

69408-1

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No. 69408-1

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

MICHAEL SMITH,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES, and
EASTSIDE GLASS & SEALANTS,
Respondents.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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I. INTRODUCTION

In accordance with the Industrial Insurance Act (Act), the Appellant, Michael Smith, sought judicial review of a Board of Industrial Insurance Appeals (Board) decision that denied him workers' compensation benefits.

He filed his appeal in superior court on Friday, January 20, 2012, exactly thirty days after receiving the Board's decision. However, Mr. Smith served his notice of appeal upon the Board, Attorney General's Office, and Department on Monday, January 23, 2012, thirty-three days after the decision. The testimony and the evidence provided at an evidentiary hearing on the matter established that the service documents were prepared and scheduled to be served on Friday, but due to severe weather conditions in the area, the documents were not served until the following Monday.

On July 26, 2012, six months later and four weeks before trial, the Department sought dismissal based on late service. Finding it had no discretion, the superior court granted the Department's motion to dismiss.

Mr. Smith asserts that the Act does not require dismissal in this case. Rather, in cases of delayed service, the Act allows the court to exercise its discretion and determine if dismissal is appropriate.

In its briefing, the Department agrees that the court has subject matter jurisdiction, but it argues courts have long held that service delays result in automatic dismissal and the superior court is without discretion to allow Mr. Smith's case to proceed.¹ Mr. Smith respectfully disagrees. Courts interpreting service delays under the Act have dismissed appeals for lack of subject matter jurisdiction. Courts have not examined, outside the context of subject matter jurisdiction, whether the statute allows for less severe remedies. It does.

Being so, Mr. Smith asks this Court to reverse the superior court's dismissal and remand for trial on the merits.

II. ARGUMENT

The superior court has discretion to hear the merits of Mr. Smith's claim for benefits because: (1) the superior court has discretion under the Act and applicable case law; (2) courts routinely examine the circumstances of each case to determine a just result, and Mr. Smith has demonstrated that weather conditions impeded his ability to serve; and (3) there should be no concern over potential abuse because the court would evaluate each case consistent with its sound discretion.

¹ The Employer, Eastside Glass and Sealants, and the Department each submitted briefing in response to Mr. Smith's appeal. However, both construct nearly the same arguments against allowing Mr. Smith's case to proceed on the merits, so Mr. Smith herein replies to both and for simplicity will refer generally to both the Employer and the Department by use of the term "the Department." When citing directly to respondents' briefs, the brief submitted by the Department will be referenced as Br. Resp'ts (Dep't), and the brief submitted by the Employer will be referenced as Br. Resp'ts (Emp).

A. Under the Act and Consistent with Applicable Case Law, the Court has Discretion to Allow a Timely Filed Appeal to Proceed on the Merits

1. The Department's mandatory dismissal argument is founded on subject matter jurisdiction principles that are inapplicable here

In support of its argument that dismissal is required, the Department cites to three cases, *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990); *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 842 P.2d 1006 (1992); and *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 26 P.3d 977 (2001). However, these cases held that perfecting the appeal within 30 days was a prerequisite to invoking the court's *jurisdiction*. Jurisdiction here is not contested.

In each of these cases the court was not trying to determine what remedies were available under the Act with regard to a delay in service, but instead analyzed each case to determine if the superior court had subject matter jurisdiction to entertain the appeal. The court in all three cases held in order to invoke the superior court's subject matter jurisdiction an appealing party must perfect her appeal by both filing and serving notice of the appeal within 30 days of the Board's decision. The court dismissed all three cases for want of jurisdiction because service was either delayed or not accomplished. *See Fay*, 115 Wn.2d at 198-199 (holding the claimant's appeal was properly dismissed because in order to

invoke the jurisdiction of the superior court an appealing party must file and serve notice within the 30 day appeal period and the claimant did not timely serve); *see also Petta*, 68 Wn. App. at 408 (holding the trial court erred when it denied the Department's motion to dismiss on the ground that the superior court lacked subject matter jurisdiction due to the claimant's failure to timely serve); *see also Hernandez*, 107 Wn. App. at 195-198 (holding the claimant's petition was properly dismissed for lack of subject matter jurisdiction because the claimant failed to both file and serve her appeal within 30 days).

In other words, the courts reasoned that a party who failed to perfect her appeal failed to invoke the court's subject matter jurisdiction. Lack of subject matter jurisdiction "renders the superior court powerless to pass on the merits of the controversy brought before it." *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (citations omitted). Thus, the superior court lacked the power to examine the merits of the claimants' appeals under the holdings in *Fay*, *Peeta*, and *Hernandez*. As such, it did not examine any possible remedies for the claimants' failure to perfect their appeals.

Moreover, to the extent that *Fay*, *Peeta*, and *Hernandez*, held that a party could invoke or fail to invoke the superior court's subject matter

jurisdiction through compliance or noncompliance with statutory procedures, these cases have been overruled:

Our Supreme Court has held that article IV, section 6 is dispositive and has overruled precedents that erroneously classify the superior court's jurisdiction as statutory. . . . It is incorrect to say that the court acquires subject matter jurisdiction from an action taken by a party or that it loses subject matter jurisdiction as the result of a party's failure to act.

MHM&F, LLC v. Pryor, 168 Wn. App. 451, 459-460, 277 P.3d 62 (2012) citing *ZDI Gaming, Inc. v. Washington State Gambling Comm'n*, 173 Wn.2d 608, 616-618, 268 P.3d 929 (2012); *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 316-320, 76 P.3d 1192 (2003); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994) (additional citations omitted).

The rationales in *Fay*, *Peeta*, and *Hernandez* are largely inapplicable to the case at hand, in which jurisdiction is not contested.² Because the superior court has jurisdiction it is now allowed to exercise its discretion by considering and applying relevant authorities including: the

² *Fay*, *Peeta*, and *Hernandez* interpreted the statute only to conclude that the 30 day time limitation applies to both the filing of the notice of appeal and to the service of the notice in order to invoke the court's subject matter jurisdiction. "The perfection provision of the statute does not expressly provide that an appealing party must both file and serve within 30 days in order to invoke the jurisdiction. But that has been the interpretation." *Hernandez*, 107 Wn. App. at 196, citing *Fay*, 115 Wn.2d at 198; see also *Peeta*, 68 Wn. App. at 409 & n.1. Even if it may be appropriate for the court to retain the interpretation that service within 30 days is required to perfect the appeal, it does not stand to reason that failure to perfect the appeal within 30 days results in automatic dismissal. Being so, the rationales in these cases remain largely inapplicable to the case at hand.

Act, other case law; and court rules. These authorities allow for alternative remedies to dismissal and discredit the Department's mandatory dismissal contention.³

2. The Act does not require dismissal for a delay in service

The applicable law is two-fold. First, the Act in general is remedial in nature and should be liberally constructed in favor of the worker. RCW 51.12.010; *See also Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citations omitted). Additionally, "where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker[.]" *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

Second, the specific statute at issue, RCW 51.52.110, states that if an aggrieved party "*fails to file* with the superior court its appeal as provided in this section within said thirty days the decision and order of the board . . . shall become final." RCW 51.52.110 (emphasis added). The

³ The Department also cites to two cases, *Magee v. Rite Aid* and *Marley v. Dep't of Labor & Indus.* for the proposition that failure to timely appeal results in the Board order becoming final. Br. Resp'ts (Dep't) 12. This argument fails. First, it is undisputed that Mr. Smith timely filed his appeal. Second, the authority cited is not on point. *See Magee v. Rite Aid*, 167 Wn. App. 60, 277 P.3d 1 (2012) (the claimant filed an appeal to superior court but did not appeal a particular conclusion of law and argued that the original order was void when entered for want of subject matter jurisdiction); *See also Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994) (the claimant never attempted to appeal the order; rather, six years after the order was issued, she sought to have it declared void for want of subject matter jurisdiction).

statute proceeds to explain how a party must perfect its appeal, “[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.” *Id.* The statute, on its face, does not require that decision and order of the board become final upon a failure to *perfect* the appeal. *See Daugherty v. Dep’t of Labor and Indus.*, 150 Wn.2d at 319 (the Supreme Court “decline[d] to read RCW 51.52.110 as requiring dismissal of *Dougherty’s* otherwise timely filing” and held that the appellant’s claim was dismissed in error despite his procedurally defective appeal). The Act cannot be construed to require dismissal as the only available remedy because the Act is to be liberally construed and does not explicitly mandate dismissal for a service delay.

3. Case law interpreting statutory procedural requirements outside of a jurisdictional context does not mandate dismissal and favors resolution on the merits

a. The Supreme Court in *Dougherty* allowed a procedurally defective appeal to proceed because the error did not impact the court’s jurisdiction

The court in *Dougherty* allowed an appeal to proceed to trial despite the claimant failing to adhere to the statute’s procedural requirement that he file his claim in the county listed in the Act. Within RCW 51.52.110, the filing location requirement and the service requirement are contained within the same paragraph:

[A]n appeal to the superior court shall be to the superior court of the county of residence of the worker . . . or to the superior court of the county wherein the injury occurred or . . . to the superior court for Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board.

RCW 51.52.110. The filing location, like service, is a procedural requirement under the statute.

In *Dougherty*, the Department argued that the claimant's failure to adhere to the statute and file his claim in the proper county required dismissal of the appeal. *Dougherty*, 150 Wn.2d at 313. The Court rejected this argument.

The *Dougherty* court determined that filing in the proper county was a venue requirement, not a jurisdictional prerequisite. *Id.* at 316-320. The Court, exercising its discretion consistent with the civil rules, allowed for a change of venue. *Id.* at 319-320. Prior to *Dougherty*, cases had been dismissed for failure to file in the county as required within the statute on the basis that filing in the wrong county deprived the superior court of subject matter jurisdiction. *Id.* at 319.

Nonetheless, the Department claims that *Dougherty* is inapplicable because *Dougherty* merely held that a defect in venue does not deprive the court of subject matter jurisdiction but "do[es] not hold that a court has

discretion in enforcing statutory procedural requirements.” Br. Resp’ts (Dep’t) 22.

Yet, that is exactly what the *Dougherty* court did –it found that it was within the court’s discretion to allow for a remedy short of dismissal when the claimant failed to adhere to a statutory procedural requirement. Similarly here, because service within 30 days is no longer seen as a jurisdictional prerequisite, the court has the discretion to allow the claim to proceed. The *Dougherty* court’s rationale that a claimant’s otherwise timely filing should not be dismissed is directly on point and should control in this case.

b. *ZDI Gaming and MHM&F, LLC make clear that, once jurisdiction is established, courts have discretion to determine whether a statute requires dismissal*

The Department further disputes the applicability of *ZDI Gaming* and *MHM&F, LLC*, again stating that *ZDI Gaming* only held that a defect in venue does not deprive the court of subject matter jurisdiction. Br. Resp’ts (Dep’t) 22.

This is too narrow an application of the Court’s holding in *ZDI Gaming*, as made clear in *MHM&F, LLC*. These cases hold that the court retains its subject matter jurisdiction regardless of a party’s compliance with statutory procedural requirements. “If the type of controversy is

within the superior court's subject matter jurisdiction, as it is here, then all other defects or errors go to something other than subject matter jurisdiction." *MHM&F, LLC*, 168 Wn. App. at 460 (citations omitted).

As explained in *MHM&F, LLC*, an unlawful detainer action, "[w]hether the superior court ruled correctly or incorrectly in this particular case, it did not lack subject matter jurisdiction." *Id.* The *MHM&F, LLC* court explained that the alleged errors did not relate to the court's subject matter jurisdiction but instead went to the court's interpretation of the applicable statute. *Id.* Specifically, the issue was whether the applicable statute required the summons to refer to the respondent's facsimile number and if so whether the "absence of such a reference require[s] that the action be dismissed[.]" *Id.* Had this issue been presented, it could have been litigated and ruled upon by the trial court. *Id.* at 460-461. In other words, the trial court undoubtedly had subject matter jurisdiction and it also had the discretion to determine whether a failure in statutory procedure required dismissal. However, the appellant in *MHM&F, LLC* failed to make such arguments at the trial court level. *Id.*

In this case, the parties agree that the court has subject matter jurisdiction, and, as in *MHM&F LLC*, the alleged errors go to statutory interpretation- whether the statute requires dismissal for a minor service

delay. However, unlike the appellant in *MHM&F LLC*, Mr. Smith argued to the superior court that the Act and specifically, RCW 51.52.110, do not require dismissal. Because the Act does not prescribe any specific consequence for a service delay, it is within the court's sound discretion to allow an appeal despite a minor and excusable service delay.

c. *Sprint Spectrum* does not mandate dismissal; there is no precedent that requires a court, with subject matter jurisdiction, to dismiss an appeal due to a service delay

The Department analogizes the case at hand with *Sprint Spectrum, LP v. State Dep't of Revenue*, 156 Wn. App. 949, 235 P.3d 849 (2010). This analogy also fails for two reasons: first, the Administrative Procedure Act (APA), not the Industrial Insurance Act, was at issue; second, *Sprint* conceded that if the court determined it had not complied with the statute then the court lacked subject matter jurisdiction and was required to dismiss.

First, the court in *Sprint Spectrum* applied the APA. Chapter 34.05 RCW et seq. Unlike the Industrial Insurance Act at issue here, the APA is *not* to be liberally construed in the claimant's favor, "there is no basis to apply a liberal construction to the plain words of this [APA] statute." *Sprint Spectrum, LP*, 156 Wn. App. at 963.

Second, *Sprint* conceded that failure to comply with the procedural requirements would deprive the court of jurisdiction. "Sprint has not

questioned the Department of Revenue's theory that a failure to comply [with APA's procedural requirements] deprives the superior court of subject matter jurisdiction. Consequently Sprint has not argued that the consequences of failure to comply should be anything other than dismissal for lack of subject matter jurisdiction." *Sprint Spectrum, LP*, 156 Wn. App. at 967 (Becker, J., concurring). Thus, the court left open the question of "what consequences will then flow from a failure to comply with the statutory service requirements" in the event that the defect goes to something other than subject matter jurisdiction. *Id.*

Despite the Department's contrary argument, *Sprint Spectrum, LP* does not stand for the proposition that the court must dismiss an appeal under the Industrial Insurance Act due to a minor and excusable service delay. *Sprint Spectrum, LP* does not apply the Industrial Insurance Act and it does not address the issue of remedies. Simply, there is no precedent that requires a court with subject matter jurisdiction to dismiss an appeal based solely on a minor and excusable service delay. As explained above, the statute does not require dismissal and the *Dougherty* court expresses the preference for cases to proceed despite procedural shortcomings.

B. As Courts Routinely Examine the Circumstances of Each Case, Allowing Mr. Smith's Appeal to Proceed is Reasonable

1. Court rules and prior case law demonstrate the court's authority to determine a just result under the facts of each case

The Department claims that unlike the venue requirement at issue in *Dougherty*, a service delay is incurable and cannot be remedied by the court no matter the circumstances. *See* Br. Resp'ts (Dep't) 15.

The court regularly examines the circumstances surrounding each case- it looks to the applicable statutes, case law, and facts. When crafting remedies the court considers principles similar to those found in cases applying excusable neglect or extraordinary circumstances. *See* CR 60(b) (the court may provide relief from final judgments, orders, or proceedings in cases of mistake, inadvertence, excusable neglect, unavoidable casualty, or as justice requires.); RAP 18.8(b) (the appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file certain pleadings); *See also Davidson v. Thomas*, 55 Wn. App. 794, 780 P.2d 910 (1989) (the court allowed an appeal from an agency decision to proceed when the appellant filed its petition for review within the time frame required by the applicable statute, but served the county clerk outside of the time frame because the court found that "late service in the circumstances of this case does not warrant dismissal") (citations omitted); *City of Goldendale v. Graves*, 88 Wn.2d 417, 562 P.2d 1272 (1977) (the court allowed an

attorney to appeal his client's conviction from the county district court to the superior court when the attorney noted the appeal five days outside of the time frame because the court reasoned that "if a court is unable to correct an injustice where a defendant or his attorney was unable to comply with the rules through no intent or act of his own volition[,] [t]his is not reasonable . . . under the particular circumstances here, justice requires relief") (citations omitted). Other remedies, such as a continuance, may be appropriate in cases of delayed service.

Court rules and case law espouse the generally understood principle that the court has authority to accomplish substantial justice under the circumstances of each case. Now that it is clear that the court retains its jurisdiction in this case, it should also be clear that the court has the ability to accomplish substantial justice.

2. Mr. Smith presented evidence that weather conditions likely disrupted service

Despite the Department's contrary argument, Mr. Smith supported the claim that his late service was excusable. At an evidentiary hearing, Mr. Smith submitted newspaper articles that described the severe ice and snow storms that affected the area. CP 166-171. There was also testimony from a witness who remembered that "this week had a tremendous snow and ice storm. . . . because . . . [on] the 20th ... when

[he] went back to the parking lot someone had slid down the hill and smashed into [his] car.” Verbatim Report of the Proceedings, Aug. 16, 2012 (VRP) 41. Although the witness that served the documents was unable to recall the specific mailings at issue, Mr. Smith argued that this snow and ice storm delayed or disrupted the mail.⁴ CP 104 n.2; 174. The superior court agreed that the snow and ice storm likely affected Mr. Smith’s ability to serve the documents:

[W]hen there’s a storm in Seattle people want to leave the office and I think that’s probably what occurred here. I think everything was set up probably to get done that day, but with a nearly three o’clock filing, 2:48 filing, things were probably brought back to the office and it wasn’t completed until Monday.

VRP 70. The trial court’s rationale as to why it found that service was delayed can be read into the superior court’s final order, “[a]n oral decision consistent with findings and conclusions may be used to interpret them[.]” *Johnson v. Whitman*, 1 Wn. App. 540, 546, 463 P.2d 207 (1969) (reasoning that although a written order will control over an inconsistent oral ruling, a consistent oral decision may be used to interpret the written order) (citations omitted). Thus, the superior court reasoned that the delay was unintentional and excusable. However, the superior court believed it did not have discretion and it granted dismissal. VRP 77.

⁴ It is undisputed that in cases seeking workers’ compensation benefits service is deemed complete upon mailing. See *Vasquez v. Dep’t of Labor & Indus.*, 44 Wn. App. 379, 383-384, 722 P.2d 854 (1986).

C. Sound Discretion by the Superior Court Would Temper any Potential Over Use

The respondents are concerned that if this court were to agree that it has discretion to consider remedies short of dismissal, then abuse by plaintiffs would follow. The Employer argues that if this court were to follow Mr. Smith's "misguided assertion, the practical application would open the door to substantial compliance as a mere option." Br. Resp'ts (Emp) 5. Likewise, the Department states that allowing Mr. Smith's case to proceed would "render the line the courts have drawn through the substantial compliance doctrine meaningless." Br. Resp'ts (Dep't) 24. Respondents' concern is unnecessary.

To be clear, Mr. Smith is not arguing substantial compliance with the statute, instead the parties disagree over the remedies available to the court to address a service delay. To this end, Mr. Smith asserts that the Act, case law, and court rules allow the court discretion to examine the surrounding circumstances and allow the case to proceed. Simply because the court has discretion to provide remedies, it does not necessarily follow that the court must provide such remedies in every case. The flood gates the Employer worries over necessarily would be dammed by the superior court's sound discretion. In some instances, it may be reasonable to

dismiss claims for procedural shortcomings. However, based on the facts of this case, the appeal should be allowed to proceed.

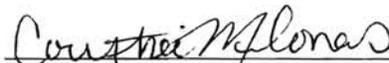
VI. CONCLUSION

Appellant respectfully requests that the Court REVERSE the superior court's dismissal and REMAND this case for trial on the merits.

DATED this 19^m day of May 2013.


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PROOF OF SERVICE

I hereby certify under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy of the Appellant's Reply Brief upon the individuals listed by the following means:

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