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NO. 99157-0

**SUPREME COURT
OF THE STATE OF WASHINGTON**

PAUL UMINSKI,

Petitioner,

v.

CLARK COUNTY,

Respondent.

ANSWER TO PETITION FOR REVIEW, DEPARTMENT OF LABOR AND INDUSTRIES

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TABLE OF CONTENTS

I. INTRODUCTION....................1

II. ISSUES....................2

III. STATEMENT OF THE CASE....................2

A. Uminski Appealed a Board Decision To Superior Court but Did Not Serve the Appeal on the Department or the Attorney General's Office....................2

B. The Court of Appeals Reversed the Superior Court....................4

IV. ARGUMENT....................4

A. Requiring a Party To Perfect Appellate Jurisdiction Does Not Conflict With Any Decisions of This Court or the Court of Appeals....................5

B. The Court of Appeals' Rejection of the Superior Court's Incorrect Legal Analysis Does Not Conflict with the Case Law Regarding the Substantial Evidence Standard....................12

V. CONCLUSION....................13

TABLE OF AUTHORITIES

Cases

Black v. Dep't of Labor & Indus.,
131 Wn.2d 547, 933 P.2d 1025 (1997)...................... 1, 5, 7, 8, 9, 10, 12

City of Seattle v. Pub. Emp't Relations Comm'n,
116 Wn.2d 923, 809 P.2d 1377 (1991).. 4

Corona v. Boeing Co.,
111 Wn. App. 1, 46 P.3d 253 (2002)... 6

Fay v. Nw. Airlines, Inc.,
115 Wn.2d 194, 796 P.2d 412 (1990).. 6, 7

Hernandez v. Dep't of Labor & Indus.,
107 Wn. App. 190, 26 P.3d 977 (2001)... 5, 6, 7

Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.,
137 Wn. App. 810, 156 P.3d 240 (2007)... 13

Petta v. Dep't of Labor & Indus.,
68 Wn. App. 406, 842 P.2d 1006 (1992).. 6, 7

Reeves v. Dep't of Gen. Admin.,
35 Wn. App. 533, 667 P.2d 1133 (1983)....................................... 11, 12

Scott's Excavating Vancouver, LLC v. Winlock Props., LLC,
176 Wn. App. 335, 308 P.3d 791 (2013).. 13

Stewart v. Dep't of Emp't Sec.,
191 Wn.2d 42, 419 P.3d 838 (2018).. 4, 5, 7

Uminski v. Clark Cnty.,
No. 53007-4-II, 2020 WL 4195988 (Wash. Ct. App. July 21,
2020) (unpublished) (slip. op.) 1

Statutes

RCW 51.52.110 .... 1, 3, 4, 5, 6, 8, 9, 10

Rules

RAP 13.4(b) 5, 14

RAP 13.4(b)(1) or (2) 2

RAP 13.4(d)(1) 4

I. INTRODUCTION

A party who does not attempt to serve an appeal on a necessary party has not substantially complied with the service requirements. Paul Uminski failed to meet the statutory requirements for perfecting an appeal of a Board of Industrial Insurance Appeals (Board) decision by failing to serve his notice of appeal on either the Department of Labor and Industries (Department) or the Attorney General's Office. And though the Attorney General's Office happened to have received a copy of the appeal, this was merely fortuitous as far as Uminski is concerned, as Uminski made no attempt to serve either the Department or the Attorney General's Office. The Court of Appeals followed well-settled precedent in concluding that Uminski failed to perfect the appeal and that this mandated the appeal's dismissal.[1]

Uminski did not substantially comply with RCW 51.52.110 because he did not make any attempt to serve the appeal on the Department, a necessary party under the statute. Citing *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 933 P.2d 1025 (1997), Uminski argues that he substantially complied because—due to circumstances that occurred independently of Uminski's actions—the Attorney General's

[1] *Uminski v. Clark Cnty.*, No. 53007-4-II, 2020 WL 4195988 (Wash. Ct. App. July 21, 2020) (unpublished) (slip. op.). A copy of the slip opinion is attached as appendix 1.

Office had actual knowledge of the appeal. Pet. at 4–6. But to show substantial compliance under *Black*, Uminski had to actually attempt to serve the appeal on either the Department or the Attorney General's Office, which he did not do. Uminski shows no conflict with *Black* or other case law, and thus fails to demonstrate a basis for this Court's review under RAP 13.4(b)(1) or (2).

This Court should deny the petition for review.

II. ISSUES

1. Did the Court of Appeals properly dismiss Uminski's appeal because Uminski did not serve it on either the Department or the Attorney General's Office, when the courts have ruled that perfection of statutory requirements is necessary to secure appellate jurisdiction?

2. Did the Court of Appeals correctly address the legal question of whether the undisputed facts established actual or substantial compliance with RCW 51.52.110?

III. STATEMENT OF THE CASE

A. Uminski Appealed a Board Decision To Superior Court but Did Not Serve the Appeal on the Department or the Attorney General's Office

The Board issued a decision regarding an injured worker, Paul Uminski. *See* CP 3–6.[2] Uminski filed an appeal from the Board's decision with the Clark County Superior Court. CP 1–2. Uminski served

[2] The record does not establish the substance of the Board's decision in this case, nor the substance of the underlying decision by the Department that was the subject of the Board appeal. *See* CP 3–6.

the appeal on the Board and the employer, but did not serve the appeal on either the Department or the Attorney General's Office. *See* CP 1–2, 11, 16–20. Uminski's proof of service did not assert that he served the appeal on either the Department or the Attorney General's Office. CP 18.

A Department employee who is responsible for monitoring superior court appeals signed a declaration indicating that the Department had not received a copy of the appeal. CP 19–20. The Attorney General's Office nonetheless received a copy of Uminski's appeal.[3] *See* CP 23–24. An Assistant Attorney General signed a declaration that stated that the office had received a copy of the appeal, though not from whom the office had received it. CP 23–24.

Clark County moved to dismiss the appeal, arguing that Uminski failed to perfect it as required by RCW 51.52.110. CP 8–20. Uminski argued that he substantially complied because the Attorney General's office had received a copy of the appeal, though he did not claim that he served the appeal on the Attorney General's Office. CP 21–30. The superior court denied the motion to dismiss. CP 36.

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[3] Uminski and Clark County have each asserted that the Board forwarded a copy of the appeal to the Attorney General's Office. Pet. at 2; Resp't Answer at 2. But as the Court of Appeals correctly observed, nothing in the record establishes how the Attorney General's Office received the appeal. Slip op. at 3; *see* CP 23–24.

B. The Court of Appeals Reversed the Superior Court

The Court of Appeals reversed the superior court, concluding that Uminski neither perfected his appeal nor substantially complied with RCW 51.52.110's service requirements. *Uminski*, slip op. at 7–8. The Court rejected Uminski's argument that he substantially complied with the service requirements under *Black*, because the worker in *Black* served the appeal on the assigned Assistant Attorney General, while Uminski did not serve the appeal on the Assistant Attorney General. *Id*. Rather, the Assistant Attorney General was aware of the case for reasons unrelated to Uminski's actions. *Id*. at 6.

IV. ARGUMENT

The Court of Appeals' decision does not conflict under RAP 13.4(d)(1) with *Black* because Uminski failed to serve his appeal in any fashion that was reasonably calculated to lead to the Director having actual knowledge of the case. The courts routinely apply the principle that a party needs to perfect its appeal of an administrative order to obtain appellate jurisdiction. *Stewart v. Dep't of Emp't Sec.*, 191 Wn.2d 42, 54, 419 P.3d 838 (2018) ("'[B]y failing to serve its [appeal] within the 30 day time limit,' a party 'fail[s] to invoke the superior court's appellate jurisdiction.'" (quoting *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991))). Substantial compliance occurs

when a party completes some of the requirements of the appeal statute but does so in a procedurally flawed way, not when a party makes no attempt to serve a necessary party at all. *See Stewart*, 191 Wn.2d at 53; *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 196–97, 26 P.3d 977 (2001). Uminski insists that the Court of Appeals decision conflicts with *Black*, but there is no conflict because the worker in *Black* served the appeal on the Assistant Attorney General, which Uminski did not do. *Compare* Pet. at 2, 4–6 *with Black*, 131 Wn.2d at 549, 553–55. Uminski shows no appellate conflict and review should be denied. RAP 13.4(b).

A. Requiring a Party To Perfect Appellate Jurisdiction Does Not Conflict With Any Decisions of This Court or the Court of Appeals

Uminski fails to show any conflict necessitating review with *Black* or other case law because he failed to serve his appeal on either the Director or the Assistant Attorney General in any fashion. Uminski therefore did not perfect his appeal because he neither followed the express requirements of RCW 51.52.110 nor substantially complied with those requirements. The Court of Appeals properly dismissed his appeal because the appealing party must either comply with the statute's service requirements or substantially comply with them to properly invoke the superior court's appellate jurisdiction. *See Stewart*, 191 Wn.2d at 53; *Hernandez*, 107 Wn. App. at 196–97.

It is undisputed that Uminski did not follow the express service requirements of RCW 51.52.110, which provides the exclusive method for obtaining judicial review of the Board's decisions. It provides that an appealing party has 30 days from the date of receipt of the Board's final decision to file an appeal in superior court. RCW 51.52.110. To perfect an appeal, a party must serve the Director of the Department:

> 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. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer.

RCW 51.52.110. If the appealing party "fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final." *Id*.

Appellate courts have repeatedly held that dismissal is required where the appellant timely filed a notice of appeal in superior court but did not timely serve the notice of appeal. *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 199–201, 796 P.2d 412 (1990); *Corona v. Boeing Co.*, 111 Wn. App. 1, 8–9, 46 P.3d 253 (2002); *Hernandez*, 107 Wn. App. at 196–97, 199; *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 410–11, 842 P.2d 1006 (1992). A party who fails to comply with the statutory requirements

for filing and serving an appeal fails to invoke the court's appellate jurisdiction, so dismissal of such appeals is necessary. *See Fay*, 115 Wn.2d at 201; *Stewart*, 191 Wn.2d at 53; *Hernandez*, 107 Wn. App. at 196–97, 199; *Petta*, 68 Wn. App. at 410–11.

Uminski effectively concedes that he failed to serve the appeal on the Director and, instead, he argues that he substantially complied with the statute because the Attorney General's Office had actual knowledge of the appeal, which Uminski claims is sufficient under *Black*. *See* Pet. at 1–6. Uminski's argument fails. *Black* held that service of the appeal on the assigned Assistant Attorney General is sufficient to substantially comply with the statute's requirement to serve the Director, not that fortuitous knowledge of the appeal by any Assistant Attorney General suffices. *See Black*, 131 Wn.2d at 549, 553–55. Uminski neither served nor attempted to serve the appeal on either the Assistant Attorney General or the Director, and the Assistant Attorney General had knowledge of the appeal for reasons that are not explained by the record, but which in any event were not due to Uminski's actions. *See* CP 2, 11, 18–20. The Court of Appeals properly rejected the proposition that fortuitous knowledge is sufficient to show service. By that logic, an Assistant Attorney General who happened to read an article that mentioned a case would have "actual knowledge" of the appeal and it would not matter if the appealing party

failed to serve the appeal on either the Department or the Assistant Attorney General. There can be any number of ways an Assistant Attorney General could learn of an appeal, but the rules governing service do not contemplate such a haphazard way to establish service.

Moreover, Uminski's argument misconstrues *Black*'s holding. *Compare* Pet. at 4–6 *with Black*, 131 Wn.2d at 549, 553–55. *Black* recognized that a worker can show substantial compliance by demonstrating either that the *Director* had actual knowledge of the appeal or that the worker *served* the appeal on the assigned Assistant Attorney General. *Black*, 131 Wn.2d at 553–55. Uminski does not contend that the Director had actual knowledge of the appeal, nor would the record support such an argument. *Black* referenced the Director having actual knowledge of the appeal because RCW 51.52.110 requires service on the Director. *Id.* *Black* concluded that service of the appeal on the assigned Assistant Attorney General is a method of serving the appeal on the Director that, while not the method set out in the statute, is nonetheless reasonably calculated to ensure that the Director has actual knowledge of the appeal. *See id*. Nowhere did *Black* suggest that the Assistant Attorney General's fortuitous knowledge of the appeal—regardless of how or why it exists—is sufficient to establish substantial compliance with the statute.

And such a result would be contrary with *Black*'s underlying legal analysis, which was that substantial compliance consists of the appealing party attempting to serve the appeal on the necessary party in a fashion that was reasonably calculated to lead to the Director obtaining actual knowledge of the appeal. *See Black* at 553–55. Uminski did not attempt to serve the appeal on either the Director or the Assistant Attorney General in any fashion, so it is not true that he attempted service in a way that was reasonably calculated to lead to the Director having actual knowledge of the appeal. *Black* provides no support for Uminski's arguments and the Court of Appeals' decision here does not conflict with it.

Nor is Uminski correct that the Court of Appeals decision should be reversed because it would result in parties "routinely" requiring the Director to testify about whether the Director had personal knowledge of the appeal. Pet. at 8. Uminski claims that if showing actual knowledge by the Assistant Attorney General is insufficient to show substantial compliance, then appealing parties will need to attempt to have the Director testify about actual knowledge of the appeal. Pet. at 8–9. This argument fails for three reasons.

First, there is no need to attempt to invoke substantial compliance in the first place when the appealing party served the Director by mail as required by RCW 51.52.110, and workers and employers routinely serve

their appeals on the Director in that fashion. When the parties comply with RCW 51.52.110, the Director's individual knowledge is irrelevant. Second, where a party serves the appeal on the assigned Assistant Attorney General, the party can claim substantial compliance, again without needing to present any evidence about the Director's actual knowledge of it. *Black*, 131 Wn.2d at 549, 553, 555. Third, regardless of whether it would be easier for a party to present evidence about an Assistant Attorney General's knowledge of the appeal than about the Director's knowledge of it, evidence of the Assistant Attorney General's knowledge of the appeal is legally insufficient. To demonstrate substantial compliance, *Black* requires a party to either show that the Director had actual knowledge or that the party served the appeal on the Assistant Attorney General representing the Department in that case. *Id.*

It is also very unlikely that appealing parties would routinely fail to serve the appeal on either the Director or the Assistant Attorney General, yet have some good faith basis for believing that the Director had actual knowledge of the appeal. Uminski did not establish substantial compliance under *Black* or any other appellate decision, and the law of substantial compliance should not be changed simply because it might be challenging in a rare subset of cases to present evidence about the Director's knowledge of the appeal.

Uminski also attempts to rely on *Reeves v. Dep't of Gen. Admin.*, 35 Wn. App. 533, 537, 667 P.2d 1133 (1983), but that case supports the Court of Appeals' decision, not Uminski's arguments. Pet. at 9–11. Uminski incorrectly suggests that *Reeves* stands for the rule that where an Assistant Attorney General is authorized to represent a state agency, service of an appeal on an Assistant Attorney General is equivalent to service of the appeal on that state agency. *See* Pet. at 9–11. But *Reeves* held the opposite of this. *Reeves*, 35 Wn. App. at 537. *Reeves* held that where a statute directs service of an administrative appeal on the administrative agency's head, the party cannot serve the appeal on the Assistant Attorney General in lieu of the agency head, despite the fact that the Assistant Attorney General represents the agency. *Id*.

Uminski suggests that since *Black* recognized that a party can serve an appeal on an Assistant Attorney General, *Reeves* now stands for the rule that service of an appeal on the Assistant Attorney General is service on the agency head. But that argument misconstrues *Black*'s holding. *See* Pet. at 9–11. *Black* recognized that service of an appeal on an Assistant Attorney General substantially complies with the statute, not that service on the Assistant Attorney General was equivalent to serving the appeal on the agency head. And *Black* did not disturb *Reeves*'s holding that service of an appeal on an Assistant Attorney General is not

equivalent to service of the appeal on the Director. *Compare Black*, 131 Wn.2d at 549, 553–55 *with Reeves*, 35 Wn. App. at 537.

Indeed, it is precisely because service of an appeal on an Assistant Attorney General is not equivalent to service of the appeal on the agency head that *Black* had to consider whether the substantial compliance doctrine excused the appealing party's failure to follow the strict requirements of the statute. In any event, Uminski did not serve the Assistant Attorney General in this case so neither *Black* nor *Reeves* supports him. Uminski neither complied with the statute nor substantially complied with it, because he made no attempt to serve the appeal on either the Assistant Attorney General or the Director.

B. The Court of Appeals' Rejection of the Superior Court's Incorrect Legal Analysis Does Not Conflict with the Case Law Regarding the Substantial Evidence Standard

Uminski also fails to show that the Court of Appeals' decision conflicts with case law recognizing that the appellate courts review questions of fact only for substantial evidence. *See* Pet. at 6–7. Uminski points to the superior court's use of the phrase "I find" to describe its legal conclusion that he substantially complied with the statute, and incorrectly argues that the Court of Appeals improperly substituted its judgment for the superior court on a question of fact. Pet. at 6–7. But whether a party substantially complied with the service requirements of a statute under the

undisputed facts of a case is a question of law, not fact. *See Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 816, 156 P.3d 240 (2007) (Whether a legal conclusion flows from undisputed facts is a question of law that is reviewed de novo.). And it does not matter that the superior court used the words "I find" to describe its legal conclusion, because legal conclusions that are improperly labeled as findings of fact are properly reviewed as legal conclusions. *See Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013).

There was no dispute in this case about whether Uminski served the appeal on either the Attorney General's Office or the Director (he did not) nor whether an Assistant Attorney General had actual knowledge of the appeal (one did). The issue was whether the undisputed facts support the legal conclusion that Uminski substantially complied with the statute. This is a question of law, which the Court of Appeals properly reviewed de novo. *See Meadow Valley*, 137 Wn. App. at 816. Uminski's assertion that the Court of Appeals substituted its judgment for that of the trial court lacks merit and does not warrant review.

V. CONCLUSION

Uminski shows no conflict with *Black*, *Reeves*, or any other case law. Uminski made no attempt at serving his superior court appeal on

either the Director or the Assistant Attorney General so he neither complied with the service statute nor substantially complied with it. The cases Uminski cites do not say otherwise; indeed, they support the Court of Appeals' decision. The Court of Appeals properly directed the dismissal of his appeal and this Court should deny review consistent with RAP 13.4(b).

RESPECTFULLY SUBMITTED this 29th day of December, 2020.

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July 21, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL UMINSKI, Respondent, v. CLARK COUNTY, Appellant.	No. 53007-4-II UNPUBLISHED OPINION

CRUSER, J. – Clark County (County), a self-insured employer, appeals from the superior court's order denying the County's motion to dismiss Paul Uminski's appeal to the superior court of the denial of his worker's compensation claim against the County. Because the record does not establish that the Director of the Department of Labor and Industries (Director) was served with or had actual notice of Uminski's appeal, we reverse the superior court's denial of the County's motion to dismiss and remand this matter to the superior court to dismiss the appeal.[1]

FACTS

I. BACKGROUND

Paul Uminski was working as a deputy sheriff in Clark County when he was diagnosed with carpal tunnel syndrome. Uminski filed a workers' compensation claim with the Department

[1] Because we reverse based on no proof of actual notice, we do not address the County's arguments regarding fortuitous knowledge, attorney of record, or the inapplicability of substantial compliance for statutory timelines.

of Labor and Industries (Department). The Department denied the claim, and the Board of Industrial Insurance Appeals (Board) affirmed the Department's decision.

Uminski filed a notice of appeal with the superior court. Uminski's certificate of service stated that he served the notice of appeal on the Board's counsel and on the County's counsel. The certificate of service did not show service on the Director, the Department, or the Department's counsel. The parties do not dispute that Uminski did not serve the Director, the Department, or the Department's counsel.

II. County's Motion to Dismiss

The County moved to dismiss the appeal, arguing that superior court lacked jurisdiction because Uminski had not served the Director as required under RCW 51.52.110. In support of the motion to dismiss, the County attached an affidavit from Roxanne Yaconetti, the "correspondence liaison for the Director." Clerk's Papers (CP) at 19. Yaconetti described the normal process for processing appeals from Board decisions. She stated that there was no record of the Director having received a notice of appeal to the superior court in this matter.

Uminski opposed the motion to dismiss. Although he admitted that he had not served the notice of appeal in a manner reasonably calculated to give the Director notice, Uminski argued that the Director had actual notice of the appeal. Uminski asserted that there was proof of actual notice because Assistant Attorney General (AAG) James Johnson "filed the Department's Notice of Non-Participation with Clark County superior Court" and that actual notice to the AAG was sufficient. CP at 22.

In support of his argument, Uminski attached a declaration from Johnson. Johnson stated that he was "an [AAG] assigned to the Labor and Industries Division of the Attorney General's Office [(AGO)]." CP at 23. On June 14, 2018, "the Labor and Industries Division of the [AGO]

received" a copy of the notice of appeal filed by Uminski. CP at 23. Johnson did not explain how the AGO obtained a copy of the notice of appeal.[2]

Johnson further stated,

> The Department does not appear and participate in all superior court appeals involving self-insured employers. Therefore, that same day, June 14, 2018, AGO staff forwarded to me and other attorneys copies of [notice of appeal] so we could decide whether the Department of Labor and Industries would actively participate in the case. By June 15, 2018, we had decided not to participate.

CP at 23-24. Johnson commented, "The decision not to participate meant that I was the attorney of record assigned to the appeal, and would file a notice of non-participation, as I later did." CP at 24.

The County responded that Uminski had not established substantial compliance with the service requirement under RCW 51.52.110 because substantial compliance requires an actual attempt to comply with the service requirement, not just the incidental actual notice that occurred here. The County also asserted that notice to an AAG was not the same as the Director receiving notice.

The superior court denied the County's motion to dismiss:

> Well, the issue is whether I have jurisdiction because of the substantial compliance because that term is used in various cases, including *Black vs. Labor & Industries*[,131 Wn.2d 547, 555, 933 P.2d 1025 (1997)]. It's not whether there's any prejudice. Apparently, it's not a standing issue. It's basically a subject matter jurisdiction issue because the person raising it did receive notice within the time limits and everybody else received it. So, it's just a question of whether under these circumstances where the claimant, or the person filing the appeal, didn't serve the documents, but the documents got over to the attorneys that were in the position to make the decision, whether that constitutes substantial compliance for jurisdictional purposes under *Black*. I find that it does; I deny the Motion to Dismiss.

[2] At the hearing on the motion to dismiss, the County asserted that the Board had forwarded a copy of the notice of appeal to the AGO.

RP at 5; CP at 36.

The County sought discretionary review. We granted review.

ANALYSIS

The County argues that the superior court erred in denying the motion to dismiss because Uminski failed to demonstrate that he served the Director as required by RCW 51.52.110. Because the record does not contain any evidence that the Director had actual notice of the appeal, we hold that Uminski has not established substantial compliance with the service requirement, and therefore, the trial court erred in denying the County's motion to dismiss.

I. LEGAL PRINCIPLES

When reviewing a Board decision, the superior court acts in its limited appellate capacity. *Fay v. Nw. Airlines, Inc*., 115 Wn.2d 194, 197, 796 P.2d 412 (1990). Thus, the appealing party must comply with RCW 51.52.110 for the superior court to have jurisdiction over an appeal from a Board decision. *Fay*, 115 Wn.2d at 198. "Whether a court has subject matter jurisdiction is a question of law reviewed de novo." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) (citing *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

Under RCW 51.52.110, the party appealing the Board's decision must file his or her notice of appeal with the clerk of the court and serve the Director, the Board, and the self-insured party within 30 days of a final order or notice of the final order. Generally, if the appealing party fails to timely serve the Director, dismissal of the appeal is required. *See Krawiec v. Red Dot Corp.*, 189 Wn. App. 234, 239, 354 P.3d 854 (2015).

But "the modern preference of courts [is] to interpret their procedural rules to allow creditable appeals to be addressed on the merits absent serious prejudice to other parties."[3] *Graham Thrift Grp., Inc. v. Pierce Cty.*, 75 Wn. App. 263, 268, 877 P.2d 228 (1994). Thus, "[s]ubstantial compliance with the terms of RCW 51.52.110 is . . . sufficient to invoke the superior court's appellate jurisdiction." *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 195, 26 P.3d 977 (2001) (citing *In re Saltis*, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980)).

"'Substantial compliance is generally defined as actual compliance with the substance essential to every reasonable objective of a statute.'" *Krawiec*, 189 Wn. App. at 241 (quoting *Hernandez*, 107 Wn. App. at 196 (internal quotation marks omitted). The objective of RCW 51.52.110's service requirement "is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions." *Saltis*, 94 Wn.2d at 895.

Substantial compliance with RCW 51.52.110 occurs when "(1) the [D]irector received actual notice of appeal to the superior court; or (2) the notice of appeal was served in a manner reasonably calculated to give notice to the [D]irector." *Saltis*, 94 Wn.2d at 896. Our Supreme Court has also held that service on the AAG assigned to represent the Department in the matter being

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[3] Citing *Graham Thrift Group*, Uminski appears to contend that the superior court had jurisdiction despite the defect in service because the lack of service was not prejudicial to the Department. But *Graham Thrift Group* merely recognizes that "the modern preference of courts to interpret their procedural rules to allow creditable appeals to be addressed on the merits absent serious prejudice to other parties." 75 Wn. App. at 268. RCW 51.52.110 is not, however, a court's procedural rule, nor does *Graham Thrift Group* stand for the proposition that failure to comply or substantially comply with a jurisdictional service requirement is irrelevant as long as a party is not prejudiced by lack of service. The substantial compliance doctrine itself is an acknowledgment of the modern preference of allowing appeals to proceed despite service issues—the preference does not, however, require that the courts entirely ignore statutory service requirements. *Black*, 131 Wn.2d at 552-53.

appealed "is reasonably calculated to give notice to the interested party." *Black*, 131 Wn.2d at 555 (following *Vasquez v. Dept. of Labor & Indus.*, 44 Wn. App. 379, 722 P.2d 854 (1986)).

II. No Proof of The Director's Actual Notice

Here, although, under *Black*, service on the AAG might have been sufficient to establish that Uminski served the notice of appeal in a manner reasonably calculated to give notice to the Director, there was no service on the AGO or Johnson, and Uminski does not argue that he served the notice of appeal in a manner reasonably calculated to give notice to the Director. Instead, Uminski argues that he has established that the Department, the real party in interest, had actual notice of the appeal because Department determined that it would not participate in the appeal.

To establish actual notice, there had to be some evidence that the Director, actually received notice of the appeal. At best, the record shows that Johnson, who later became the Department's attorney of record in this matter, had actual notice of the appeal and that he and other attorneys played a role in deciding whether the Department would participate in the appeal.

As noted above, Johnson's declaration stated,

> The Department does not appear and participate in all superior court appeals involving self-insured employers. Therefore, that same day, June 14, 2018, *AGO staff forwarded to me and other attorneys copies of [notice of appeal] so we could decide whether the Department of Labor and Industries would actively participate in the case. By June 15, 2018, we had decided not to participate*.

CP at 23-24 (emphasis added). This statement establishes that Johnson and "other attorneys" were involved in deciding whether the Department would participate. But Johnson does not mention that the Department or Director actually participated in this decision. And there is nothing in the record establishing that the Department or Director are routinely consulted when the decisions about whether to participate in a case are made by the AGO.

It is mere conjecture that any direct communication with the Director about the notice of appeal occurred. Without something in the record affirmatively establishing that the Director participated in the decision, Uminski fails to show that the Director had actual knowledge of the appeal.

We note that Uminski cites no authority establishing that an AAG's knowledge can be imputed to the Director, and we assume there is no such authority. *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296-97, 381 P.3d 95 (2016) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). And although *Black* is similar to this case in many ways, it is not helpful because it addressed whether the notice of appeal was served in a manner reasonably calculated to give notice to the Director and it does not address whether an AAG's actual notice would alone be sufficient to show that the Director had actual notice.

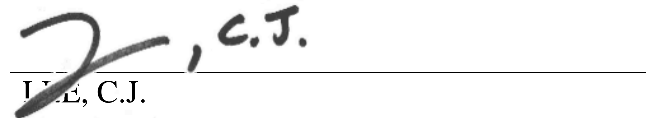
Because Uminski fails to show that the Director had actual notice of the appeal, we reverse the superior court's denial of the County's motion to dismiss and remand for dismissal of the appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

MAXA, J.



LEE, C.J.

NO. 99157-0

SUPREME COURT
OF THE STATE OF WASHINGTON

PAUL UMINSKI, Petitioner, v. CLARK COUNTY, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Answer to Petition for Review, Department of Labor and Industries and this Declaration of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Susan L. Carlson
Supreme Court Clerk
Washington State Supreme Court

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DATED this 29th day of December, 2020, at Olympia, Washington.

AUTUMN MARSHALL
Legal Assistant
(360) 586-7737

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

December 29, 2020 - 10:13 AM

Transmittal Information

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Appellate Court Case Number:	99157-0
Appellate Court Case Title:	Paul Uminski v. Clark County
Superior Court Case Number:	18-2-01238-8

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