with statutory service requirements. The court conducted no prejudice analysis.

#### CONCLUSION

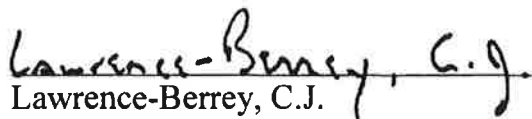
We affirm the superior court's dismissal of Perrenoud's appeal of BIIA's order upholding DLI's safety citation.


No. 36219-1-III  
*Perrenoud Roofing v. Dept. of L&I*

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Fearing, J.

WE CONCUR:

  
\_\_\_\_\_  
Lawrence-Berrey, C.J.

  
\_\_\_\_\_  
Pennell, J.

# APPENDIX “B”

**FILED**  
**OCTOBER 10, 2019**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

PERRENOUD ROOFING, INC.,	)	
	)	No. 36219-1-III
Appellant,	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
DEPARTMENT OF LABOR AND	)	
INDUSTRIES,	)	
	)	
Respondent.	)	

THE COURT has considered the appellant's motion for reconsideration of the court's opinion of August 29, 2019, and the record and file herein, and is of the opinion the motion for reconsideration should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration is denied.

PANEL: Judges Fearing, Lawrence-Berrey, Pennell,

FOR THE COURT:

  
ROBERT LAWRENCE-BERREY  
Chief Judge

# APPENDIX “C”



STATE OF WASHINGTON

## BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • [www.biia.wa.gov](http://www.biia.wa.gov)

Enclosed is the Board's final order in this appeal.

### What if I disagree with the decision reached in the final order?

- Any party who disagrees with any portion of this decision may appeal to superior court.

### How much time do I have to appeal to superior court?

- In **workers' compensation** and **WISHA** cases, your appeal to superior court must be filed within 30 days from the date you receive the Board's final order.
- In **crime victim** and **employer premium** cases, your appeal must be filed within 30 days from the date the order was mailed to you.

### In what county do I file a superior court appeal?

- In a **workers' compensation** case, file the appeal either (1) in the county where the injured worker or beneficiary lives, or (2) in the county where the injury took place. If the worker's residence and the place of injury are outside Washington State, file the appeal in Thurston County Superior Court.
- In a **WISHA** case, file the appeal in the county where the alleged violation occurred.
- In a **crime victim** or **employer premium** case, file the appeal either (1) in Thurston County, (2) in the county where you live or where your principal place of business is located, or (3) in any county where the property owned by the petitioner and affected by the contested decision is located.

### Do I need to send copies of the appeal to anyone?

- Copies of the appeal **MUST** be mailed or hand-delivered to the BIIA, L&I, and (if applicable) to the Self-Insured Employer:

Board of Industrial Insurance Appeals  
2430 Chandler Court SW  
P.O. Box 42401  
Olympia, WA 98504-2401

Department of Labor and Industries  
Office of the Director  
P.O. Box 44001  
Olympia, WA 98504-4001



### **Is there a form for filing an appeal in superior court?**

- No. Each superior court has its own filing requirements. There is a directory available on the Washington Courts website to help you locate the appropriate superior court:  
[http://www.courts.wa.gov/court\\_dir](http://www.courts.wa.gov/court_dir).

### **What evidence will the superior court consider?**

- The case will be tried based on the record made before the BIA. The record consists of transcripts, depositions, and exhibits offered during Board hearings.

### **Get more information about superior court appeals:**

This letter is for informational purposes only. It doesn't contain all filing requirements for superior court appeals. If you file an appeal in superior court you are solely responsible for complying with all applicable laws, including the superior court local rules. More information can be found in the Revised Code of Washington (RCW) and Washington Administrative Code (WAC). These legal publications are available in law libraries and on the Washington State Legislature website: [www.leg.wa.gov/LawsAndAgencyRules](http://www.leg.wa.gov/LawsAndAgencyRules).

Most of these rules can be found in the Board's *Rules of Practice and Procedure*, a publication found on the Board's web site: [www.bia.wa.gov](http://www.bia.wa.gov).

- **Workers' Compensation** – See RCW 51.52.110 and WAC 263-12-170.
- **Washington Industrial Safety and Health Act (WISHA)** – See RCW 49.17.150.
- **Employer Premium** – See RCW 51.48.131, RCW 51.52.112, and RCW 34.05.510-598.
- **Crime Victims** – See RCW 7.68.110 and RCW 34.05.510 – RCW 34.05.598.

Superior court local rules may be consulted on the Washington Courts website:  
[http://www.courts.wa.gov/court\\_rules](http://www.courts.wa.gov/court_rules).

### **Attorney Fees:**

This section applies **only** to injured workers, beneficiaries, and crime victims. It does **not** apply to employers or to WISHA or employer premium cases.

- A worker/beneficiary/crime victim represented by an attorney who succeeds in their appeal may ask the Board to set the attorney fee. The request must be in writing and must be filed within one year of receipt of the Board's final order. The Board has authority to set the fee even though a fee agreement was made with the attorney. The responsibility for paying the fee, however, remains with the worker/beneficiary/crime victim.

**LAW OFFICE OF J. GREGORY LOCKWOOD PLLC**

**November 07, 2019 - 11:23 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36219-1  
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**Superior Court Case Number:** 17-2-03387-6

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