FILED
OCTOBER 15, 2014
Court of Appeals
Division III
State of Washington

NO. 32377-3-III

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

PERFORMANCE CONTRACTING, INC.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES' BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

PAUL M. CRISALLI
Assistant Attorney General
WSBA # 40681
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206)464-7740

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUE 2

Did the superior court properly dismiss PCI's appeal, where the legal assistant assigned to place the envelopes in the mailbox could not specifically recall complying with the firm's procedures and none of the four parties identified in the certificate of service (including two statutorily required parties) received service? 2

III. STATEMENT OF THE CASE 2

A. The Department Cited PCI for Violating Worker Safety Violations, and the Board Affirmed that Decision 2

B. PCI Filed an Appeal in Superior Court, but None of the Four Parties Identified in the Certificate of Service Received the Notice of Appeal 2

C. The Superior Court Dismissed PCI's Appeal Because it Failed to Timely Perfect its Appeal, as Required by Statute 3

IV. STANDARD OF REVIEW 4

V. ARGUMENT 5

A. PCI Failed to Timely Perfect its Appeal, Where it Failed To Timely Serve Necessary Parties 5

1. PCI Needed to Mail its Appeal to the Board and the Department within 30 days of Receiving the Board's Order Denying Review to Perfect its Appeal 5

2. PCI Failed to Mail the Notice of Appeal to the Board and the Department (and two other parties identified in the certificate of service) 10

3. PCI's Arguments that it Actually Served Required Parties are Wrong 11

B. PCI Did Not Substantially Comply With Service Requirements 15

C. The Court Should Not Equitably Toll the Perfection Deadline 17

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

B & J Roofing, Inc. v. Bd. of Indus. Ins. App.,
66 Wn. App. 871, 832 P.2d 1386 (1992) 7, 8

Benyaminov v. City of Bellevue,
144 Wn. App. 755, 183 P.3d 1127 (2008) 18

Black v. Dep't of Labor & Indus.,
131 Wn.2d 547, 933 P.2d 1025 (1997) 9, 15, 16

Boguch v. Landover Corp.,
153 Wn. App. 595, 224 P.3d 795 (2009) 5, 14

Capital City Excavating Co. v. Donovan,
679 F.2d 105, 110 (6th Cir. 1982) 19

Compare Sprint Spectrum,
156 Wn. App. at 958 16

Corona v. Boeing Co.,
111 Wn. App. 1, 46 P.3d 253 (2002) 7

Danzer v. Dep't of Labor & Indus.,
104 Wn. App. 307, 16 P.3d 35 (2000) 19

Farrow v. Dep't of Labor & Indus.,
179 Wash. 453, 38 P.2d 240 (1934)) 12

Fay v. Nw. Airlines, Inc.,
115 Wn.2d 194, 796 P.2d 412 (1992) 7, 8

Graves v. Vaagan Bros. Lumber, Inc.,
55 Wn. App. 908, 781 P.2d 895 (1989) 17

Hernandez v. Dep't of Labor & Indus.,
107 Wn. App. 190, 26 P.3d 977 (2001) 7, 8

Hill v. Dep't of Labor & Indus.,
161 Wn. App. 286, 253 P.3d 430 (2011) 4

Humphrey Indus., Ltd. v. Clay St. Assocs., L.L.C.,
170 Wn.2d 495, 242 P.3d 846 (2010) 15

Kirkland v. Dep't of Revenue,
45 Wn. App. 720, 727 P.2d 254 (1986) 7

Knight v. Dep't of Labor & Indus.,
___ Wn. App. ___, 321 P.3d 1275, 1282 (2014) 14

Lund v. Benham,
109 Wn. App. 263, 34 P.3d 902 (2001) 13

Medina v. Pub. Util. Dist. No. 1,
147 Wn.2d 303, 53 P.3d 993 (2002) 7

Millay v. Cam,
135 Wn.2d 193, 955 P.2d 791 (1998) 18

Morgan v. Johnson,
137 Wn.2d 887, 976 P.2d 619 (1999) 20

O'Neil v. Estate of Murtha,
89 Wn. App. 67, 947 P.2d 1252 (1997) 7

Olson v. The Bon, Inc.,
144 Wn. App. 627, 183 P.3d 359 (2008) 12, 15

Petta v. Dep't of Labor & Indus.,
68 Wn. App. 406, 842 P.2d 1006 (1992) 7, 9, 15

Rogers v. Dep't of Labor & Indus.,
151 Wn. App. 174, 210 P.3d 355 (2009) 4

Saltis v. Dep't of Labor & Indus.,
94 Wn.2d 889, 621 P.2d 716 (1980) 15

Scott v. Harris,
550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 668 (2007) 14

Sec'y of Labor v. Barretto Granite Corp.,
830 F.2d 396, 399 (1st Cir. 1987) 19

Sorrentino v. Internal Rev. Serv.,
383 F.3d 1187, 1195 (10th Cir. 2004) 12

Sprint Spectrum LP v. Dep't of Rev.,
156 Wn. App. 949, 235 P.3d 849 (2010) 6, 7, 8

State v. Robinson,
104 Wn. App. 657, 17 P.3d 653 (2001) 18

Venwest Yachts, Inc. v. Schweickert,
142 Wn. App. 886, 176 P.3d 577 (2008) 6

West v. Thurston Cnty.,
168 Wn. App. 162, 275 P.3d 1200 (2012) 20

Statutes

RCW 4.92.100 7

RCW 4.96.020 7

RCW 49.17.140(3) 5

RCW 49.17.150 ..... 6, 15, 17

RCW 49.17.150(1) 6

RCW 51.52.110 ..... 6, 8, 9

RCW 51.52.140 4

RCW 82.32.150 7

Other Authorities

BLACK'S LAW DICTIONARY 1251 (9th ed. 2009) 6

Rules

CR 56(c) 4, 15

CR 56(e) 5

I. INTRODUCTION

Consistent with such principles as providing administrative finality and giving notice to interested parties, a party appealing a worker safety violation decision from the Board of Industrial Insurance Appeals must file its notice of appeal in superior court and mail the notice to the Board and the director of Department of Labor and Industries within 30 days of the Board's decision. The failure to comply with this requirement requires dismissal of the appeal.

Performance Contracting, Inc. (PCI) filed its notice of appeal in Lincoln County Superior Court within 30 days of the Board's decision affirming a worker safety citation against PCI. But neither the Board nor the Department was served until PCI sent a copy of the appeal several months later. And two other parties listed in PCI's certificate of service did not receive the notice of appeal either.

Faced with these facts and the fact that the legal assistant assigned to mail the firm's outgoing mail at the post office could not recall mailing these four envelopes, the superior court dismissed PCI's appeal. The superior court correctly reasoned that it was highly improbable that the post office could lose these four separately addressed envelopes out of all of the firm's mail, so it could infer that they never reached the mailbox. Proper service did not occur. This Court should affirm.

II. ISSUE

Did the superior court properly dismiss PCI's appeal, where the legal assistant assigned to place the envelopes in the mailbox could not specifically recall complying with the firm's procedures and none of the four parties identified in the certificate of service (including two statutorily required parties) received service?

III. STATEMENT OF THE CASE

A. The Department Cited PCI for Violating Worker Safety Violations, and the Board Affirmed that Decision

The Department cited PCI for violating worker safety regulations, after a compliance inspector discovered a worksite where PCI failed to have guardrails around the floor opening in the attic where a PCI employee worked. CP 9-10. PCI appealed to the Board of Industrial Insurance Appeals. CP 74. An industrial appeals judge issued a proposed decision and order affirming the citation, and PCI filed a petition for review. CP 39-73. The Board issued an order denying the petition for review on August 14, 2013, thereby affirming the citation. CP 36.

B. PCI Filed an Appeal in Superior Court, but None of the Four Parties Identified in the Certificate of Service Received the Notice of Appeal

On September 9, 2013, the Lincoln County Superior Court clerk received and filed PCI's notice of appeal. CP 1-17. The certificate of service states that an assistant mailed the notice of appeal on September 5, 2013, to the Board, the Department, the assigned assistant attorney

general, and PCI's out-of-state attorney. CP 7. But no one received service. CP 195, 201-02, 232; RP 4, 12.

On October 17, 2014, the Board received by fax a copy of the notice of appeal. CP 195. On November 7, 2014, PCI mailed by certified mail the notice of appeal to the Board, Department, and assistant attorney general. CP 199, 259-262. The Board, Department, and assistant attorney general each received service on November 12, 2014, more than 30 days from the Board's order denying the petition for review. CP 262.

C. The Superior Court Dismissed PCI's Appeal Because it Failed to Timely Perfect its Appeal, as Required by Statute

The Department moved to dismiss for PCI's failure to perfect its appeal by not timely serving necessary parties. CP 183-92. PCI responded that its Washington attorney prepared the documents for filing on September 5 and that the items were placed in the bin for the legal assistant to take to the post office. CP 207-08, 234-35, 237-38, 240. The law firm typically prepares about 25 to over 150 pieces of mail to go out per day. CP 237. There is no evidence other mail sent on September 5 was not received. *See* RP 25. While the legal assistant said that she follows the law firm's mailing procedures, she did not specifically remember placing the four envelopes containing the notice of appeal in the mailbox. CP 264-65.

The superior court dismissed PCI's appeal, ruling that PCI did not timely perfect its appeal because it failed to serve necessary parties by mailing them the notice of appeal within 30 days of the Board's order denying review. CP 278. The court reasoned that the evidence did not show that the envelopes reached the mailbox because it is highly unlikely that the post office failed to deliver the notices to any of the four parties listed in the certificate of service. CP 278; RP 27-28. The court rejected PCI's request for reconsideration, reaffirming its findings, and ruling that no equitable doctrine allowed the court to overlook the service defect. CP 311-13. PCI appeals. CP 320-28.

IV. STANDARD OF REVIEW

This Court applies the ordinary civil standards of review to appeals originating before the Board. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). This Court reviews a trial court's ruling on a motion for summary judgment de novo where no material facts are in dispute and the dispositive issue is a question of law. *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430

(2011), *review denied*, 172 Wn.2d 1008 (2011). To defeat summary judgment, a party may not rely on self-serving speculation or conjecture. CR 56(e); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009).

V. ARGUMENT

A. PCI Failed to Timely Perfect its Appeal, Where it Failed To Timely Serve Necessary Parties

To perfect its appeal in superior court, PCI had to serve, personally or by mail, the Board and Department within 30 days of the Board's order denying review. Neither the Board nor Department (nor attorneys representing the Department and PCI) received timely service, so the superior court properly dismissed PCI's appeal.

1. PCI Needed to Mail its Appeal to the Board and the Department within 30 days of Receiving the Board's Order Denying Review to Perfect its Appeal

To perfect an appeal of a Board order related to a WISHA citation, the appealing party must file the notice of appeal with the superior court and serve a copy by mail or personally on the director of the Department and the Board:

> Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred, by filing in such court within thirty days following the communication of the board's order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside.

> Such appeal *shall be perfected* by filing with the clerk of the court and *by serving a copy thereof by mail, or personally, on the director and on the board.*

RCW 49.17.150(1) (emphasis added).[1] Here the Legislature specified how to "perfect[]" an appeal. To perfect means "[t]o take all legal steps needed to complete, secure, or record (a claim, right, or interest)." BLACK'S LAW DICTIONARY 1251 (9th ed. 2009). The appellant *shall* perfect its appeal by serving a copy on both the director and the Board. It is well-established that "shall" imposes a mandatory requirement unless a contrary legislative intent is apparent. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 894, 176 P.3d 577 (2008). No contrary intent is shown in RCW 49.17.150(1).

The perfection language in RCW 49.17.150(1) mirrors exactly the requirements to perfect an appeal from a Board order relating to workers' compensation appeals. RCW 51.52.110 (stating "[s]uch appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board"). While there is little published case law on RCW 49.17.150's perfection requirements, appellate courts have looked to cases examining identical or analogous statutes dealing with workers' compensation

[1]Although courts used to discuss statutes like this in terms of the superior court's subject matter jurisdiction, that has changed. Rather, this statute creates requirements for a party to perfect an appeal. *See, e.g.*, *Sprint Spectrum LP v. Dep't of Revenue*, 156 Wn. App. 949, 951, 961, 235 P.3d 849 (2010).

appeals. *See B & J Roofing, Inc. v. Bd. of Indus. Ins. App.*, 66 Wn. App. 871, 877, 832 P.2d 1386 (1992) (affirming dismissal of appeal for failing to timely petition the Board for review).

Those appellate courts have repeatedly held that dismissal is required where the appellant timely filed a notice of appeal in superior court but did not timely serve the notice of appeal. *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 199-201, 796 P.2d 412 (1992); *Corona v. Boeing Co.*, 111 Wn. App. 1, 8, 46 P.3d 253 (2002); *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 193, 196, 26 P.3d 977 (2001); *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 410-11, 842 P.2d 1006 (1992).[2] In *B & J Roofing*, the Court affirmed dismissal of a WISHA appeal, where the employer's attorney's secretary accidently mailed its petition for review to the office of the attorney general and not to the Board's Olympia office, as

[2]It is undisputed that the Legislature may specify the conditions necessary to perfect an appeal, and, in many contexts, the Legislature shapes a party's ability to bring an action. For example, courts routinely apply statutes of limitations. *E.g.*, *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997) (statute of limitations is a legislative policy to shield defendants and the judicial system from stale claims). The Legislature may require claims to be filed with government agencies before commencing suit. *E.g.*, RCW 4.92.100; RCW 4.96.020; *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002) ("All time requirements necessarily involve a judgment by the legislature or court as to the amount of time necessary to achieve the legislative or judicial purpose"). The Legislature may also require taxpayers to pay the full amount of an assessment before bringing a challenge, and the courts apply such a requirement. *E.g.*, RCW 82.32.150; *Kirkland v. Dep't of Revenue*, 45 Wn. App. 720, 723, 727 P.2d 254 (1986). In a recent case, the court held that a party must comply with a statutory requirement to serve a board in order to perfect an appeal. *See Sprint Spectrum*, 156 Wn. App. at 951. *Sprint Spectrum* addressed an appeal from the Board of Tax Appeals, where the statute stated that a copy of the appeal shall be served on the agency (the tax board), and the court held that the failure to serve the tax board warranted dismissal. *Id.* at 953.

required by statute. 66 Wn. App. at 873. The Court rejected the employer's request to enlarge the time to file because it resulted from secretarial error, which amounted to inexcusable neglect. *Id.* at 876.

The Supreme Court in *Fay* likewise required timely service to perfect an appeal. In *Fay*, a worker failed to serve the notice of appeal on the Department's director (a required party under RCW 51.52.110) within the thirty-day appeal period. 115 Wn.2d at 196. The Supreme Court affirmed the trial court's dismissal of the worker's appeal, noting that the worker had "failed to satisfy the requirements of the appeal statute when she neglected to serve notice upon the Director of the Department within the required time period." *Fay*, 115 Wn.2d at 201 (emphasis omitted).

In *Hernandez*, the Court specifically identified the Board as a party requiring service. 107 Wn. App. at 196. There, the worker timely filed a notice of appeal from a Board order and timely served the director and the employer's attorney. *Hernandez*, 107 Wn. App. at 194. But she did not timely serve the Board. *Id.* In order to perfect the appeal, the court held that the appealing party must serve the Board: the "second paragraph of the statute . . . sets out how the appeal is perfected, i.e., by filing with the clerk and service on the required parties, including the Board." *Id.* at 196. The court affirmed the trial court's order of dismissal. *Id.* at 199; *see also Sprint Spectrum LP v. Dep't of Revenue*, 156 Wn. App. 949, 951, 961, 235

P.3d 849 (2010) (affirming dismissal when party did not serve Board of Tax Appeals as required under the Administrative Procedure Act).

Similarly, the *Petta* Court held that the Board and the Department are separate entities and RCW 51.52.110 requires service on both. 68 Wn. App. at 410. In *Petta*, the worker timely filed a notice of appeal in superior court. 68 Wn. App. at 407. The worker's attorney instructed a process server to serve the notice of appeal on the Board during the 30-day appeal period. *Id.* at 407-08. But the process server failed to do so, a fact that the attorney did not realize for several months. *Id.* The court reversed the trial court's denial of the Department's motion to dismiss, observing that the notice of appeal was not served on the Board or the director during the 30-day appeal period. *Id.* at 410-11. The court said that even accepting that there had been proper service upon the director by serving the Attorney General's Office, this would not have constituted service on the Board because the Board and the Department "are separate entities" and RCW 51.52.110 required service upon both. *Id.* at 410. Even though the worker's noncompliance with RCW 51.52.110's service requirements was "inadvertent," dismissal was required. *Id.* at 410-11.[3] As the cases

[3]In *Black v. Department of Labor & Industries*, 131 Wn.2d 547, 553, 933 P.2d 1025 (1997), the Supreme Court criticized *Petta* on other grounds relating to whether service on the attorney general constitutes service on the director for purposes of RCW 51.52.110's service requirements. But *Petta* remains good law as to the effect of untimely service on the Board.

consistently hold, an appeal must be dismissed if the appellant fails to meet statutory service requirements, as happened here.

2. PCI Failed to Mail the Notice of Appeal to the Board and the Department (and two other parties identified in the certificate of service)

Here, the superior court correctly dismissed PCI's appeal, because PCI failed to timely serve the Board and Department, as required by statute. The undisputed evidence shows that the legal assistant assigned to put the envelopes containing the notices of appeal in the mailbox stated that she does not specifically recall doing so. CP 264-65. Neither the Board nor the Department received service. CP 195, 201-02. And the two other parties identified in the certificate of service—the assistant attorney general and PCI's attorneys in Ohio—also did not receive the envelopes containing the notice of appeal. CP 232; RP 4, 12. While the law firm usually sends out 25 to 150 pieces of mail a day, the firm presented no evidence that other recipients failed to receive mail. *See* RP 25. Because four separate parties did not receive their separately addressed envelopes, the superior court reasonably inferred that the envelopes did not reach the mailbox. As the superior court explained, while the post office is not infallible and could lose one of the envelopes, the odds that the post office lost all four envelopes is highly improbable. CP 278, 311-13; RP 27-28. PCI thus failed to timely perfect its appeal, since it did not mail its notice

to the Board and Department within 30 days of the Board order, as required by statute. The superior court properly dismissed PCI's appeal.

3. PCI's Arguments that it Actually Served Required Parties are Wrong

The Court should reject PCI's attempts to circumvent the service requirements. First, while PCI correctly notes that service is effective upon placing the notice of appeal in the mail, the facts reflect that the envelopes containing the notice of appeal never made it to the mailbox. The issue, therefore, is not whether mailing constitutes proper service but whether the documents were actually mailed. The facts demonstrate that they were not.

Second, PCI's argument that the superior court relied only on nonreceipt is wrong. App. Br. at 26-28. The superior court properly considered the facts and concluded that the envelopes did not reach the mailbox. CP 311-13; RP 27-28. The only evidence of effective service is the self-serving certificate of service (filled out before the envelopes purportedly went out), statements that the attorney and law firm staff prepared the envelopes, and the legal assistant's testimony that she does not recall acting contrary to the law firm's procedures when she went to the post office. CP 7, 207-08, 234-35, 237-38, 240, 264-65. But she does not recall actually placing the envelopes in the mailbox. CP 264-65.

On these facts alone, the mailbox presumption does not apply. While the mailbox rule provides a rebuttable presumption that the document was received by the addressee in the usual time, that presumption is not invoked lightly. *Olson v. The Bon, Inc.*, 144 Wn. App. 627, 634, 183 P.3d 359 (2008). A party has to provide "independent proof" such as a postmark, dated receipt, "or evidence of mailing apart from a party's own self-serving testimony." *Id.* at 634 (citing *Sorrentino v. Internal Rev. Serv.*, 383 F.3d 1187, 1195 (10th Cir. 2004)). Only if an office handles "such a large volume of business that no one could be expected to remember any particular notice or letter" can proof be "(a) an office custom with respect to mailing and (b) compliance with the custom in the specific instance." *Olson*, 144 Wn. App. at 635 (citing *Farrow v. Dep't of Labor & Indus.*, 179 Wash. 453, 455, 38 P.2d 240 (1934)).

There is no independent proof of mailing aside from self-serving declarations. And everyone but the person actually tasked with placing the envelopes in the mail remembers these particular envelopes, meaning that the law firm does not have so much mail that it cannot remember the specific documents at issue in this case. *See Olson*, 144 Wn. App. at 635. Further, there is no evidence of compliance with the mailing customs in this specific instance, again aside from speculation from the legal assistant

that she must have followed the custom. On these facts, there is no presumption that PCI mailed the notices to the required parties.

In addition to the failure to provide independent proof of service, not just one party, but none of the four listed in the certificate of service received service. CP 195, 201-02, 232; RP 4, 12. This is not a case of nonreceipt of an adverse party, but here, the administrative tribunal and PCI's own out-of-state attorney, in addition to the Department and its attorney, did not receive service. On these facts, the superior court reasonably concluded that the envelopes did not reach the mailbox and that service was not accomplished.

In its motion for reconsideration, which PCI repeats later in its opening brief (App. Br. 26-27), PCI makes the flawed argument that the superior court failed to apply summary judgment standards and drew an unreasonable inference that amounted to speculation in concluding that the envelopes never reached the mailbox.[4] First, the predicate facts are undisputed: (1) all four parties, including two required parties, identified in the certificate of service did not receive service; (2) the legal assistant does not independently recall mailing the documents; (3) the court received the notice of appeal via priority mail; and (4) PCI presented no evidence that other intended recipients of the law firm failed to receive

[4]This Court reviews the superior court's denial of reconsideration for an abuse of discretion. *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001).

mail from that day. The reasonable inference to draw from these facts is that the envelopes never reached the mailbox, as it is extremely unlikely that the post office would lose only these four envelopes. Even on summary judgment, neither the superior court nor this court has to accept as true allegations that are contradicted by the record and which no reasonable finder of fact would believe. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 668 (2007). On the facts presented, dismissal was appropriate.

Second, while PCI argues that the superior court had to rely on speculation and conjecture to conclude that the envelopes did not reach the mailbox, it would be more speculative to follow PCI's lead and conclude the envelopes did reach the mailbox. *See* App. Br. at 26-28. It is highly improbable that the post office would lose four separately addressed envelopes sent to four different locations. A nonmoving party must set forth specific facts showing a genuine issue for trial and may not rely on speculation. *Knight v. Dep't of Labor & Indus.*, ___ Wn. App. ___, 321 P.3d 1275, 1279, 1282 (2014) (in the absence of evidence, nonmoving party could not rely on speculation), *review pending* (2014); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009). The undisputed facts show that there is no "independent proof" of service, so

the superior court correctly dismissed the appeal. *See Olson*, 144 Wn. App. at 634-35. PCI's argument to the contrary lacks merit.

B. PCI Did Not Substantially Comply With Service Requirements

PCI did not substantially comply with the requirements of RCW 49.17.150. App. Br. at 19-25. It is well-established that strict compliance with service requirements is not required if a party substantially complies with the statute. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025 (1997) (service upon attorney was sufficient to serve director); *Saltis v. Dep't of Labor & Indus.*, 94 Wn.2d 889, 892, 621 P.2d 716 (1980) (stating the same). The key to substantial compliance is *actual* compliance with the reasonable objective of the statute. *Id.*; *see Humphrey Indus., Ltd. v. Clay St. Assocs., L.L.C.*, 170 Wn.2d 495, 504, 242 P.3d 846 (2010) (substantial compliance requires actual compliance with respect to the substance essential to the statute's reasonable objectives).

Either one complies with a deadline or one does not. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991) (holding that substantial compliance did not occur where the appellant served the notice of appeal on a required party three days late); *see also Humphrey*, 170 Wn.2d at 505. Noncompliance with a deadline is not substantial compliance. *See Petta*, 68 Wn. App. at 409-10.

The doctrine of substantial compliance allows an appeal by a party who has complied with a statute's objective, albeit with minor defects. *Black*, 131 Wn.2d at 552. Through the doctrine of substantial compliance, it is evident there has been a long-standing recognition that there is no readily available cure for a failure to timely file or serve as there may be for other procedural defects such as filing in the wrong venue or serving the wrong person at the agency. *Compare Sprint Spectrum*, 156 Wn. App. at 958 ("substantial compliance does not encompass noncompliance" and failure to serve tax board is noncompliance with statute) *with Black*, 131 Wn.2d at 553 (serving wrong person at agency is substantial compliance because agency was timely served). PCI did not actually comply with the objectives of the statute as it did not serve the Board or the director within 30 days; therefore, it did not substantially comply.

PCI quotes *Black* for the proposition that "[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." App. Br. 21 (quoting *Black*, 131 Wn.2d at 552) (quotation marks omitted)). But as *Black* recognizes, there must be actual compliance with statutory objectives for this doctrine to apply. *Id.* at 552. *Black* does not stand for the proposition that the Legislature cannot specify that a party must perfect its appeal through timely filing and service. By requiring there to be at least

some notice to the required parties, the substantial compliance doctrine appropriately balances administrative finality and notice against the preference to address the merits of an appeal. Because no required party received timely service, PCI did not substantially comply with RCW 49.17.150's perfection requirements. The superior court correctly dismissed PCI's appeal.

Contrary to PCI's suggestion, this case is not analogous to *Graves v. Vaagan Bros. Lumber, Inc.*, 55 Wn. App. 908, 781 P.2d 895 (1989). There, the Court held that because the appealing party undisputedly mailed his notice of appeal to the employer, the Board, the director, and the correct superior court on the same day, he substantially complied with the perfection requirements, despite the fact that the superior court did not receive the notice of appeal. *Graves*, 55 Wn. App. at 909-910, 913-14. Here, by contrast, the evidence shows that the envelopes to the required parties (and their representatives) did not reach the mailbox. Under *Graves* admittedly narrow holding, substantial compliance did not occur here. *Graves*, 55 Wn. App. at 913.

C. The Court Should Not Equitably Toll the Perfection Deadline

The Court should reject PCI's request to act in equity, to ignore the perfection statute, and to allow its appeal to go forward. App. Br. at 23-24, 28-31. The superior court correctly rejected this argument when it

dismissed the appeal and again, when PCI re-raised the issue in its motion for reconsideration.

As our Supreme Court has recognized, the doctrine of equitable tolling applies in limited circumstances "when justice requires." *See Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). The "predicates" for equitable tolling are "bad faith, deception, or false assurances by the defendant" *and* "the exercise of diligence by the plaintiff." *Millay*, 135 Wn. 2d at 206. Equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. *Millay*, 135 Wn.2d at 206. Courts typically permit equitable tolling to occur only sparingly, and "should not extend it to a garden variety claim of excusable neglect." *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008) (internal quotations omitted) (quoting *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653 (2001)).

Here, neither predicate for equitable tolling has been met. The Department did not engage in bad faith, deception, or false assurances, nor does PCI allege that the Department did so. Because *Millay*'s first predicate has not been met, equitable tolling is not appropriate.

Moreover, PCI did not exercise diligence in this case. PCI sent the notice of appeal to the required parties on November 7, 2013, received on

November 12, 2013. This was two months after the perfection deadline passed, and nearly a month after PCI learned that the Board did not receive the notice of appeal. These facts do not amount to diligence.

Danzer is instructive. There, the employer also asked the court to apply the doctrine of equitable tolling to allow it to appeal a WISHA citation that had become final under RCW 49.17.140(1). *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 312, 317, 16 P.3d 35 (2000). The court initially observed that no Washington cases had applied equitable tolling in the context of an appeal of a WISHA citation. *Danzer*, 104 Wn. App. at 318. But, relying on federal precedent interpreting the Occupational Health and Safety Act, WISHA's federal analogue, the *Danzer* court suggested that equitable tolling might be appropriate if the employer's delay in filing an appeal "was caused by the agency's deception, the agency's failure to follow proper procedures, or other agency actions that misled or confused the petitioner." *Danzer*, 104 Wn. App. at 318 (citing *Sec'y of Labor v. Barretto Granite Corp.,* 830 F.2d 396, 399 (1st Cir. 1987); *Capital City Excavating Co. v. Donovan,* 679 F.2d 105, 110 (6th Cir. 1982)). The *Danzer* court declined to apply equitable tolling in the case before it because the employer had not identified "any Department action that caused its failure to appeal" the citation. *Danzer*, 104 Wn. App. at 318.

The same is true here. PCI points to no Department action that caused its failure to appeal the citation on time, and there is none. Instead, the failure occurred because, despite its good faith, PCI failed to place the envelopes containing the notices in the mailbox. Equity cannot excuse this lack of diligence. Accordingly, the superior court correctly declined to excuse PCI's late appeal under the doctrine of equitable tolling. Summary judgment on the Department's behalf was proper.

Finally, this Court should reject PCI's request to ignore procedural requirements because equity favors allowing the appeal to go forward. App. Br. at 31. By PCI's logic, courts would *always* permit untimely appeals to proceed to the merits. Such logic is untenable. It ignores the Legislature's prerogative to establish appeal deadlines and appellate courts' assumption that the Legislature "means exactly what it says." *West v. Thurston Cnty.*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012) (quoting *Morgan v. Johnson,* 137 Wn.2d 887, 892, 976 P.2d 619 (1999)) (internal quotation marks omitted). The superior court correctly dismissed the appeal.

VI. CONCLUSION

PCI failed to mail the Board and the Department its notice of appeal within 30 days of receiving the Board's order denying review. In failing to do so, PCI did not timely perfect its appeal, as required by

statute. The superior court correctly dismissed PCI's appeal. This Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of October, 2014.

ROBERT W. FERGUSON
Attorney General

PAUL M. CRISALLI
Assistant Attorney General
WSBA No. 40681
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206)389-3822

NO. 32377-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PERFORMANCE CONTRACTING, INC., Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be filed and served the Department's Brief of Respondent and this Certificate of Service in the above described manner.

Via First Class United States Mail, Postage Prepaid to:

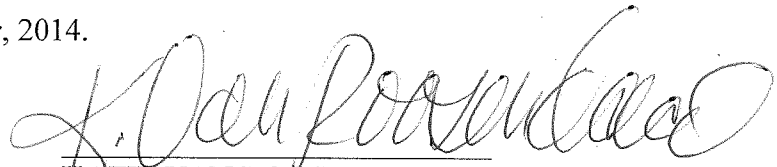
Court of Appeals, Division III
500 N Cedar St
Spokane, WA 99201-1905

Via First Class United States Mail, Postage Prepaid to:

Robert L. Olson
Schlemlein Goetz Fick & Scruggs
66 South Hanford Street, Suite 300
Seattle, WA 98134

Gary Auman
Dunlevey Mahan & Furry
110 N. Main Street, Suite 1000
Dayton, OH 45402

DATED this 15th day of October, 2014.



KATIE VAN ROOSENDAAL
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740