FILED
AUG 14, 2014
Court of Appeals
Division III
State of Washington

NO. 32377-3

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

PERFORMANCE CONTRACTING, INC.
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

Appeal from the Superior Court for Lincoln County
Cause No. 13-2-00073-4

BRIEF OF APPELLANT

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A. INTRODUCTION AND OVERVIEW

Performance Contracting, Inc. ("PCI") was charged by the Department of Labor and Industries ("Department") with a serious violation of the Washington Industrial Safety and Health Act ("WISHA"). The citation was affirmed by the Board of Industrial Insurance Appeals ("Board"). PCI appealed to superior court by timely mailing the notice of appeal to the court for filing and by mailing on the same day copies of the notice to the Director of the Department and the Board. The court received and filed the notice of appeal. The Department filed a motion to dismiss the appeal based on PCI's alleged failure to perfect the appeal by failing to serve the Director and the Board who contended they had not received their copies of the notice of appeal.

Following a hearing before the Honorable John Strohmaier of the Lincoln County Superior Court, the court granted the Department's motion and dismissed PCI's appeal. PCI filed a motion for reconsideration that was denied.

PCI now seeks reversal of the trial court's dismissal and failure to reconsider for the following reasons:

1. RCW 49.17.150(1) requires only mailing of the notice of appeal to the Director and the Board, not actual receipt.

2. PCI's attorney and legal staff followed their custom and practice in mailing the notice of appeal to the court and to all parties within the statutory time period.

3. That evidence establishes both actual and substantial compliance with the statute.

4. The Department and Board suffered no prejudice by not obtaining the copy of the notice of appeal as mailed.

5. State policy and equitable principles should be applied to allow PCI's appeal to be determined on the merits.

B. APPLICABLE STATUTE

RCW 49.17.150(1) is the WISHA statute at issue. It states:

> 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 by 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. . . . (Emphasis added.)

C. ASSIGNMENTS OF ERROR AND ISSUES

ASSIGNMENT OF ERROR No. 1: The trial court erred in dismissing PCI's appeal for failing to perfect the appeal as required by RCW 49.17.150.

ISSUE No. 1: Does RCW 49.17.150(1) only require mailing within the required time or does it also require actual receipt by the Director and Board?

ISSUE No. 2: Did PCI actually comply with the statute by timely mailing copies of the notice of appeal to the Director and the Board notwithstanding their assertions of non-receipt?

ISSUE No. 3: Did PCI substantially comply with the statute?

ISSUE No. 4: Should state policy and principles of equity be applied to allow PCI's appeal to be heard on the merits?

ASSIGNMENT OF ERROR No. 2: The trial court erred in not granting PCI's motion for reconsideration of the Order Dismissing Appeal.

ISSUE No. 1: Was there evidence or reasonable inferences from the evidence to justify the Order?

ISSUE No. 2: Is the Order contrary to law?

ISSUE No. 3: Did the Order ensure that substantial justice was done?

D. STANDARDS OF REVIEW

Legal issues are reviewed de novo which permits the appellate court to substitute its judgment for that of the superior court whose decision is being reviewed. *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.2d 241 (2001). Questions of law subject to de novo review include the proper construction of a statute, *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998), and interpretation of case law, *State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). The appellate court also reviews de novo any determination which takes the decision of a case out of the hands of the jury such as rulings on a CR 12(b)(6) motion or other motions to dismiss, *Washington Appellate Practice Deskbook*, WSBA (3rd edition and 2011 Supplement), § 18.3. All trial court rulings, including evidentiary rulings, made in conjunction with a motion for summary judgment are subject to de novo review, *Id.* at § 18.7(2) citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) and other decisions.

Rulings on motions for reconsideration are reviewed for abuse of discretion. *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001). The Supreme Court explained that standard in *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997):

> A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

E. STATEMENT OF THE CASE

1. Underlying WISHA Citation

The following facts are in PCI's notice of appeal to Franklin County Superior Court, *CP 1-7,* that attached the Proposed Decision and Order of the Industrial Appeals Judge, *CP 8-15*, and the Board's Order Denying Petition for Review, *CP 16-17*.. PCI was a subcontractor to a general contractor constructing a school in Davenport, WA. *CP 9*. It had only one employee on site insulating duct work installed by another subcontractor in the attic, 60' away from a floor opening and not exposed to any fall hazard. *CP 4*. An inspector for the Department cited PCI for violating a WAC provision that required guard rails and toe boards or cover around floor openings and imposed a penalty, later adjusted to $800, for this "serious" violation of WISHA. *CP 10*. At the hearing before the Industrial Appeals judge and over PCI's objection, the judge amended the citation to charge PCI with violating a different WAC provision (requiring railings on all exposed sides of a ladder way floor opening) and then

upheld both the violation as serious and the adjusted penalty. *CP 13-14.* PCI's appeal to the Board and to the Superior Court claims prejudice from the amended citation and asserts it had no actual or constructive knowledge of the alleged violation. *CP 4-5.* PCI assigns error to three findings of fact and related conclusions of law because they rely on mistaken facts, lack supporting evidence, are contrary to law and constitute an abuse of discretion. *CP 4-6.*

Although the monetary penalty is minor, the impact of this serious violation on PCI's ability to bid and obtain public and private construction contracts is potentially great. *Declaration of Charles Williams, CP 268-270.*

2. Superior Court Proceedings Related to Appeal

8/17/13 The Ohio attorneys for PCI receive the Board order denying PCI's petition for review. *Declaration of Douglas S. Jenks at ¶ 2, CP 228; Order Denying Petition for Review and Certificate of Service, CP 16-17.* This date starts the 30 day period for filing a notice of appeal that ends on September 16, 2013. *RCW 49.17.150(1).*

Early Sept. Attorneys for PCI in Ohio draft a notice of appeal to superior court and Washington attorneys for PCI in Seattle begin finalization for filing and service. *Jenks Declaration at ¶ 2, CP 228; Declaration of Robert L. Olson at ¶ 3, CP 233.*

9/5/13 Legal staff of Washington attorneys for PCI mail Notice of Appeal (via priority mail) to Lincoln County Superior Court for filing and mail a copy (via regular mail) to the Director of the Department, Board, the Department's attorney, and PCI's Ohio attorney Gary Auman. The Notice of Appeal is

accompanied by a Certificate of Service signed under penalty of perjury by legal assistant Laurel Barton. *CP 7; also CP 248.* They also mail a motion for admission pro hac vice of Gary Auman of Ohio as attorney for PCI. *Declaration of Laurel Barton at ¶ 3, CP 240.* The following declarations describe the process of preparation and mailing of these documents: *Laurel Barton (legal assistant), CP 239-262; Shontara Anderson (receptionist and mail clerk), CP 263-267; Gwen Crosswhite (office manager), CP 236-238; and Robert L. Olson (attorney), CP 233-235.*

9/9/13 Lincoln County Superior Court files and dockets the Notice of Appeal, *CP 1-17,* and the Motion for Limited Admission, *CP 18-23.*

9/16/13 The Court files the order granting limited admission of attorney Gary Auman based on the ex parte motion for such admission. *CP 26-27.*

10/17/13 PCI Ohio attorney Douglas Jenks calls the Board to inquire about filing of the Certified Board Record. *CP 229 at ¶ 3.* Sherry Ison informs him that the Board never received any notice of appeal. *Id.* Jenks faxes to the Board a letter with a copy of the notice of appeal to the Board previously mailed. *Id. and CP 231.*

10/18/13 The Board acknowledges receipt of the notice of appeal faxed by Jenks and notes that it will file the Certified Board Record with the court. *CP 197.*

11/4/13 The attorney for the Department, Assistant Attorney General (AAG) Ward McAuliff, emails Douglas Jenks to inform him that the Director, the Board and he did not receive the notice of appeal. *Jenks Declaration at ¶ 4, CP 229, and CP 232.* This is the first written notice of non-receipt received by PCI. *CP 229 at ¶ 4.*

11/7/13 PCI's Washington attorneys mail (via certified mail with return receipt requested) a duplicate copy of the notice of appeal to the Director, the Board and AAG McAuliff.

Barton Declaration at ¶ 4, CP 241 and CP 259-261; Olson Declaration at ¶ 4, CP 235.

11/12/13 Letter of PCI Washington attorney Robert Olson dated 11/7/13 with duplicate notice of appeal was received by all three parties per signed receipts. *Barton Declaration at ¶ 4, CP 241, and CP 262.*

11/25/13 Court dockets Certified Board Record received from Board. *CP 34.*

3. Proceedings Related to Motion to Dismiss

The Department filed a "Motion to Dismiss for Failure to Timely Serve Notice of Appeal as Required under RCW 49.17.150", *CP 181-182*, supported by a Memorandum of Authorities, *CP 186-202*, that included the affidavits of Sherry Ison, legal assistant to the Board, *CP 194-195*, and Roxanne Yaconetti, an employee of the Department, *CP 200-202*. PCI responded with its legal authority, *CP 203-227,* supported by the Declarations of Douglas S. Jenks, *CP 228-232*, Robert Olson, *CP 233-235*, Gwen Crosswhite, *CP 236-238*, Laurel Barton, *CP 239-262*, Shontara Anderson, *CP 263-267*, and Charles Williams, *CP 268-270.* The Department filed a short reply, *CP 273-276.*

The Court conducted a hearing on the motion on February 7, 2014 before the Honorable John Strohmaier. The hearing was transcribed, *VRP*

1-30.[1] The major focus of the hearing was on the competing contentions of the parties: PCI's assertion it had mailed the notice of appeal to the Director of the Department and the Board (and to the attorney for the Department and PCI's Ohio counsel) on the same day it mailed the notice to the court for filing *versus* the Department's contention that the Director and Board had not received the notice as required. Neither party challenged or rebutted the other party's contention. That left the Court in a quandary: "How can I find that everything was done right but nobody got anything. It's quite a dichotomy." *VRP 23(6-8).* While agreeing with PCI's argument that mailing was all the statute required, not receipt, *VRP 16, 21*, the Court focused on the Department's evidence of non-receipt as proof that PCI had not in fact mailed the notice, *VRP 7 (22-25),* and on what the judge considered the unlikelihood that the post office failed to deliver four envelopes,[2] *VRP 12(12-16)*("one in a million or maybe ten million or something"), while speculating that something had happened to the mail before it got to the post office despite the lack of any such evidence: *VRP 10(11-14)*("The question is when she went to pick up the mail did she pick up these four envelopes or were they actually left on the

[1] The transcript is less than clear with many apparent syntax errors most likely arising because the transcript was prepared from audio media, *VRP 30*, rather than by a courtroom reporter.

[2] PCI did not contest the claim that neither the Department's attorney nor PCI's Ohio attorney had received a copy of the notice.

table or washed down the street."); *13(21-25)*(possibility the four envelopes dropped between the car and the mail); *19(25) – 20(3)*("It's just did this final person in the puzzle, probably Ms. Anderson, did she, did she lose these things, were they pickpocketed, did something unknown where they were not delivered to the post office"); *26(8-13)*("The question is really from the gal, from the mailbox at 4:30 to the post office, what the heck happened. And even if someone pickpocketed her and she dropped them, out in the rain, weren't picked up, whatever, outside of the car, is that substantial compliance. The effort was there, the intent was there, the ability.")

At the conclusion of the hearing, the Court announced its ruling in favor of the Department:

> [I]t just seems so astronomically unlikely in spite of all the well doings, the well intentions and the procedures and safeguards that the firm had, I just can't quite believe that the evidence would – just by the fact of four separate individuals did not get the letter, something happened to the letters before they got to the post office. And [if] the Court of Appeals overrules me on that, great, I'd be glad to hear the case. I just don't think I have the authority to go further.

VRP at 28. The Court closed with an apology of sorts:

> I'm kind of apologetic here almost because I'd really like to hear the facts of the case because there's quite a lot in there and on the ladder safety issue, maybe it will be corrected and we can do it. But regrettably, I have to deal – I don't think I have authority, so that's kind of where I'm stuck.

> Sorry. . . . I'm not really sorry, but I'm sorry for the fact the Petitioner will not get their day in court in a sense.

Id. The Court then entered an Order Dismissing Appeal, *CP 277-278*, that contained four short findings of fact and a conclusion of law that simply recited that "PCI's appeal has not been perfected as required by RCW 49.17.150." *Id.*

PCI filed a motion for reconsideration under CR 59(a), *CP 279-290*, supported by a Second Declaration of Laurel Barton, *CP 293-304*. The Department responded with a short brief, *CP 307-310.* On March 21, 2014 the Court issued an Order Denying Motion for Consideration, *CP 311-313*, which clarified the Court's reasoning on the persuasive effect of the non-receipt of the envelopes:

> HOWEVER, the mailing of four separate envelopes by plaintiff's attorneys on September 5, 2013 and the failure of these four envelopes to reach the four separate addresses listed in the Certificate of Service negate the presumption and inference that the post office received these mailings as stated in the Declarations filed by the plaintiff.

CP 312(4-7). The Court also ruled it was not aware of any authority to hold that the plaintiff substantially complied with service, *CP 313(1-2),* but left open the possibility of being overruled on that point when: 1) the notice of appeal was timely prepared and received by the County Clerk; 2) the sender in good faith with proper business practices attempted to mail the notices to the appropriate parties; 3) there was no

showing of any prejudice as one defendant received a substitute copy within one month of the initial deadline and another party received its copy almost three weeks later; and 4) a decision on the merits is certainly preferred to a dismissal on a procedural technicality. *Id. at lines 2-12,*

This appeal followed five days later, *CP 320-326.* The appeal seeks review of both Court orders – dismissing the appeal and denying the motion for reconsideration. *Id.*

F. ARGUMENT

1. PCI Actually Complied with the Service Requirements of RCW 49.17.150(1) by Timely Mailing its Notice of Appeal to both the Director and the Board.

a. The service may be by mail.

RCW 49.17.150(1) allows service of a notice of appeal by mail:

> 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. (Emphasis added.)

The evidence here is uncontroverted that PCI mailed its notice of appeal to both the Board and the Director on September 5, 2013, well before the expiration of the statutory deadline of September 16, 2013.

Proof of mailing may be established by the testimony of a witness with first-hand knowledge the letter was properly mailed. *Farrow v. Dept. of Labor & Industries,* 179 Wash. 453, 454-55, 38 P.2d 240 (1934).

Alternatively, however, proof of mailing may be made by showing (1) an office custom regarding mailing, and (2) compliance with the custom in the specific instance. *Id.*; *Lieb v. Webster*, 30 Wn.2d 43, 46-47, 190 P.2d 701 (1948); *Sheeler v. Dept. of Employment Sec.*, 122 Wn. App. 484, 488-89, 93 P.3d 965 (2004). The alternative method of proof is available "when an office handles such a large volume of mail that no one could be expected to remember any particular letter or notice." *Automat Co. v. Yakima Cy.*, 6 Wn. App. 991, 995, 497 P.2d 617 (1972). Accord: *Farrow, supra,* 179 Wash. at 445 (the rule allowing proof of mailing by office custom "has become well established."); *Olson v. The Bon, Inc.,* 144 Wn. App. 627, 183 P.3d 359 (2008) (discussing rule and requirements at some length).

The declarations filed by PCI in support of its response to the motion to dismiss establish the office custom and compliance with it on September 5, 2013 sufficient to prove that service by mail occurred on that date. See entry for 9/5/13, *supra at pp. 6-7,* for a description of the declarations. Office manager Gwen Crosswhite, legal assistant Laurel Barton, and receptionist and mail clerk Shontera Anderson all note the high volume of mail generated daily by the law firm and describe the firm's custom and practice of how the mail is prepared and processed. Barton and Anderson describe how the firm's custom was complied with –

Barton by noting how she prepared the envelopes by addressing and stamping them and placing them in the firm's "out" basket for pick-up and delivery to the post office per the firm's custom; and Anderson by her explicit testimony of compliance with the firm's custom of pick-up and delivery to the post office. The notice of appeal as mailed and filed with the court contains a certificate of service signed under penalty of perjury by Ms. Barton. *CP 240 and 248.*

b. PCI's service by mail was effective and timely on the date it was mailed.

"Service" is not defined in RCW, chapter 49.17, nor does RCW 49.17.150(1) specify when service by mail is deemed complete. *Vasquez v. Department of Labor and Industries*, 44 Wn. App. 379, 382-84, 722 P.2d 854 (Div. 3, 1986) addressed those issues when it interpreted the identical workers compensation statute, RCW 51.52.110, and held service is timely if the notice is mailed before the expiration of 30 days even if it is received beyond the 30 day period. Since an administrative appeal invokes appellate, not general jurisdiction, the court relied upon RAP 18.6(b) by analogy: " ... if the time period in question applies to a party serving a paper by mail, the paper is timely served if mailed within the time permitted for service...." *Id.* at footnote 3. Other provisions of state law are consistent. See, e.g., the Board's operating regulation, *WAC 263-*

12-01501(1)(B)(ii) (the "filing of a written communication with the board is perfected by mail when the written communication is deposited in the United States mail, properly addressed to the board's headquarters in Olympia and with postage prepaid."); definitions under the state Administrative Procedures Act, RCW 34.05.010(19)("...Service by mail is complete upon deposit in the United States mail."); RCW 1.12.070, the state's general "filing by mail" statute, that provides that documents filed with the state via mail but not received are deemed "filed and received" on the date of mailing if competent evidence of such mailing is provided.[3]

Under *Vasquez*, PCI's notice of appeal was effective on the date it was mailed, September 5, 2013, regardless of when the Director or the Board received it. And since that date was well before the 30-day deadline of September 16, 2013, the service was timely.[4]

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[3] PCI discussed this statute in its Response to the Motion to Dismiss, *CP 211-214.* At the hearing on the motion and in its Order Denying Motion for Reconsideration, the court ruled the statute applied only to filings with state agencies, not service. *VRP 17, 22.* PCI countered that the statute still embodied a state policy of how to deal with important mail sent to the state and not received. *VRP 9(17)-10(4), 17-18. See also CP 214* citing *Hamma Hamma Company v. Shoreline Hearings Board,* 85 Wn.2d 441, 453, 536 P.2d 157 (1975) as to purpose of the statute.

[4] The cases cited by the Department in support of its motion, *CP 188-190,* are all distinguishable and not applicable since they are based on facts not present in our case. Each of the Department's cases presents facts showing the appealing party simply failed to take either adequate steps or any action at all to serve the required parties within the required 30 day time period. Specifically:

Petta v. Dept. of Labor & Industries, 68 Wn. App. 406, 842 P.2d 1006 (1992) involves service by a process server where the court noted substantial attorney culpability for failing to correct the lack of service within the statutory time period despite having notice to that effect. *Id.* at 411.

c. RCW 49.17.150(1) only requires mailing, not actual receipt.

During the hearing on the motion, the Court rightly noted that RCW 49.17.150(1) only requires mailing, not actual receipt, of the notice of appeal.[5] That result conforms to the cases cited above and other cases dealing with similar statutes that require mailing, as opposed to receipt, of notices. *See, e.g., Washington Federal Savings v. Klein,* 177 Wn. App. 22, 30, 311 P.3d 53 (2013*), review denied,* 179 Wn.2d 1019, 318 P.3d 280 (2014)(notice to creditors under probate code); *Wisniewski v. State Farm Gen. Ins. Co.,* 25 Wn. App. 766, 609 P.2d 456 (1980)(notice cancelling

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In Fay v. Northwest Airlines, Inc., 115 Wn.2d 194, 796 P.2d 412 (1990) for some reason not explained in the decision, the claimant simply failed to serve the Director until after she was served with a motion to dismiss.

Hernandez v. Dept. of Labor & Industries, 107 Wn. App. 190, 26 P.3d 977 (2001) presents facts virtually identical to those in *Fay*, but where for some reason not explained in the decision, the claimant simply failed to serve the Board until after she was served with a motion to dismiss.

City of Seattle v. PERC, 116 Wn.2d 923, 809 P.3d 1337 (1991) was an appeal under a former section of the Administrative Procedures Act that required service of an appeal within 30 days of mailing of the agency's decision. *Id.* at 927. The city of Seattle miscalculated the time period by starting from the date it received the decision. *Id.* By that calculation, its appeal was served late, on the 33rd day. *Id.*

In *Corona v. The Boeing Company*, 111 Wn. App. 1, 46 P.3d 245 (2002) the court noted "Corona made no attempt to serve the notice of appeal on any party until September 11, beyond the 30 day filing and service period." *Id.* at 9.

Based on those facts, the courts held that appellants had failed to comply with the applicable statutes and dismissed the appeals. In contrast to those facts, PCI did, in fact, mail the notice of appeal to the court and to all parties within the required 30 day window.

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[5] "I think if you mailed it, it's substantial compliance, okay. . . . If it got to the post office, you win, okay. That's how I look at it." *VRP 16 (4-11).* In response to a statement from the AAG that the Director never timely received a notice, the Court said "I'm not going to buy that part, okay. If he didn't get it, that's not the issue, okay. I don't think he has to get it. I think it has to go in the mail." *VRP 21(11-16).*

insurance policy); *Tremmel v. Safeco Insurance Co.,* 42 Wn. App. 684, 713 P.2d 155 (1986)(same; revised statute); *Building Supplies, Inc. v. Gillingham,* 17 Wn.2d 489, 492, 135 P.2d 832 (1943)(notice to owner of lien claim under prior construction lien statute; the court bluntly noted "the risk of loss in the mail is on the owner"). The same approach applies to court rules. Service of process by mail on the opposing party under CR 4(d)(4) is complete upon mailing. *Jones v. Stebbins*, 122 Wn.2d 471, 476, 860 P.2d 1009 (1993). Service on opposing counsel of pleadings under CR 5(b)(2)(a) is complete on the third day following mailing and "actual receipt is legally insignificant." *Rosander v. Nightrunners Transport Ltd.,* 147 Wn. App. 392, 401, 196 P.3d 711 (2008). [6] See also *Dunlap v. Transamerica Occidental Life Ins. Co.,* 858 F.2d 629, 632 (11th Cir. 1988)(notice by clerk to party under FRCP 77(d) in the manner

[6] *Bank of the West v. F&H Farms, LLC.,* 123 Wn. App. 502, 504, 98 P.3d 532 (Div. 3, 2004) appears to be contrary since it holds that proof of mailing a pleading to opposing counsel raises only a presumption of receipt that is rebuttable. But the case is properly limited to its facts where the court affirmed the trial court's vacating a summary judgment entered against a party who had not received notice of the summary judgment proceedings. The court relied on the trial court's authority to determine the weight to be given to the assertion of non-receipt in light of the lack of prejudice to the moving party and the policy of favoring resolution of disputes on the merits. *Id.* at 505. "This accords with our notion that the object of this exercise is ultimately justice." *Id.* See also *Automat Co., Inc. v. Yakima County*, 6 Wn. App. 991, 995-96, 497 P.2d 617 (Div. 3 1972)(rejecting contention that presumption of non-receipt disappears in the face of positive evidence of non-receipt and instead relying on and upholding trial court's assessment of witness credibility to find adequate evidence of mailing by custom and practice).

provided for in in Rule 5 is deemed complete upon mailing whether or not the notice is actually received).

The recent *Klein* case, *supra*, is most instructive because it follows closely the facts of our case. The probate code section at issue there required "actual notice to creditors by serving the notice on the creditor or mailing the notice to the creditor." RCW 11.40.020(c). The PR of the probate estate mailed the notice to creditors supported by an affidavit of mailing. One of the creditors, Washington Federal, asserted it had not received any notice and supported that assertion with affidavits from two employees. It filed a tardy claim that the trial court dismissed. The court of appeals affirmed, holding "the statute requires only proof that the estate's notice was mailed, not proof that it was received. Washington Federal's evidence of nonreceipt does not rebut the estate's proof of mailing." *Id.* at 23. In support of its holding, the court noted "[h]ad proof of receipt been of concern to the legislature, it could have so provided." *Id.* at 28. It elaborated by noting that when a legal assistant declares she has given notice by mailing, "it is reasonable to accept her statement as prima facie proof of mailing. To refute such a declaration, a creditor must do more than swear that the mail never arrived." *Id.* at 31. The Department has failed to do that; instead it has relied exclusively on the evidence of nonreceipt.

Notwithstanding the Court's acknowledgement of this law, the Court failed to apply it and wrongly dismissed PCI's appeal for failing to "perfect" the appeal pursuant to the statute, *CP 278*, and failed to correct its error by denying PCI's motion for reconsideration. *CP 311-313*. The Court's decision is contrary to law and its failure to reconsider is an abuse of discretion. See argument *infra*. The dismissal order should be vacated and the appeal reinstated.

2. PCI Substantially Complied With the Service Requirements of RCW 49.17.150(1).

In *Saltis v. Dept. of Labor & Industries*, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980) an appeal of a Board order in a workers' compensation case was served on the Department of Labor & Industries, not to the Director of the Department as required by RCW 51.52.110. The Washington Supreme Court, after reviewing early cases that required strict compliance with the elements of the statute to provide the superior court with appellate jurisdiction, "warn[ed] against slavish adherence to the precedent they represent" before announcing that forthwith substantial compliance with the statutory requirements would suffice. *Id. at 894-96.* "Thus, we hold that proper service in this case occurred if: (1) the director 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

director." *Id. at 896* (emphasis added). Subsequent cases have elaborated on the substantial compliance standard as applied to RCW 51.52.110.

In *Black v. Dept. of Labor & Industries*, 131 Wn.2d 547, 553-55, 933 P.2d 1025 (1997) the court, citing *Saltis*, held at 555 that an appellant seeking judicial review of the Department's denial of workers' compensation benefits substantially complied with the requirement of RCW 51.52.110 that the notice of appeal be served on the Director of the Department by serving the Assistant Attorney General assigned to handle the case. The court first noted at 552 that the doctrine of substantial compliance in appellate matters has been part of Washington law since territorial days, citing the Code of 1881. It then cited other formulations of the doctrine:

> We have characterized "substantial compliance" as "satisfaction of the 'spirit' of a procedural requirement...." *Fisher Bros. Corp. v. Des Moines Sewer Dist.,* 97 Wash.2d 227, 230, 643 P.2d 436 (1982). "Substantial compliance has been found where there has been compliance with the statute albeit with procedural imperfections." *Continental Sports Corp. v. Department of Labor & Indus.,* 128 Wn.2d 594, 603, 910 P.2d 1284 (1996) (sending notice of appeal by Federal Express substantially complies with RCW 51.48.131 requirement that notice be sent by U.S. mail). For our most recent statement of the generally applicable test see *City of Seattle v. Public Employment Relations Comm'n,* 116 Wash.2d 923, 928, 809 P.2d 1377 (1991) (" 'Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [the] statute.' ") (quoting *In re*

> *Santore,* 28 Wn. App. 319, 327, 623 P.2d 702, *review denied,* 95 Wash.2d 1019 (1981)).

The court concluded its discussion by noting the policy underpinnings of the doctrine. "Substantial compliance is available in the appellate context because "(t)he distinct preference of modern procedural rules is to allow appeals to proceed to a hearing on the merits in the absence of serious prejudice to other parties." *Black*, 131 Wn.2d at 552, citing *Hoirup v. Empire Airways, Inc.*, 69 Wn. App. 479, 483, 848 P.2d 1337 (1993). In *Saltis*, 94 Wn.2d at 896, Justice Horowitz, writing for the court, made the same point: Because "delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities," substantial compliance with procedural rules is sufficient to invoke both the general and appellate jurisdiction of the superior court (internal citations omitted)." He concluded:

> ... the means of establishing superior court jurisdiction under RCW 51.52.110 are aimed primarily at insuring adequate procedural safeguards of timeliness, notice, and appropriate forum. To this extent, the legislature was not unwilling to allow judicial review of a subject otherwise removed from court jurisdiction if appeal is promptly requested and affected parties are made aware of the challenge.

Id.

Graves v. Vaagen Bros. Lumber, Inc., 55 Wn. App. 908, 781 P.2d 895 (1989) deals with a worker compensation appeal where the appellant's

notice of appeal under RCW 51.52.110 was not received by the court. The facts were similar to but the reverse of ours. The Board ruled against the appellant on June 6, 1988. On June 16, the appellant mailed the notice of appeal to the correct court and to his employer, the Board and the Director of the Department. The parties soon received the notice, but the court never received the original notice. Upon discovery of that fact, a second copy of the notice was mailed to the court which received it on July 28, some 20 days after the 30 day deadline. The employer moved to dismiss for failure to timely file the notice of appeal which the trial court granted. Division III reversed by applying the doctrine of substantial compliance. The court noted there were two steps to confer appellate jurisdiction: 1) filing with the court and 2) proper service. *Id. at 912*. "*Vasquez* and *Saltis* indicate our court's leniency toward the second of those two steps." *Id.* It further noted "[o]ther cases also indicate the general trend toward leniency concerning compliance with the necessary steps for invoking appellate jurisdiction," citing, most significantly for our purposes, Judge McInturff's concurring opinion in *Vasquez* where he suggested that in interpreting jurisdictional requirements of RCW 51.52.110, the rules of appellate procedure are most analogous; and *First Fed. Sav. & Loan Ass'n v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170)1979, *aff'd*, 93 Wn.2d

777, 613 P.2d 129 (1980) which quoted the language of RAP 1.2(a)[7] and stated: "It is apparent that the trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form." *Graves*, 55 Wn. App. at 912-13. After finding that on the facts before it, there was no prejudice, the court then closed with its holding, *Id.* at 913-14:

> Given the current trend in this state to interpret statutory jurisdictional requirements for invoking appellate jurisdiction liberally so as to promote justice, we hold that Mr. Graves' filing was in substantial compliance with the first step and in compliance with the second step requirements of the statute.

The *Graves* holding can and should be applied here to rule that PCI complied with the substantial evidence standard by mailing the notice of appeal to all required parties, thus actually complying with the statutory mandate, but because of some unknown procedural irregularity, the mail was apparently not delivered as intended or if it was, it was not properly accounted for at its destinations.

3. The Policy of Resolving Disputes on the Merits and Principles of Equity and Justice Mandate Reversal.

Both the Board and the Director, and the Department's attorney, have received adequate, actual and timely notice of the appeal. When its

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[7] "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules..."

attorney notified PCI in writing the Department had not been served, PCI provided a duplicate notice of the appeal to the Department, the Board and the AG within three days of the notice, *CP 232 and 259*, which was within two months of filing the notice of appeal with the court, *CP 1*. The Board filed the Certified Board Record shortly thereafter. *CP 25*. Thus, within approximately two and one half months after the filing of the notice of appeal, the case was ready for resolution. There has been no inordinate delay in resolving this case on the merits as it deserves.

The Department has not alleged and cannot prove any prejudice. The trial court ruled there has been no prejudice to the Department. *VRP 18(15-18).* By comparison, if the appeal is dismissed on this technical deficiency, PCI will be substantially prejudiced as it will have no opportunity to challenge the citation on its merits. Even though the proposed penalty may be small, the impact of allowing an unchallenged serious violation to blemish PCI's record will be great in that PCI will be detrimentally affected in its potential ability to bid and obtain government and private construction contracts. *Williams Declaration at ¶ ¶ 4-5, CP 269-270.*

Washington has a strong ("overriding") policy that favors resolving disputes on the merits. *Showlater v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). As a general principle of administrative

law "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 539, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970), quoting *NLRB v. Monsanto Chemical Co., 8 Cir., 205 F.2d 763, 764* (8th Cir. 1953). This general rule applies in Washington. *Mentor v. King Cy.*, 22 Wn. App 285, 588 P.2d 1226 (1978). Justice requires its application here.

The trial court recognized that "equities are on [PCI's] side" but then erroneously noted that "jurisdiction wise, equity is not relevant." *VRP 14(14-17).* This court can and should correct that error by applying the principles of justice, equity and state policy cited above to allow PCI's appeal to be heard on its merits.

4. The Court Erred in not Granting PCI's Motion for Reconsideration.

PCI's motion for reconsideration of the Order Dismissing Appeal ("Order") asserted three grounds under CR 59(a) as the reason to reconsider and vacate the Order. *CP 279-286.* The grounds are discussed below. By ignoring all of the grounds in its Order Denying Motion for Reconsideration, *CP 311-313*, the Court abused its discretion.

a. There is no evidence or reasonable inference from the evidence to justify dismissing PCI's appeal

At the hearing on the motion to dismiss, the Court acknowledged and apparently agreed with counsel's argument that the U.S. Postal Service was not infallible[8], *VRP 12(1-6),* but it nevertheless discounted that fallibility and speculated instead on the possibility that something happened to the letters before they got to the post office, see discussion and citations to VRP *supra at pp. 9-10*, notwithstanding the complete absence of any proof of any such event.[9] Based on that reasoning, the court dismissed PCI's appeal. PCI argued for reconsideration based on the following authority.

The Court's conclusion is not warranted by the evidence before the court. Suspicion, speculation and conjecture are insufficient to support a factual determination. *Holman v. Coie,* 11 Wn. App. 195, 214, 522 P.2d 195 (1974) citing *Sortland v. Sandwick*, 63 Wn.2d 207, 211, 386 P.2d 130 (1963); *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356, 493 P.2d 1018

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[8] PCI relied on and argued *Hayes v. Scott Noble, King County Assessor,* 1994 WL 12073(Wash.Bd.Tax App., 1994) cited in PCI's Response to the Motion to Dismiss, *CP 212-213*, where the Board held that appellant had timely mailed a notice of appeal contrary to an erroneous postmark by noting "it is common knowledge – and we take official notice – that the U.S. Postal Service is not infallible. … we infer that the U.S. Postal Service erred."

[9] It also defies logic and common sense to believe PCI did "something" that explains the non-delivery of the letters to the parties when it is uncontroverted that the letter to the court was received and all of the letters were mailed on the same day, at the same time, at the same post office mail slot by the same person. See Declaration of Shontara Anderson, *CP 263-265.*

(1972). Without proof that PCI had done something wrong, the Court cannot speculate about what PCI did or didn't do and then attribute those unidentified actions as the reason the recipients did not receive the mail. The Department presented no such proof, choosing instead to rest on the evidence of non-receipt. That evidence is insufficient. *Washington Federal Savings v. Klein, supra,* 177 Wn. App. at 30 (to refute a declaration of mailing, a party must do more than swear that the mail never arrived). There is no evidence to justify the Court's decision as embodied in the Order.

The Court's conclusion is likewise not warranted by a reasonable inference from the evidence. "An inference is a logical conclusion or deduction from established facts." *Martin v. Insurance Co. of N. America,* 1 Wn. App. 218, 460 P.2d 682 (1969). PCI 's attorney argued that it was equally conceivable that the US Postal Service had done something or failed to do something that would explain the non-receipt of the mail. *VRP 14(1-11),* and "too many other unknowns . . . for the court to say you lose, you're out of here, I'm not going to decide the case on the merits." *VRP 19(10-18).* There was also colloquy between PCI's counsel and the court that the extreme rain on September 5 could have played a role in the non-delivery. *VRP 12(17-25).* See also Declaration of Robert L. Olson at ¶ 3, *CP 234.* As noted earlier, the Court rejected the inference of USPS

malfeasance based on the fact that four entities did not receive the mail, a likelihood the Court placed at one in a million or more. But there was no proof of that probability. From that inference of the improbability of any USPS mishaps, the Court then jumped to the inference that PCI had failed to mail the notices to the parties who claimed non-receipt. The defects in the Court's ultimate inference are two-fold: it is not a logical conclusion from any established facts and it is an inference upon an inference.[10] "Presumptions may not be pyramided upon presumptions, nor inference upon inference." *Davidson v. Municipality of Metropolitan Seattle,* 43 Wn. App. 569, 575, 719 P.2d 569 (1986) quoting *Prentice Packing & Storage Co. v. UPIC*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940).

b. <u>The Order Dismissing Appeal is contrary to law</u>.

1) Substantive Law

As argued above in argument section 1.c, RCW 49.17.150(1) only requires mailing, not actual receipt, of the notice of appeal by the two state parties who have a stake in appeal. The Order, however, fails to give effect to this correct analysis and authority by wrongly dismissing PCI's appeal for failing to "perfect" the appeal pursuant to the statute. Since the Order is contrary to law, it should not have been entered, and the Court

[10] The Court's decision is also based on faulty logic and circular reasoning. If only mailing is required to perfect an appeal, as the Court rightly acknowledges, then receipt or non-receipt of the mail has no consequence. But here the Court has used evidence of non-receipt to infer that mailing did not occur.

should have corrected the error by granting the motion for reconsideration. By failing to do that, the Court compounded its error and abused its discretion by basing its decision on untenable reasons.

2) Procedural Law

The Department's motion to dismiss is effectively, although not stated, a motion to dismiss either for lack of subject matter jurisdiction under CR 12(b)(1) or insufficiency of process or service of process under CR 12(b)(4) or (5). In considering the motion, the court reviewed declarations submitted by both parties in addition to the pleadings on file. By doing so the motion was treated as a motion for summary judgment under CR 56. *Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.,* 9 Wn. App. 284, 288-89, 513 P.2d 102, 105, *review denied*, 82 Wn.2d 1013 (1973). On such a motion, the trial court must view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Miller v. Likins,* 109 Wn. App. 140, 144, 34 P.3d 835, 837 (2001) citing *Scott v. Pac. W. Mountain Resort,* 119 Wn.2d 484, 501-02, 487, 834 P.2d 6, 16 (1992). Summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan*

County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 296, 745 P.2d 1 (1987).[11]

The Court failed to follow this law. In considering PCI's declarations, instead of drawing inferences favorable to PCI, the Court drew unwarranted inferences adverse to PCI that its actions or inactions caused the intended mail not to reach the post office. It failed to give due consideration to other inferences more favorable to PCI, e.g., that the USPS was the cause of the non-delivery. In light of all the evidence, there is no way a reasonable person could reach only the conclusion that PCI failed to deposit the mail at the post office.

That error should have been corrected by granting the motion for reconsideration. By failing to grant the motion, the Court abused its discretion by basing its decision on untenable grounds. The Order Dismissing Appeal should not have been entered for these procedural reasons. The trial court decisions should be reversed and the case remanded for consideration of the appeal on the merits.

[11] On a related motion to set aside a default judgment, *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (Div. 3, 1994) notes that when the motion is supported by affidavits asserting lack of personal service, and the plaintiff files controverting affidavits, a triable issue of fact is presented and further notes "[t]he court, in its discretion, may direct that an issue raised by motion be heard on oral testimony if that is necessary for a just determination." (Internal citations omitted.)

c. **Substantial justice has not been done.**

The Court noted at the hearing that equity favored PCI, but that equity was not relevant to the jurisdictional issue raised by the Department. The cases cited by PCI disagree. See argument section 3 *supra*. Washington courts have applied principles of leniency, substantial compliance, justice, equity and state policy to uphold appeals against technical procedural arguments and to insure that cases are decided on the merits. These principles firmly apply to appellate jurisdiction. Other cases have applied the court's inherent equitable power to forgive compliance with jurisdictional requirements. *State v. Ashbaugh*, 90 Wn.2d 432, 583 P.2d 1206 (1978)(reviewing cases dealing with jurisdictional issues and excusing non-payment of jurisdictional filing fee for appeal based on mere oversight of attorney that was corrected); *State v. Sorenson*, 2 Wn. App. 97, 466 P.2d 532 (1970)(substantial, but not literal, compliance with jurisdictional requirements sufficient); *Scannell v. State*, 128 Wn.2d 829, 912 P.2d 489 (1996)(forgiving late notice of appeal where *pro se* misinterpretation of an amended rule was "clearly an innocent mistake").

Substantial justice has not been done by ignoring this authority. This court can and should correct this oversight by applying this authority and reversing the decision of the trial court.

G. CONCLUSION

It was obvious at the hearing on the motion to dismiss the trial court was struggling with the facts and issues presented by the motion. It professed to be troubled by the major issue which it characterized as a "dichotomy." The court failed to accurately assess and resolve the issues before it and failed to follow applicable law. It compounded its errors by refusing to grant PCI's motion for reconsideration.

PCI respectfully requests this Court to correct these errors and vacate the Order Dismissing Appeal and reinstate PCI's appeal so that it can be considered on the merits.

Respectfully submitted this 14th day of August, 2014.

SCHLEMLEIN GOETZ FICK & SCRUGGS, P.L.L.C.

By: _____

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DECLARATION OF SERVICE

I, Marlene Tibke, do hereby declare that;

1. I am an employee of Schlemlein Goetz Fick & Scruggs, P.L.L.C., and am now, and at all times material hereto was, a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-referenced action and competent to testify hereto.

2. On the date set forth below, I caused to be served a copy of the foregoing Brief of Appellant upon the following party in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 14 day of August, 2014.

Marlene Tibke