99157-0

No. 53007-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

PAUL UMINSKI, Respondent/Plaintiff

v.

CLARK COUNTY, Petitioner/Defendant

PETITION FOR REVIEW TO THE SUPREME COURT

DOUGLAS M. PALMER, WSBA 35198
Attorney for Respondent/Plaintiff
Hamrick Palmer
PO Box 1306
Vancouver, WA 98666
360-553-0207

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Cases

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Issue Presented for Review

Whether a party substantially complies with RCW 51.52.110 when the Office of the Attorney General actually receives the appealing party's notice of appeal within the statutorily prescribed 30 days?

The Supreme Court should grant review, per RAP 13.4(b)(1), on this issue because this Court's holding in *Black v. Department of Labor & Indus.*, 131 Wn.2d 547, 933 P.2d 1025 (1997) holding that service on an Assistant Attorney General substantially complies with RCW 51.52.110.

The Court should grant review, per RAP 13.4(b)(1), because Division II wrongly substituted its own factual findings, despite substantial evidence supporting the trial court's findings contrary to *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

Also, the Court should grant review, per RAP 13.4(b)(2), because the decision conflicted with Division 2's holding in *Reeves v. Dep't of Gen. Admin.*, 35 Wn. App. 533, 537-8, 667 P.2d 1133 (1983) that RCW 4.92.020 (permitting service on Assistant Attorney Generals on any actions against the State) only applies to original actions under a superior court's general jurisdiction, unless new authority (as in *Black*), permits such service.

Instead, this Court should hold that where an Assistant Attorney General receives actual notice of a superior court appeal prior to the 30-day

appeal deadline constitutes substantial compliance with RCW 51.52.110 and RCW 4.92.020.

Statement of the Case

On May 16, 2018, the Board of Industrial Insurance Appeals issued its Order Denying Mr. Uminski's Petition for Review. The 30th day from this Order was Friday, June 15, 2018. Mr. Uminski's attorneys received that Order on May 21, 2018. The 30th day from receipt of this Order was Wednesday June 20, 2018.

On June 4, 2018, Mr. Uminski filed and served a Notice of Appeal in Clark County Superior Court. This filing was made within the time limits imposed by RCW 51.52.110. The Notice of Appeal was directly served on the Board of Industrial Insurance Appeals and the Self-Insured Employer, Clark County. (Appendix A)

While Mr. Uminski did not directly serve the Department of Labor & Industries, the Board of Industrial Insurance Appeals forwarded Mr. Uminski's Notice of Appeal to the Attorney General's Office. It was forwarded to James Johnson, Assistant Attorney General, who received it on June 14, 2018. (Appendix A & B). The next day, June 15, Assistant Attorney General Johnson averred "We [The Department of Labor & Industries] had decided not to participate." (Appendix B, page 2, lines 2-3). Assistant Attorney General Johnson also declared that he was the

attorney of record for the Department. (Appendix B, page 2, lines 4-6). The RCW 51.52.110 30-day appeal deadline ran on June 19, 2018 (the 30th day after the May 16, 2018 decision was communicated to Mr. Uminski's attorney). The Department then notified the Court of its non-participation in mid-July 2018. (Appendix B, page 2, lines 4-8).

Clark County Superior Court then denied Defendant's Motion to Dismiss. (C.P. p. 36). The Superior Court reasoned that despite defects in service, "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." Report of Proceedings p. 5, ln. 11-17.

Defendant's sought discretionary review from Division 2, which was granted. Division II then reversed the decision of the Clark County Superior Court, holding that despite actual, timely receipt by Assistant Attorney General Johnson, that Plaintiff, Mr. Uminski did not substantially comply with RCW 51.52.110 and there was insufficient evidence to conclude the Department had actual notice of the appeal. Mr. Uminski sought reconsideration, which was denied by Division II.

Standard of Review

This appeal involves a question of statutory construction, which is reviewed *de novo*. *Krawiec v. Red Dot Corp.*, 189 Wn. App. 234 P.3d 854

(2015).

Argument

Based upon a long line of case, the Court should grant review as this Court has established that substantially compliance with the service requirements of RCW 51.52.110 is sufficient. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 553, 933 P.2d 1025 (1997); *Fay v. Northwest Airlines*, 115 Wn.2d 194, 199 (1990); *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003); *In re Saltis*, 94 Wn. 2d 889, 896, 621 P.2d 716 (1980); *see also Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 855, 232 P.3d 558, 562 (2010) (applying *Black* to another statutory scheme). The decision of Division 2 conflicts with this Court's holding in *Black*. RAP 13.4(b)(1)

This Court's decision in *Black* is most instructive. In that case, the injured worker served his superior court notice of appeal on a specific assistant attorney general, but did not serve the Department directly. This Court positively cited to Division III's decision in *Vasquez v. Dep't of Labor & Indus.*, 44 Wn. App. 379, 722 P.2d 854 (1986) that service on the attorney representing a self-insured employer's attorney was sufficient. *Black*, 131 Wn.2d at 554. The *Black* Court also noted that in *Fay*, *supra*, the Court assumed that service on "a self-insurer's attorney was sufficient service under RCW 51.52.110." *Black*, 131 Wn.2d at 554. This Court held,

"*Vasquez* and *Fay* are on point." *Id.* In other words, where an Assistant Attorney General receives a notice of appeal, that substantially complies with RCW 51.52.110.

However, below, Division II disagreed. Here, the Court first cited *In re Saltis* for the proposition that the requirements of RCW 51.52.110's requirements should be practically interpreted so that "interested parties receive actual notice of appeals of Board decisions." *Slip Opinion*, p. 5, *citing In re Saltis*, 94 Wn.2d at 895. But the Court held that actual receipt by Assistant Attorney General Johnson followed by the Department's filing of its Notice of Non-Participation was insufficient to meet the principles this Court laid down in *Saltis*. *Slip Opinion*, p. 7. This is in direct conflict with *Black* and by implication *Fay*.

Division II held, contrary to the plain holding of *Black*, there must be evidence in the record that the Director of the Department of Labor & Industries had direct, actual notice of this appeal. *Id.* By so holding, Division II effectively overturned this Court's precedent in *Black*: timely receipt of an appeal by an attorney representing a party means timely receipt of the appeal by that party. By so holding, Division II substituted its own evidentiary findings for the trial court's, despite substantial evidence supporting the trial court's findings. Also, requiring additional evidence beyond actual receipt by an attorney of record impugns the professionalism

of the attorney (RPC 1.2(f)) and invades attorney-client communications. By so doing, the decision below created an untenable standard of proof with adverse policy implications. The Court should grant review, per RAP 13.4(b)(1), to reaffirm that its 1997 decision in *Black* remains good law.

a. In addition to not following *Black*, Division II wrongly substituted its factual determinations.

The decision below wrongly imposed its own factual determination for the determination made by the trial court in violation of established Supreme Court precedent. RAP 13.4(b)(1). Appellate courts may only disturb factual determinations of trial courts if the record lacks substantial evidence to support the trial court's findings. *Ruse*, 138 Wn.2d at 5. Clark County Superior Court found there was sufficient notice to the Department of Labor & Industries, the party-in-interest:

> 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.

Report of Proceedings p. 5, ln. 11-17. The trial court also noted, that Assistant Attorney General Johnson "was not just any attorney general, it was one who felt that by the next day he could decide they won't let him plan to participate in this case. So, he sounds like he had some authority."

Id. p. 2, ln. 17-20.

This is substantially supported by Assistant Attorney General Johnson's declaration that he and his client had sufficient notice such that "we could decide whether the Department of Labor & Industries would actively participate in the case. By June 15, 2018, we had decided not to participate." CP at 23-24. Mr. Johnson also swore under oath that he was the attorney of record on behalf of the Department in this matter. CP at 23-24. Then Assistant Attorney General Johnson, with authority from the Department, notified the Clark County Superior Court of its non-participation. *Id.* This process worked exactly as intended by RCW 51.52.110, despite the defects.

The Court of Appeals, instead, relied upon the Declaration of Ms. Yaconetti. CP at 19. Ms. Yaconetti confirmed what Mr. Uminski has acknowledged: his Notice of Appeal was not directly sent to Department. Division II ended its analysis there, despite the holding in *Black*. Ms. Yaconetti did not aver the Department had no actual knowledge of the appeal, merely that an appeal had not been recorded in the log she manages. This is insufficient for Division II to effectively conclude this record lacked the substantial evidence to support the trial court's findings.

b. Requiring the Director to have actual knowledge of every workers compensation appeal does not achieve the practical purposes of RCW 51.52.110.

Division II's holding creates an untenable burden of proof with adverse policy incentives. First, any superior court appeal is subject to dismissal so long as the appealing party cannot present affirmative evidence of the Director's actual knowledge of the appeal. Such inquiry not only invades attorney-client communication, but may require routine fact-finding hearings with testimony by the Director as permitted by RCW 51.52.115[1]. Taken at face value, Division II's holding would routinely require the Director to testify in every jurisdiction across the state about his knowledge of any particular appeal. This does not achieve the purpose of the Act.

Also, the issue here, per *Black*, is not whether the Department received actual notice, but whether Assistant Attorney General Johnson, the Department's attorney of record, received timely, actual notice of the appeal. There is sufficient evidence in this record to support the trial court's

[1] "That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced."

findings. The trial court's conclusion that Mr. Uminski substantially complied with RCW 51.52.110 flowed naturally from that finding. The Court should grant review to affirm that actual, timely receipt by an attorney representing a party-in-interest is sufficient to meet its holding in *Black*. It is sufficient because it achieves the practical purpose of letting parties or their attorney of record know about the appeal. *In re Saltis*, 94 Wn.2d at 895; *Black*, 131 Wn.2d at 554.

c. Division II's decision below also conflicted with its own decision in *Reeves*.

Finally, the Court should grant review because RCW 4.92.020 mandates that actual receipt by an Assistant Attorney General is sufficient to serve the State of Washington. When reading the statute as a whole, Division II's emphasis on the Department's actual receipt is legal error this Court should clarify. Chapter 4.92 RCW governs the initiation of claims and against the State. RCW 4.92.020 provides,

> Service of summons and complaint in such actions shall be served in the manner prescribed by law upon the attorney general, or by leaving the summons and complaint in the office of the attorney general with an assistant attorney general.

(Emphasis added). Here, an Assistant Attorney General actually and timely received Mr. Uminski's Notice of Appeal consistent with RCW 4.92.020.

In *Reeves*, 35 Wn. App. 533, Division II originally limited RCW 4.92.020 to only original actions under a superior court's general jurisdiction. The Court reasoned that appeals from administrative tribunals invokes the Superior Court's appellate, not original jurisdiction. *Id.* at 537. The *Reeves* Court acknowledged this Court's holding in *Saltis* that permitted substantial compliance "with statutory provisions to invoke the *appellate*, as well as the *general*, jurisdiction of the courts." *Id. citing In re Saltis*, 94 Wn.2d 889. The *Reeves* Court noted that even in light of *Saltis*, "no authority exists permitting noncompliance with the statutory mandate." *Id.* at 538.

However, the *Reeves* Court goes on to hold, "Service upon the Attorney General is neither service upon the statutorily designated administrative head of an administrative agency nor upon the statutorily designated agency itself." *Id. citing Smith v. Dep't of Labor & Indus.*, 23 Wn. App. 516, 596 P.2d 296, *rev. den.*, 92 Wn.2d 1013 (1979). Yet almost 20 years later, this Court held exactly that: service upon the Attorney General substantially complies RCW 51.52.110's designation of service upon the Director. *Black*, 131 Wn.2d 547.

Below, Division II was aware that such authority now exits: *Vasquez*, *Fay*, and *Black*. *Supra.* While at a superficial level Division II was following *Reeves*, *Reeves* itself acknowledged authority, like in *Black*,

may allow for service on an attorney despite the statutory language. Division II failed to follow the deeper holding of *Reeves*. RAP 13.4(b)(2).

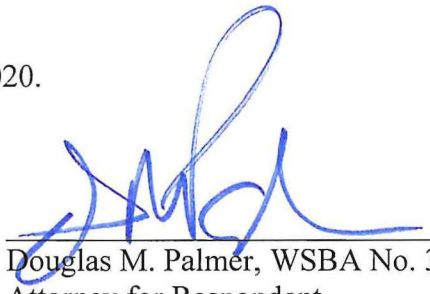
This Court should grant review to affirm the deeper holding of *Reeves*: Where the Attorney General is designated as the representative of the State or Agency, then service of an administrative appeal pursuant to RCW 4.92.020 is not merely substantial compliance, but actual compliance. Here, RCW 51.52.140 designates the Attorney General as the legal advisor and representative of the Department. RCW 4.92.020 permits service of actions upon an Assistant Attorney General.

Again, the trial court found the Assistant Attorney General received timely, actual notice of Mr. Uminski's Notice of Appeal, despite the service defects. Substantial evidence supports this finding. Division II acknowledged that by June 15, 2018, nearly a week prior to the jurisdictional cut-off for Mr. Uminski's appeal, the Department made its decision not to participate in this appeal. Slip Opinion p. 3. Substantial evidence supports this finding. As the trial court noted, Mr. Johnson "was not just any attorney general, it was one who felt that by the next day he could decide they won't let him plan to participate in this case. So, he sounds like he had some authority." Report of Proceedings p. 2, ln. 17-20. The Court should grant review because these facts satisfies RCW 51.52.110 and RCW 4.92.020 as held by this Court in *Black v. Dep't of Labor & Indus.*

Conclusion

The Court should grant review, per RAP 13.4(b)(1), to re-affirm its core holding in *Black*: actual, timely receipt of a notice of appeal by an Assistant Attorney General substantially complies with RCW 51.52.110. The Court should grant review, per RAP 13.4(b)(1), because Division II wrongly substituted its own factual findings, contrary to *Ruse*, 138 Wn.2d at 5, despite substantial evidence supporting the trial court's findings. The Court should grant review to reject Division II's attempt to undermine *Black* by requiring additional factual evidence of the Director's actual knowledge of the appeal with its adverse evidentiary and policy implications. The Court should grant review, per RAP 13.4(b)(2), to hold RCW 4.92.090 does apply to administrative appeals to superior court where the Attorney General is the designated legal advisor of the State agency.

Dated: October 27, 2020.



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June 4, 2018

Clark County Superior Court
Clerk of Superior Court
PO Box 5000
Vancouver, WA 98666

Re: *Paul Uminski v. Clark County*

Dear Clerk of Court:

Enclosed please find please find a Notice of Appeal dated June 4, 2018, with case information cover sheet and a check in the sum of $240.00, for review and filing.

Sincerely,

Douglas M. Palmer

DMP:sh
Enclosures
cc: Paul Uminski
James L. Gress
David E. Threedy

CASE TYPE 2

18-2 01238-8 COUNTY SUPERIOR COURT
CASE INFORMATION COVER SHEET

Case Number _____ Case Title PAUL UMINSKI v. Clark County

Attorney Name Douglas M. Palmer Bar Membership Number 35198

Please check one category that best describes this case for indexing purposes. Accurate case indexing not only saves time in docketing new cases, but helps in forecasting needed judicial resources. Cause of action definitions are listed on the back of this form. Thank you for your cooperation.

APPEAL/REVIEW
XX Administrative Law Review (ALR 2)
___ Appeal of a Department of Licensing Revocation (DOL 2)
___ Civil, Non-Traffic (LCA 2)
___ Civil, Traffic (LCI 2)

CONTRACT/COMMERCIAL
___ Breach of Contract (COM 2)
___ Commercial Contract (COM 2)
___ Commercial Non-Contract (COL 2)
___ Third Party Collection (COL 2)

PROTECTION ORDER
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___ Domestic Violence (DVP 2)
___ Foreign Protection Order (FPO 2)
___ Sexual Assault Protection (SXP 2)
___ Vulnerable Adult Protection (VAP 2)

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___ Judgment, Another State (FJU 2)
___ Tax Warrant (TAX 2)
___ Transcript of Judgment (TRJ 2)

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___ Change of Name (CHN 2)
___ Deposit of Surplus Funds (MSC 2)
___ Emancipation of Minor (EOM 2)
___ Injunction (INJ 2)
___ Interpleader (MSC 2)
___ Malicious Harassment (MHA 2)
___ Minor Settlement (No guardianship) (MST 2)
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___ Non-Death Injuries (TMV 2)
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TORT, NON-MOTOR VEHICLE
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___ Other Malpractice (MAL 2)
___ Personal Injury (PIN 2)
___ Products Liability (TTO 2)
___ Property Damage (PRP 2)
___ Wrongful Death (WDE 2)

IF YOU CANNOT DETERMINE THE APPROPRIATE CATEGORY, PLEASE DESCRIBE THE CAUSE OF ACTION BELOW.

_____

Please Note: Public information in court files and pleadings may be posted on a public Web site.

Appendix A

SUPERIOR COURT FOR THE STATE OF WASHINGTON

COUNTY OF CLARK

PAUL UMINSKI,

Appellant/Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES.

Respondent/Defendant.

No. 18-2 01238-8

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Appellant, Paul Uminski, appeals to County Superior Court for the State of Washington, the Decision and Order of the Board of Industrial Insurance Appeals dated May 16, 2018..

The name and address of Appellant/Plaintiff's attorneys is:

Douglas M. Palmer
Busick Hamrick Palmer, PLLC
PO Box 1385
Vancouver, WA 98666

The name and address of Respondent/Defendant's attorney is:

James L. Gress
Gress, Clark, Young & Schoepper
8705 SW Nimbus Ave., Suite 240
Beaverton, OR 97008

The name and address of the Board of Industrial Insurance Appeals is:

Appendix A

David E. Threedy
Board of Industrial Insurance Appeals
2430 Chandler Court SW
PO Box 42401
Olympia, WA 98504-2401

Also appearing on behalf of the Department of Labor and Industries:

Date: June 4, 2018.

DOUGLAS M. PALMER, WSBA No. 35198
Attorney for Claimant

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APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PAUL UMINSKI	)	DOCKET NO. 17 14288
	)	
	)	ORDER DENYING PETITION FOR
CLAIM NO. SZ-38960	)	REVIEW WITH ERRATA SHEET

Industrial Appeals Judge Jeffrey A. Friedman issued a Proposed Decision and Order on March 19, 2018. Copies were mailed to the parties of record.

The claimant filed a Petition for Review, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order, the Petition for Review, and the entire record. The Petition for Review is denied, as provided by RCW 51.52.106. The Proposed Decision and Order becomes the final order of the Board as corrected below.

ERRATA SHEET

The Proposed Decision and Order issued on March 19, 2018, contains two errors, which are corrected as follows:

1. On page 6, line 6; "line 22" is changed to "line 18."
2. On page 5, a new entry is made following line 15 reading: "Page 26, lines 6 through 13, inclusive, are stricken."

Dated: May 16, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

Appendix A

CL1

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AG1

OFFICE OF THE ATTORNEY GENERAL/TUMWATER
DOCKET MANAGER
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OLYMPIA, WA 98504-0121

In re: PAUL UMINSKI
Docket No. 17 14288

Appendix A

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

PAUL UMINSKI, APPELLANT/PLAINTIFF, V. DEPARTMENT OF LABOR AND INDUSTRIES, RESPONDENT/DEFENDANT.	No. 18-2-01238-8 DECLARATION OF JAMES S. JOHNSON

I, James S. Johnson, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

1. I am an assistant attorney general assigned to the Labor and Industries Division of the Attorney General's Office.
2. Attached as exhibit 1 is the copy of the cover letter, case information cover sheet, and notice of appeal in this matter the Labor and Industries Division of the Attorney General's Office received on June 14, 2018, as is shown by the received stamps on the cover letter, case information sheet, and notice of appeal.
3. 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

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707

forwarded to me and other attorneys copies of exhibit 1 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.

4. 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. Ordinarily I send my notice of non-participation within a few days of receiving the appeal. In this case I did not send it out until mid-July because my assistant took an extended vacation beginning in mid-June, and we decided all such notices could wait for her return.

DATED this 29th day of August, 2018, in Tumwater, Washington.

James S. Johnson, AAG
WSBA # 23093

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707

Appendix B

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

PAUL UMINSKI, Respondent, v. CLARK COUNTY, Petitioner.	)	Cause No: 53007-4-II CERTIFICATE OF SERVICE

The undersigned states that on the October 27, 2020, I served copies of the Respondent's Petition for Review on the following individuals, via electronically or first class mail, postage paid, addressed as follows:

James L. Gress
Gress, Clark, Young, & Schoepper
8705 SW Nimbus Ave., Suite 240
Beaverton, OR 97008

Anastasia Sandstrom
Office of the Attorney General
800 Fifth Avenue, Suite 200
Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

Date: October 27, 2020.

DOUGLAS M. PALMER, WSBA No. 35198
Attorney for Claimant

Hamrick Palmer PLLC
3305 Main Street, Suite 301
PO Box 1306
Vancouver, WA 98666-1385
Telephone (360) 553-0207
Fax (360) 418-01263

Filed
Washington State
Court of Appeals
Division Two

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

[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.

HAMRICK PALMER PLLC

October 27, 2020 - 11:54 AM

Transmittal Information

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