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NO. 69408-1-I

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

MICHAEL SMITH,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON and EASTSIDE
SEALANTS AND GLASS,

Respondents.

**BRIEF OF RESPONDENT EASTSIDE GLASS &
SEALANTS**

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I. INTRODUCTION

The present matter involves the Petitioner's failure to timely serve the Department of Labor and Industries (hereinafter "Department") and the Board of Industrial Insurance Appeals ("hereinafter "Board") in order to perfect the Petitioner's appeal.

Where the only argument set forth by the Petitioner is subject matter jurisdiction leading to a less severe sanction than dismissal, the Respondent respectfully asserts affirmation of the lower Court's dismissal under RCW 51.52.110.

II. COUNTERSTATEMENT OF ISSUE

Where RCW 51.52.110 requires timely filing and timely service to perfect a parties' appeal, did the Superior Court properly dismiss the Petitioner's appeal where the record clearly reflects a failure by the Petitioner to timely serve the Department and Board?

III. COUNTERSTATEMENT OF THE CASE

On December 21, 2011, the Employer received the Board's Decision and Order (dated December 20, 2011) in the above matter, wherein the appeal of the Petitioner, Michael Smith, was denied and the Department Order for Mr. Smith to repay his time loss compensation was affirmed.

Per RCW 51.52.110 and WAC 263-12-170; an appeal to the Superior Court by any party who disagrees with the Board's ruling; may do so within thirty days of the date you receive the Board's final Order. This confirms the appeal to this Court *and the parties* was due no later than January 20, 2012, as there are thirty-one days in the month of December.

The Employer did not receive a copy of Claimant's Notice of Appeal to this Court in this matter until, January 24, 2012. As the issue before the Court primarily addresses the lack of perfected notice upon the Board and the Department, the

Respondent defers to the Counterstatement of the Case as set out by the Department of Labor and Industries' in their briefing.

IV. ARGUMENT

A. Standard of Review.

Where the present case involves a question of law, statutory construction and/or interpretation, the standard of review is de novo. *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

B. **Where the Petitioner clearly did not perfect the appeal at issue as per RCW 51.52.110 and the case of ZDI Gaming does not open the door for judicial discretion, the Superior Court correctly dismissed the Petitioner's appeal.**

There is no dispute that the statute on point is RCW 51.52.110 which provides not only the exclusive method for obtaining judicial review but also provides a clear timeframe for action and clear directions on whom and how to perfect service. RCW 51.52.110.

The Petitioner incorrectly asserts the case of *ZDI Gaming v. Gambling Comm'n*, 173 Wn.2d 608, 268 P. 3d 929 (2013),

opens the door for judicial discretion regarding the remedies for procedural requirements yet the true purpose of ZDI instead addresses remedies for incorrect venue only. There is no question that in the present case the Petitioner chose the correct venue, only that the perfection of the appeal did not comply with statute.

Similarly, the Petitioner also relies upon the case of *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003) which deals with an issue that is not on point but again addresses the issue of venue.

Without reciting applicable case facts as set forth in the Department's briefing, the Respondent reiterates the remedy for failure to timely serve parties is dismissal. *Fay v. Northwest, Inc.*, 115 Wn.2d 194, 199, 796 P.2d 412 (1990); *Petta v. Dept' of Labor and Indus.*, 68 Wn.App. 406, 407, 842 P.2d 1006 (1992); *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 194, 26 P.3d 977 (2001).

Petitioner incorrectly asserts only a failure to file an

appeal is fatal and would result in dismissal. However, the case law is clear that that notice to all parties and the Board is required. *Sprint Spectrum LP v. Dep't of Revenue*, 156 Wn.2d 481, 681 P.2d 227 (1984). As follows, the Petitioner has incorrectly asserted the acknowledged untimely appeal should be allowed to move forward as the parties were not prejudiced and such action was excusable. If the Court were to follow the Petitioner's misguided assertion, the practical application would open the door to substantial compliance as a mere option.

IV. CONCLUSION

As a matter of law, the Court was correct in dismissing the Petitioner's appeal were the statutory requirements of RCW 51.52.110. For the foregoing reasons, the Respondent respectfully requests that this Court affirm the lower court's dismissal of the present appeal.

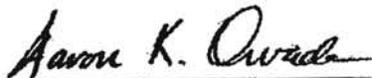
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DATED this 5th day of April, 2013.

AMS LAW, P.C.



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Attorneys for Respondent Eastside Glass &
Sealants

CERTIFICATE OF SERVICE

I, Kasey Johansen, hereby certify under penalty of perjury under the laws of the State of Washington that on April 5, 2013, I filed with the Court of Appeals Division I, via Legal Messenger, the original of the following document and one copy:

1. BRIEF OF RESPONDENT EASTSIDE GLASS & SEALANTS

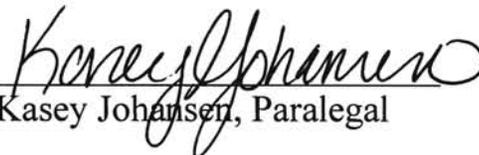
and that I further served a copy via fax and mail upon:

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AND

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SIGNED in Seattle, Washington on April 5, 2013.


Kasey Johansen, Paralegal