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INTRODUCTION

This is an appeal from an order of the Superior Court for Clark County dismissing Jason Aguirre's appeal from a decision of the Board of Industrial Insurance Appeals for failure to have a certification on his initial Proof of Service showing mailing of the Notice of Appeal.

STATEMENT OF THE CASE

On March 22, 2018, Jason Aguirre appealed a Decision and Order of the Board of Industrial Insurance Appeals to Superior Court for Clark County. CP 1. The Decision and Order dated February 28, 2018, and received on March 2, 2018, affirmed a Department of Labor and Industries order dated February 17, 2017, that denied Mr. Aguirre an anterior lumbar interbody fusion at L5-S1 recommended by his attending physician, Jordi Kellogg, MD, neurosurgeon, and closed his claim with a Category II rating for low back impairment following an unsuccessful simple nerve decompression. CP 3, CABR, pages 4-11. On the day of filing in Superior Court, Mr. Aguirre's attorney pursuant to the Notice of Appeal served by first class mail, postage prepaid, conformed copies of the Notice of Appeal to the Board of Industrial Insurance Appeals, Director of the Department of

Labor and Industries, and the self-insured employer, Kroger, Inc., as provided by RCW 51.52.110. CP 2.

Then on April 2, 2018, Mr. Aguirre's attorney filed his Proof of Service showing service by mail upon the above parties on March 22, 2018. CP 2. The Proof of Service did not have a certification as provided by GR 13. Realizing the oversight, Mr. Aguirre's attorney on July 13, 2018, filed a Proof of Service showing service on the same parties by mail on March 22, 2018, and adding a certification. CP 4. On August 9, 2018, Kroger Inc., filed Defendant's Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss. CP 5 and 26. Mr. Aguirre on November 1, 2018, filed Plaintiff's Response to Defendant's Motion to Dismiss. CP 28. On November 16, 2018, oral argument took place on the motion docket, RP 1-14, and on February 14, 2019, the trial judge entered the Order of Dismissal with Prejudice. CP 32.

ASSIGNMENT OF ERROR

The trial court erred in dismissing Mr. Aguirre's appeal to Superior Court for Clark County from a decision of the Board of Industrial Insurance Appeals on Kroger's motion to dismiss.

The issue presented by this appeal is whether Mr. Aguirre may amend his Proof of Service to add a certification of service as provided in GR 13 to comply with CR 4(g).

ARGUMENT

In the trial court, Kroger filed a motion to dismiss Mr. Aguirre's appeal. Since there were no new facts alleged, the motion to dismiss can be considered a motion for summary judgment. On appeal of a summary judgment order, where no facts are in dispute and the only issue is a question of law, the standard of review is *de novo*. *Department of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 878, 288 P.3d 390 (2012), *Department of Labor & Indus. v. Fankhauser*, 121, Wn.2d 304, 308, 849 P.2d 1209 (1993).

The Industrial Insurance Act, Title 51, provides an exclusive remedy for injured workers. Except as provided in RCW 51.52.110, all jurisdiction of the courts of the State of Washington for workers injuries is abolished by the IAJ. RCW 51.04.010. *Spokane v. Department of Labor & Indus.*, 34 Wn. App. 581, 583, 663 P.2d (1983). Appeals from administrative tribunals invoke the appellate, not the general or original jurisdiction of the superior court. Acting in its appellate capacity, the superior court has limited statutory jurisdiction, and all statutory requirements must be met

before jurisdiction is properly invoked. *Fay v. Northwest Airlines*, 115 Wn.2d 194, 197, 796, P.2d 412 (1990).

RCW 51.52.110 sets forth the procedure under which a party may appeal a decision and order of the Board of Industrial Insurance Appeals to the superior court. The appeal statute provides:

Within thirty days after a decision of the board. . . [a] worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. . .

. . . 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. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. *Fay v. Northwest Airlines*, 115 Wn.2d at pages 197-198.

The notice provision contained in the statute is a practical requirement intended to ensure that interested parties receive actual notice of appeals of Board decisions. *In re Saltis*, 94 Wn.2d 889, 895, 621 P.2d 716 (1980).

The perfection provision does not explicitly provide that a party must both file and serve within a specific time. However, cases interpreting RCW 51.52.110 hold that in order to invoke the jurisdiction of the superior court an appealing party must file and serve notice within the 30 day appeal period. *Vasquez v. Department of Labor & Indus.*, 44 Wn. App. 379, 382,

722 P.2d 854 (1986). Generally, courts have required strict compliance with the terms of the statute to secure superior court jurisdiction (cases omitted), but *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980) held that substantial compliance with the terms of RCW 51.52.110 was sufficient to invoke the appellate jurisdiction of superior court. Moving away from the requirement of strict compliance, the court “warned against the slavish adherence to the precedent” that previous cases represented. Setting forth the standard of substantial compliance, the court held that proper service on the Director of the Department could be shown if: (1) the Director received actual notice of the appeal to the Superior Court, or (2) the notice was served in a manner reasonably calculated to give notice to the Director. *Fay v. Northwest Airlines*, 115 Wn.2d at page 199.

In this case there is no question as to whether the notice of appeal was filed in Superior Court and served on the necessary parties within 30 days of Decision and Order of the Board. On the date of filing in Superior Court for Clark County, Mr. Aguirre’s attorney mailed copies of the notice of appeal to the Board of Industrial Insurance Appeals, the Director of the Department of Labor and Industries, and the self-insured employer, Kroger, Inc., as provided in RCW 51.52.110. CP 1. A Proof of Service was then filed April 2, 2018, showing that mailing, CP 2, but did not contain a

certification of mailing. Realizing the oversight, on August 27, 2018, Mr. Aguirre's attorney filed an amended Proof of Service, CP 4, which showed the original mailing and did contain a certification pursuant to GR 13. Unlike MAR 7.1, there is no requirement within RCW 51.52.110 that the Proof of Service be filed within the same period of time as the notice of appeal and actual service.¹

Although proof of service is the documentation showing service, it is the fact of service, not the proof of service, that gives the Superior Court jurisdiction to hear the appeal. *Crider v. Othello*, 9 Wn. App. 536, 538, 513 P.2d 571 (1973). The court may acquire jurisdiction even though the proof of service was defective, and the formal proof of service may be amended to reflect the true facts or add further details. *In re Estate of Palucci*, 61 Wn. App. 412, 416, 810 P.2d 970 (1991). *Washington Practice, Civil Procedure, Tegland*, Volume 14, § 8.33. The amendment to the Proof of Service filed on August 14, 2018, adding the certification cured the irregularity in the Proof of Service filed on April 2, 2018.

¹ For Purposes of MAR 7.1 under which a party seeking a trial *de novo* of an arbitration award must file a written request for trial and proof that a copy of the request has been filed within 20 days after the entry of the award. *Sunderland v. Allstate Indem. Co.*, 100 Wn. App. 324, 327, 995 P.2d 614 (2000).

Since RCW 51.52.110 provides for mailing of the notice of appeal, there is a question as to whether Civil Rule 4, Process, applies to commencement of an action in Superior Court. None of the provisions of (4)(g), Return of Service, would seem to apply. But assuming they do, there is at least a requirement that the proof of service have a certification pursuant to GR 13. CR 4(h), Amendment of Process, states that at any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. Since the appeal is on the record established before the Board, and no new evidence may be admitted in Superior Court pursuant to RCW 51.32.110, Kroger would not be prejudiced by the amendment to the Proof of Service, and it did not result in any delay. Though Mr. Aguirre's attorney did not first file a motion to amend his proof of service, that issue was not presented to the trial court, and has been waived by Kroger. RP 1-14, CR 12(h)(1).

ATTORNEY FEES

Pursuant to RCW 51.52.130, if on appeal to superior or appellate court from the decision and order of the board is reversed or modified, and

additional relief is granted to the worker, a reasonable fee for the services of the workers attorney shall be fixed by the court and payable by the self-insured employer. If Mr. Aguirre prevails in the court of appeals and in superior court, a reasonable attorney fee before each court should be awarded to his attorney.

CONCLUSION

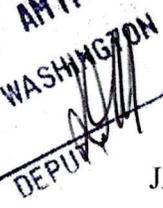
The Superior Court for Clark County has jurisdiction to hear the appeal from the Board of Industrial Insurance Appeals, the irregularity in the Proof of Service having been cured by the filing of a second Proof of Service adding a certification pursuant to GR 13.

Dated this 29 day of April, 2019.

Respectfully submitted,



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Attorney for Jason Aguirre,
Appellant

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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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.)
_____)

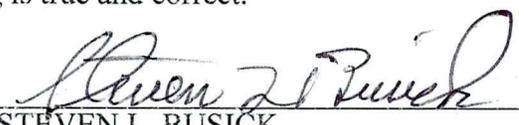
The undersigned states that on Monday, April 29, 2019, I served via US Mail, as indicated below, Brief of Appellant, addressed as follows:

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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.

Dated: April 29, 2019.



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