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SUPPLEMENT TO STATEMENT OF THE CASE

Jason Aguirre disagrees with Kroger's Counter Statement of the Case in that there are not mischaracterizations of the record in his Statement of the Case in the Brief of Appellant. There is one date which is inaccurate in the Brief of Appellant in that it was on August 24, 2018, and not July 13, 2018, that Mr. Aguirre filed his second Proof of service with the appropriate certification pursuant to GR 13. Mr. Aguirre thanks Kroger's attorney for filing the appropriate Supplemental Clerk's Papers dated June 27, 2019, including the Proof of Service dated August 24, 2018. The Proof of Service that Mr. Aguirre's attorney designated in the Clerk's Papers filed on July 13, 2018, mistakenly was a Proof of Service for the Demand for a Six Person Jury trial when the Notice to Set for Trial was filed. Kroger then filed its Notice to Dismiss on August 9, 2018, and Mr. Aguirre's attorney was alerted to the error in the Proof of Service filed on March 22, 2018. Appendix A is a conformed copy of the Proof of Service filed on March 22, 2018, and Appendix B is a conformed copy of the Proof of Service filed on August 24, 2018.¹

¹ Again, it should be explained that pursuant to RCW 51.52.110 there is no requirement that the Proof of Service be filed within 30 days of the Decision and Order of the Board of Industrial Insurance Appeals dated February 23, 2018. CP 5, CABR 1-12. All that is required is the service by mail be made within 30 days.

ARGUMENT

Contrary to what is argued in the Brief of Kroger, the Standard of review is *de novo*, and not abuse of discretion. An error of law was committed by the trial court in dismissing Mr. Aguirre's appeal to Superior Court, and there is no discretion involved. *Dep't. of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 878, 288 P.3d 390 (2012), *Dep't. of Labor & Indus. v. Frankauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993). The case cited by Kroger, *Escude v. King County Pub. Hosp. Dist.*, 117 Wn. App. 183, 69 P.3d 895 (2003) was a dismissal pursuant to CR 41(a) for voluntary dismissal, not involuntary dismissal which would be covered under CR 41(b), which is the case here.

The last sentence at page 5 of Kroger's Substantial Compliance section states that the trial court correctly ruled that Mr. Aguirre failed to substantially comply with the service rules. The trial court took the Motion to Dismiss by Kroger under advisement, and only entered the Order of Dismissal submitted by Kroger. There was no ruling made as to substantial compliance, and the trial court did not enter Findings of Fact and Conclusions of Law pursuant to CR 52.

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Mr. Aguirre did not blatantly disregard the civil requirements for proof of service as stated in the last sentence of the first paragraph at page 6. When Mr. Aguirre discovered that the original Proof of Service was defective, Appendix A, he immediately filed a corrected Proof of Service, Appendix B. Although Proof of Service is the document showing service, it is the fact of service, not the proof of service, that gives the trial court jurisdiction to hear the appeal. *Crider v. Othello*, 9 Wn. App. 536, 538, 513 P.2d 571 (1973).

Kroger's Brief at page 6, first full paragraph, cites *Brackman v. Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011), and *Sunderland v. Allstate Indem. Co.*, 100 Wn. App. 324, 995 P.2d 614 (2000), stating that time and again the Washington Appellate Courts have held that service is invalid where the certificate of service is not properly executed. These cases come under the Mandatory Arbitration Rules, which is not the case under RCW 51.52.110. MAR 7.1 requires that the proof of service, as well as the actual service, be filed within 20 days after the entry of the arbitration award. *Brackman v. City of Lake Forest Park*, 163 Wn. App. at page 893 also held that the interpretation of a court rule is a question of law reviewed *de novo*, not by abuse of discretion.

Kroger's brief at page 7 is correct in that Mr. Aguirre did not seek amendment of his Proof of Service before refile in Superior Court. In Superior Court, Mr. Aguirre's attorney at page 5, lines 12 through 24, of the Report of Proceedings argued:

...The first Proof of Service that was filed in the – in the – in the court as part of the file was dated four two oh – 4/2 of '18. And that did not have a Declaration that – under penalty of perjury that it was filed.

It was filed under my signature that the Declaration under GR 13 was not – was not there. And so then once we realized that on August 24 of 2018, we filed the Proof of Service with the appropriate Declaration under my signature again under GR 13.

In argument before the trial court, Kroger did not invoke CR (4)(h) to maintain that Mr. Aguirre did not first file a motion to file an amended proof of service with a certification. The rule provides that the court may allow any proof of service to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued. Since Kroger as the self-insured employer was served by mail the day the Notice of Appeal was filed in Superior Court pursuant to RCW 51.52.110, there was no substantial right of Kroger being violated. The trial court also did not question whether a motion had to be first made to amend the proof of service.

Since service of process pursuant to CR 4(d) can be (2) personal in state publication, (3) by publication, (4) alternative to service by publication and (e)(2) personal service out of state, there are many instances by which a proof of service may be drawn into question rather than service by mail pursuant to RCW 51.52.110, which is the only requirement. Appeals from decisions of the Board of Industrial Insurance Appeals invoke the appellate jurisdiction of the superior court, as opposed to original jurisdiction and all of the statutory requirements must be met before jurisdiction is properly invoked. *Fay v. Northwest Airlines*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990). Mr. Aguirre did meet all of the statutory requirements of RCW 51.52.110, and strict compliance with CR 4(g) should not be required.

CONCLUSION

The Superior Court for Clark County has jurisdiction to hear the appeal from the Board of Industrial Insurance Appeals, the irregularity in

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the Proof of Service having been cured by the filing of a second Proof of Service adding a certification pursuant to GR 13.

Dated this 26th day of July, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven L. Busick", written over a horizontal line.

Steven L. Busick, WSBA No. 1643
Attorney for Jason Aguirre,
Appellant

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COURT OF APPEALS
DIVISION II

2019 JUL 29 PM 1:07

STATE OF WASHINGTON

BY [Signature]
DEPUTY

**IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

JASON AGUIRRE,)	COA No. 53072-4-II
)	
Appellant,)	
)	PROOF OF SERVICE
v.)	
)	
KROGER, INC.,)	
)	
Respondent.)	
_____)	

The undersigned states that on Friday, July 26, 2019, I served via US Mail, as indicated below, Reply Brief of Appellant, addressed as follows:

Rebecca A. Watkins
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111 SW Fifth Ave., Ste. 1200
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Anastasia Sandstrom
Attorney General of Washington
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Seattle, WA 98104-3188

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

Dated this 26th day of July, 2019.

[Signature]
STEVEN L. BUSICK
Attorney for Appellant

COPY
Original Filed
APR 02 2018
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF CLARK

JASON AGUIRRE,
Plaintiff,
v.
KROGER, INC.,
Defendant.

No. 18-2-00753-8
Docket No. 17 14455
PROOF OF SERVICE

The undersigned states that on the 22nd of March, 2018, I served copies of Notice of Appeal dated March 22, 2018, via first-class mail, postage prepaid, addressed as follows:

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

Kroger, Inc
Corporate Claims
1014 Vine Street
Cincinnati, OH 45203-1141

Department of Labor and Industries
Office of the Director
PO Box 44001
Olympia, WA 98504-4001

Dated this 22nd day of March, 2018.

STEVEN L. BUSICK, WSBA No. 1643
Attorney for Claimant

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AUG 24 2018
Sandy G. Wickham, Clerk, Clark Co.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF CLARK

JASON AGUIRRE,
Plaintiff,

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1014 Vine Street
Cincinnati, OH 45203-1141

Department of Labor and Industries
Office of the Director
PO Box 44001
Olympia, WA 98504-4001

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

Dated this 24th day of August, 2018.

10/ STEVEN L. BUSICK
STEVEN L. BUSICK, WSBA No. 1643
Attorney for Claimant