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STATE OF WASHINGTON

No. 54705-4-I

SUPREME COURT
OF THE STATE OF WASHINGTON

2005 SEP 21 11 29 03

MATTHEW SETO,
Petitioner,

v.

AMERICAN ELEVATOR, INC.,
Respondent.

PETITION FOR DISCRETIONARY REVIEW

Scott A. Sayre, WSBA No. 29533
Tucker F. Blair, WSBA No. 29567
Attorneys for Petitioner Matthew Seto

BLAIR MEEKER BROWN, LLP
2505 Second Avenue, Suite 500
Seattle, WA 98121
(206) 204-0300

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUE PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....1

E. ARGUMENT.....3

 1. Mr. Seto’s Constitutional Right to Trial by Jury has Been Abridged.....3

 2. Controlling Precedent and MAR 6.2 Require Service of the Award.....4

 3. Requiring Actual Service Will Reduce Congestion in the Courts.....9

F. CONCLUSION.....10

APPENDIX.....A-1

 Decision of the Appellate Court Terminating Review.....A-2

Seto v. American Elevator, Inc., __ Wn.App. __,
 118 P.2d 373 (2005).....A-13

TABLE OF CASES

Alvarez v. Banach, 153 Wn.2d 834, 199 P.3d 402 (2005).....3, 7

Connolly v. State, 79 Wn.2d 500, 487 P.2d 1050 (1971).....6

Domingo v. Los Angeles County Metro. Transp. Auth.,
74 Cal.App.4th 550, 88 Cal.Rptr.2d 224 (1999).....8, 10

Haywood v. Aranda, 97 Wn.App. 741, 987 P.2d 121 (1999).....4

Knudsen v. Patton, 26 Wn.App. 134, 611 P.2d 1354 (1980).....3

Nevers v. Fireside, 133 Wn.2d 804, 947 P.2d 721 (1997).....6, 9

Oats v. Oats, 148 Cal.App.3d 416, 196 Cal.Rptr. 20 (1983).....8

Perkins Coie v. Williams, 84 Wn.App. 733, 929 P.2d 1215 (1997).....3, 10

Roberts v. Johnson, 137 Wn.2d 84, 969 P.2d 446 (1999).....3, 6, 9

Seto v. American Elevator, Inc., __ Wn.App. __, 118 P.2d 373
(2005).....1, 3, 7, 9

State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001).....6

Terry v. City of Tacoma, 109 Wn.App. 448, 36 P.3d 553 (2001).....9

CONSTITUTIONAL PROVISIONS

Article I, Sec. 21, of the Washington State Constitution.....3

STATUTES

RCW 7.06.050.....4

RCW 7.06.070.....4

COURT RULES

CR 5(b)(2)(A).....5, 7

CR 6(e).....7

MAR 1.3(b)(2).....5

MAR 6.2.....4, 5, 6

MAR 7.1(a).....4, 5

California Rules of Court, Rule 1615(b).....8

California Rules of Court, Rule 1616(a).....8

A. IDENTITY OF PETITIONER

Matthew Seto asks this court to accept review of the court of appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Seto seeks review of the decision of the Court of Appeals, Division I, filed on August 22, 2005, affirming the trial court's denial of Mr. Seto's request for a trial de novo. *Seto v. American Elevator, Inc.*, ___ Wn.App. ___, 118 P.2d 373 (2005). A copy of the decision is in the Appendix at pages A-2 through A-12. A copy of the published opinion is in the Appendix at pages A-13 through A-17.

ISSUE PRESENTED FOR REVIEW

Whether the Mandatory Arbitration Rules (MAR) require that actual service of the arbitration award must be completed before the 20-day period to request a trial de novo begins.

STATEMENT OF THE CASE

On April 27, 2004, the parties tried this matter in arbitration. On April 28, 2004, the arbitrator sent an e-mail message to both parties attaching copies of the arbitration award and a certificate of mailing stating that a copy of the award had been mailed both parties. CP 25. Neither document was signed by the arbitrator and the certificate of mailing was not dated. *Id.* The text of the e-mail stated that the award and

certificate of mailing would be filed “no later than tomorrow (April 29, 2004).” CP 24.

Also on April 28, 2004, the arbitrator signed the arbitration award and certificate of mailing and filed both documents with the King County Clerk. CP 11.

Mr. Seto received service of the award by U.S. mail on April 29, 2004. CP 23. Neither the copy of the award nor the attached certificate of service bore a date stamp from the King County Superior Court or otherwise indicated that the documents had actually been filed the previous day. CP 54-56. On May 19, 2004, 20 days after service of the award, Mr. Seto served a copy of a Request for Trial De Novo upon defendant American Elevator, Inc. (“American Elevator”), and filed the Request for Trial De Novo and confirmation of service upon American Elevator with the King County Clerk. CP 1-3.

On May 21, 2004, American Elevator moved to set aside Mr. Seto’s request for trial de novo on the basis that the request was untimely. CP 5-7. On the same date, the King County Superior Court Arbitration Department, citing MAR 7.1(a), filed a Notice of Waiver of Right to Trial De Novo. CP 4. Following briefing on the issue, the trial court issued an order setting aside Mr. Seto’s request for a trial de novo. CP 42-43.

Mr. Seto appealed the trial court's order setting aside his request for a trial de novo to Division I of the Washington State Court of Appeals. In a split decision, the appellate court affirmed the trial court. The appellate court's published opinion was filed on August 22, 2005. *Seto*, ___ Wn.App. ___, 118 P.2d at 373.

ARGUMENT

Review by this Court is appropriate for three reasons. First, the decision has denied Mr. Seto his constitutional right to a jury trial. Second, the appellate court's decision terminating review is in conflict with this Court's decisions in *Alvarez v. Banach*, 153 Wn.2d 834, 199 P.3d 402 (2005) and *Roberts v. Johnson*, 137 Wash.2d 84, 969 P.2d 446 (1999). Finally, the decision concerns matters of substantial public interest as it will increase "congestion in the courts and delays in hearing civil cases." See *Perkins Coie v. Williams*, 84 Wn.App. 733, 737, 929 P.2d 1215 (1997).

1. Mr. Seto's Constitutional Right to Trial by Jury has Been Abridged.

Article I, Section 21 of the Washington State Constitution guarantees the right to a jury trial in a civil action. *Knudsen v. Patton*, 26 Wn.App. 134, 137, 611 P.2d 1354 (1980). The mandatory arbitration

statute provides that “[n]o provision of this chapter may be construed to abridge the right to trial by jury.” RCW 7.06.070; *Haywood v. Aranda*, 97 Wn.App. 741, 748, 987 P.2d 121 (1999). Mr. Seto complied with all requirements and deadlines under the Mandatory Arbitration Rules. He has not waived his right to a trial de novo by inactivity or otherwise. The appellate court’s decision therefore construes the MAR in a manner that abridged and indeed deprived Mr. Seto of his right to trial by jury.

2. Controlling Precedent and MAR 6.2 Require Service of the Award.

MAR 6.2 and 7.1(a) implement RCW 7.06.050(1) and set out the respective filing obligations of the arbitrator and the party requesting a trial de novo.¹ MAR 6.2 provides: “Within 14 days after conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party. On the arbitrator’s application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days

¹ RCW 7.06.050(1) provides:

Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded

for the filing and service of the award.” MAR 7.1(a) then sets out a 20-day period for filing a request for a trial de novo:

Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

MAR 7.1(a).

Mr. Seto does not seek enlargement of the 20-day period. Nor does he challenge the sufficiency of the certificate of mailing the arbitrator filed with King County Clerk as “proof of service” under CR 5(b)(2)(B).² Rather, he seeks a determination that the 20-day period begins only after service of the award.

The first sentence of MAR 6.2 requiring the arbitrator to file “proof of service” of course imposes the requirement that the arbitrator actually serve the award. Indeed, the second sentence of MAR 6.2 restates the arbitrator’s obligation as requiring service. MAR 6.2. It also confirms that both filing and service must be completed within the deadlines set forth: “the arbitrator may apply for and the court may allow up to 14

² Under MAR 1.3(b)(2), CR 5 applies to service of all papers in a mandatory arbitration proceeding. CR 5(b)(2)(B) permits service by mail. The certificate of mailing filed by the arbitrator conformed to the requirements of CR 5(b)(2)(B).

additional days for *the filing and service* of the award.” *Id.* (emphasis added).

The appellate court’s analysis went no further than the first sentence of MAR 6.2. It improperly read the service requirement out of the Rule. Court rules are interpreted as though drafted by the Legislature using normal principles of statutory construction. *Nevers v. Fireside*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). And a “fundamental rule of statutory construction requires that language within a statute be construed to have meaning and purpose, and that it not be rendered superfluous.” *Connolly v. State*, 79 Wn.2d 500, 503, 487 P.2d 1050 (1971). A court must construe language to give meaning to the entire [rule]. *State v. Keller*, 143 Wn.2d 267, 278, 19 P.3d 1030 (2001). When read as a whole, MAR 6.2 evinces an intent that the arbitrator must serve as well as file the award within the prescribed time periods.

The 20-day period under MAR 7.1(a) is triggered only upon completion by the arbitrator of every act required under MAR 6.2. Filing of the arbitration award is incomplete absent strict compliance with MAR 6.2. *Roberts*, 137 Wn.2d at 90, 969 P.2d 446. Strict compliance includes timely “filing and service of the award.”

The appellate court's decision also disregards this Court's recent explanation of the timing rules regarding proof of service. In *Alvarez*, this Court noted that "[p]roof of service by mail is not deemed complete until the third day after mailing. *Alvarez*, 153 Wn.2d at 838, 199 P.3d 402 (emphasis added). Under the reasoning of *Alvarez*, the proof of service filed on April 28 did not become effective until service became effective – either on May 3, three days after the award was filed under the presumptive rule of CR 5(b)(2)(B), or, at the earliest, on April 29 when Mr. Seto was actually served with the award.³ As Judge Applewick noted in his dissent:

The interpretation given by the majority creates a rule which provides a 20-day appeal period for a party served with the arbitrator's award by personal service, but an appeal period of less than 20-days for a party served with the award by mail. We would not interpret the proof of service as being effective upon filing if it provided the party *will be* personally served with the award three days after it was filed. Nor should we interpret effective date of proof of service on a party served by mail to be the date of filing, when service will not be effective as a matter of law until three days after mailing and when doing so has the effect of shortening the appeal period.

Seto, ___ Wn.2d ___, 118 P.3d at 377 (Applewick, J., dissenting) (emphasis in original).

³ Under the Civil Rules, *service* by mail is not deemed complete until three days after mailing. CR 5(b)(2)(A). *See also*, CR 6(e) (adding three days when a party required to do some act or take some proceedings is served by mail).

Ineffective proof of service should not suffice to start the 20-day time period under MAR 7.1 as it contains an inherent risk of inequitable results. For example, if the arbitrator files a proper certificate of mailing but the notice does not reach the party, under the appellate court's reasoning the party could be held to have waived the right to trial based on notice they never received. Under the MAR, a party should not be faulted for missing a deadline they did not know existed.

A California appellate court faced this precise question under mandatory arbitration rules nearly identical to MAR 6.2 and 7.1. *Domingo v. Los Angeles County Metro. Transp. Auth.*, 74 Cal.App. 4th 550, 553, 88 Cal.Rptr.2d 224 (1999).⁴ That court held that the proper and equitable interpretation of the rules was to start counting the time for filing a request for a trial de novo only after the award is served. *Id.* See also *Oats v. Oats*, 148 Cal.App.3d 416, 421, 196 Cal.Rptr. 20 (1983) (finding service as “essential” in an arbitration as in any other proceeding).

Here, the appellate court's decision allows any conforming certificate of mailing to start and the 20-day period - regardless of whether

⁴ See Cal. Rules of Court, Rule 1615(b) (stating “[w]ithin 10 days after the conclusion of the arbitration hearing the arbitrator shall file the award with the clerk, with proof of service on each party to the arbitration ...”); California Rules of Court, Rule 1616(a) (stating “[w]ithin 30 days after the arbitration award is filed with the clerk of the court, a party may request a trial by filing with the clerk a request for trial, with proof of service of a copy upon all other parties appearing in the case ...”)

service is effected or even attempted. This makes no sense. While a necessary step in perfecting the award, proof of service, absent actual service, proves nothing at all. The California court identified the obvious: the act of filing proof of service remains a nullity until actual service is completed. Here, actual service was not completed until April 29. The 20-day period should not have begun until that date.

The appellate court's reasoning is also at odds with this Court's holding in *Roberts*, 137 Wn.2d at 91, 969 P.2d 446. In *Roberts*, this Court declined to interpret the nearly identical language regarding the manner of service in MAR 6.2 and 7.1 "to have different meanings and to require different acts." *Id.* It found that "the requirement of MAR 6.2 – that the arbitration award be filed 'with proof of service' – is no more ambiguous than the mandate of MAR 7.1(a) - that the request for trial de novo be filed 'along with' proof of service." *Id.* The appellate court instead turned to a Division II opinion for the proposition that MAR 7.1(a) requires service but MAR 6.2 does not. *Seto*, ___ Wn App. ___, 118 P.3d at 376. *See Terry v. City of Tacoma*, 109 Wn.App. 448, 457, 36 P.3d 553 (2001) (interpreting MAR 6.2 and MAR 7.1(a) as requiring different acts). Mr. Seto asks this Court to adhere to the holding of *Roberts* and reaffirm that filing of the award, absent service upon the parties, is ineffective.

3. Requiring Actual Service Will Reduce Congestion in the Courts.

The primary goal of the MAR is to “reduce congestion in the courts and delays in hearing civil cases.” *Nevers*, 133 Wn.2d at 815, 947 P.2d 721 (citing *Perkins Coie*, 84 Wn.App. at 737, 929 P.2d 1215). On the premise that not every proof of service proves service, the California appellate court concluded that “judicial efficiency” would improve by starting the period for requesting a trial de novo only after actual service of the award. *Domingo*, 74 Cal.App.4th at 554, 88 Cal.Rptr.2d 224. The apparent utility of using the filing date as a date certain on which to start the 20-day appeal period is illusory. The filing date insures the parties will act promptly only if the arbitrator actually serves the award.

Furthermore, Mr. Seto should not have to turn to the court docket or Clerk to determine deadlines bearing on his right to trial. The better construction of the Rules requires the arbitrator to reconcile filing and service dates. Here, the arbitrator not only failed to coordinate filing and service, he created further ambiguity by forwarding the parties an e-mail that stated two possible filing dates. The public interest is better served by an efficient court system in which all parties, including the court, understand their obligations without the necessity of collateral inquiry.

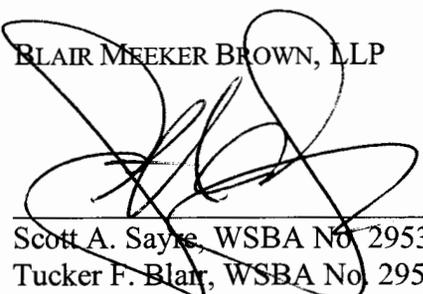
See Id.

CONCLUSION

Mr. Seto requests that this Court accept review of the appellate court decision terminating review designated in part B of this petition. The appellate court decision has denied Mr. Seto his constitutional right to a jury trial. The appellate court decision is furthermore in conflict with a prior decision of this Court's finding that a certificate of service is ineffective as proof of service until three days after mailing. It is similarly in conflict with a prior decision of this Court finding that MAR 6.2 and MAR 7.1(a) have the same meaning and require the same acts. Finally, the appellate court decision adversely affects the public interest by promoting judicial inefficiency.

DATED this 21st day of SEPTEMBER, 2005.

BLAIR MEEKER BROWN, LLP



Scott A. Sayre, WSBA No. 29533
Tucker F. Blair, WSBA No. 29567
Attorneys for Petitioner

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

MATTHEW SETO, a single person,)	
)	No. 54705-4-1
Appellant,)	
)	
v.)	
)	PUBLISHED OPINION
AMERICAN ELEVATOR, INC., a)	
Washington corporation,)	
)	
Respondent.)	FILED: <u>August 22, 2005</u>

SCHINDLER, J. – The trial court denied Matthew Seto’s request for a trial de novo as untimely under the Mandatory Rules of Arbitration (MAR). The question presented is whether service must be complete before the 20-day time period to request a trial de novo begins. The plain language of MAR 7.1 says that the 20-day period to file a request for trial de novo begins on the day the award is filed with the clerk. We conclude the arbitrator’s MAR 6.2 obligation to file “proof of service” when filing the award does not extend the 20-day period by the time it takes to complete service. Because Seto filed his request for trial de novo 21 days after the award was filed, the trial court correctly entered judgment on the arbitration award. We affirm.

No. 54705-4-1/2

FACTS

The facts are undisputed. Matthew Seto sued American Elevator, Inc., and the case proceeded to arbitration. On April 28, the arbitrator ruled in favor of American Elevator and by e-mail provided the attorneys with a copy of the arbitration award and the certificate of mailing. The arbitrator said in the e-mail that he would file the award "no later than" April 29.

The arbitrator filed the arbitration award and the certificate of mailing on April 28 with the King County Clerk. The certificate states:

I certify under penalty of perjury under the laws of the State of Washington that I mailed on this date a copy of the **ARBITRATION AWARD**, properly addressed and postage prepaid, to the parties listed¹

Seto received his copy of the arbitration award in the mail on April 29. He filed a request for trial de novo on May 19, which was 21 days after the arbitrator filed the award and certificate of mailing and 20 days after Seto received his copy. On May 21, the King County Superior Court Arbitration Department filed a "Notice of Waiver of Right to Trial De Novo."² Citing MAR 7.1, the Notice states that because the arbitration award and proof of service were filed on April 28, Seto's request for trial de novo was untimely. On May 24, American Elevator filed a motion to set aside Seto's request for a trial de novo and asked the court

¹ Clerk's Papers (CP) at 56.

² CP at 4.

No. 54705-4-1/3

to enter judgment on the arbitration award. The court entered judgment on the arbitration award and Seto appeals.

ANALYSIS

Seto contends that the MAR 7.1 20-day period for the aggrieved party to file a request for a trial de novo should not begin until the party has actually received service of the arbitration award. His argument is based on the "proof of service" language in MAR 6.2.

MAR 6.2 FILING OF AWARD, provides in pertinent part:

Filing and Service of Award. Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party.

MAR 7.1 REQUEST FOR TRIAL DE NOVO, provides:

(a) Service and Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

If the aggrieved party does not request a trial de novo by the 20-day deadline in MAR 7.1(a), the prevailing party is entitled to entry of judgment on the award. MAR 6.3.

Interpretation and construction of a court rule is a question of law reviewed de novo. Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

Our Supreme Court has strictly interpreted the requirements of MAR 7.1. See Roberts v. Johnson, 137 Wn.2d 84, 90-93, 969 P.2d 446 (1999); Simmerly v.

No. 54705-4-1/4

McKee, 120 Wn. App. 217, 84 P.3d 919, rev. denied, 152 Wn.2d 1033 (2004).

The MAR implement the basic procedural requirements of RCW 7.06.050.³

Seto argues that the words "proof of service" in MAR 6.2 should be interpreted as requiring the arbitrator to effect actual and completed service before filing a certificate of proof of service.⁴ Seto contends his interpretation is preferable because it would be more consistent with the proof of service requirement in MAR 7.1.

The unambiguous language of MAR 6.2 requires "proof of service." Where the language in a court rule is unambiguous, "we give it its plain meaning." Only where language is ambiguous do we construe it to fulfill what we discern to be the drafter's intent. Simmerly, 120 Wn. App. at 221. "Proof of service" is a term of art. It does not mean proof that the party has actually received service. Id., at 222.

The drafters used the language "proof of service" in MAR 6.2 rather than using the MAR 7.1 language, "has been served." If the drafters had intended

³ RCW 7.06.050(1) provides:

Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

⁴ Here, there is no dispute the proof of service was a certificate of an attorney that conformed to the requirements of CR 5(b)(2)(B). According to this rule, "proof of service" by mail means an affidavit or certificate from the person who mailed the papers. CR 5(b)(2)(B).

No. 54705-4-I/5

MAR 6.2 to require actual service or proof that a copy of the award "has been served" as stated in MAR 7.1, they would have used the same language. See Id. at 221. We conclude that by using the phrase "proof of service" in MAR 6.2 the drafters approved the use of a certificate or affidavit indicating that the arbitrator had put the award in the mail. The drafters did not require the arbitrator to certify that service was complete. The 20-day period for filing a request for a trial de novo under MAR 7.1 begins to run when the arbitrator has filed both the award and proof of service under MAR 6.2. Roberts, 137 Wn.2d at 92.⁵

This interpretation of MAR 6.2 is supported by our decision in Terry v. City of Tacoma, 109 Wn. App. 448, 36 P.3d 553 (2001), and the recent Supreme Court decision in Alvarez v. Banach, 153 Wn.2d 834, 199 P.3d 402 (2005). In Terry, the aggrieved party served a request for trial de novo on the opposing party, and then filed a copy of the request with a "received" stamp from the clerk's office and the opposing attorney's office. Terry, 109 Wn. App. at 451. The trial court held that the request for trial de novo did not strictly comply with MAR 7.1 because the manner of service of the request was not stated, and dismissed the litigant's request as untimely. Id. at 451. This court reversed and held that the requirement of MAR 7.1(a) for "proof that a copy has been served," does not mandate an affidavit of service, but only "some evidence" of time, place

⁵ This means the aggrieved party may have fewer than 20 days after receiving service to file for a trial de novo.

No. 54705-4-1/6

and manner of service. Id. at 457. To reach this conclusion, the court in Terry described and contrasted the language used in MAR 7.1 with the language in MAR 6.2:

MAR 7.1 does not use the phrase 'proof of service,' but rather requires 'proof that a copy [of the trial de novo request] has been served.' It is well established that when different words are used in the same statute we will presume that the legislature intended a different meaning to attach to each word. . . Here, the drafters of the MAR chose not to use the phrase 'proof of service'; therefore, they must have contemplated something different from 'proof of service' as it is ordinarily understood. This is more than mere semantics, for 'proof of service' is a term of art meaning an affidavit attested by the person who effected service.⁶

In Alvarez, the Supreme Court held that by using the past tense in MAR 7.1 to require that the request for trial de novo must be filed "along with proof that a copy *has been served* upon all other parties appearing in the case," the drafters intended that the opposing party had actually received service of the request for trial de novo. Alvarez, 153 Wn.2d at 840 (emphasis added). By contrast, the drafters did not use the past tense in MAR 6.2. We must therefore conclude that the drafters did not intend the opposing party to actually receive service of the request for trial de novo. An interpretation of the language used in MAR 6.2 that requires something other than what a strict reading of the rule requires is not in accord with the appellate courts' strict interpretation of the MAR. See, Simmerly, 120 Wn. App. at 221.

⁶ Terry, 109 Wn. App. at 457.

No. 54705-4-1/7

Our interpretation defeats Seto's argument that he actually could have waited until May 23 to file his request because under CR 5(b)(2)(A) and CR 6(e) service was not complete until three days after the award was mailed on April 28.⁷ These rules which provide that service by mail is deemed complete three days after mailing, do not change the time when the 20-day MAR 7.1 period begins to run. And MAR 6.2 does not require completed service, only that the arbitrator file "proof of service."

CONCLUSION

We conclude the unambiguous language of MAR 6.2, which requires the arbitrator to file "proof of service" together with the award, is satisfied by proof that the award has been put in the mail. MAR 6.2 does not require the arbitrator to wait until service is complete before the arbitrator files "proof of service" and thereby starts the running of the MAR 7.1 20-day time period. Here, the arbitrator complied with MAR 6.2 when he filed the award and certificate of mailing on April 28. Seto's request for trial de novo 21 days later was untimely.

⁷ CR 5(b)(2)(A) provides:

If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail . . .

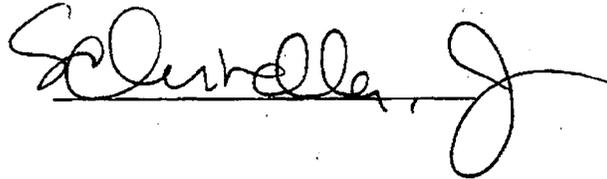
CR 6(e) provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

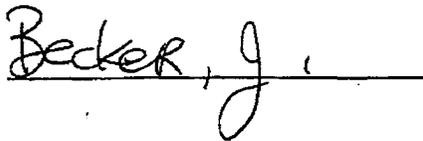
No. 54705-4-1/8

We affirm the trial court's decision to enter judgment on the arbitration award.

American Elevator is entitled to attorneys' fees on appeal under MAR 7.3 after compliance with RAP 18.1.⁸



WE CONCUR:



⁸ The court in Kim v. Pham, 95-Wn. App. 439, 446-47, 975 P.2d 544 (1999), interpreted MAR 7.3 "as requiring a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial because they failed to comply with requirements for proceeding to a trial de novo such as MAR 7.1(a)."

Seto v. American Elevator, No. 54705-4-I

APPELWICK, J. (dissenting) - I respectfully dissent.

The question is not whether the 20-day period for filing a request for trial de novo following a mandatory arbitration can be enlarged. Clearly it cannot. MAR 7.1 says so. The question is when the 20-day period commences.

The Supreme Court made it clear that the arbitrator merely filing the award is not sufficient. Roberts v. Johnson, 137 Wn.2d at 92. As Terry v. City of Tacoma notes, Roberts holds the 20-day period to file for trial de novo is tolled until the arbitrator files both the award and the proof of service. Terry, 109 Wn. App. at 454. Roberts involved ineffective proof of service in a personal service case.

This case involves service by mail, but the question here is not whether the arbitrator took the proper steps to comply with MAR 6.2. In this case it is undisputed that the arbitrator mailed the award to Seto, filed the award with the court, and filed the certificate of mailing the award all on the same day. The certificate of mailing was a proper form of "proof of service" under CR 5(b)(2)(B). These steps comply with MAR 6.2. The question is when the acts which were taken to comply with MAR 6.2 became effective to commence the 20-day appeal period under MAR 7.1.

MAR 1.3(b)(2) makes it clear that CR 5 applies to service of all papers in a MAR proceeding. Under CR 5(b)(2)(A) it is clear that service is complete on the third day following the day upon which the papers are placed in the mail (the exception for weekends and holidays is not relevant here). The Supreme Court

No. 54705-4-1/2

cited CR 5(b)(2)(A) for the proposition that, "Proof of service by mail is not deemed complete until the third day after mailing." Alvarez v. Banach, 153 Wn.2d at 838 (emphasis added).

MAR 1.3(b)(3) states unambiguously that time must be computed under CR 6(a) and (e). Further, CR 6(e) makes it clear that "whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or [some] other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Applied to the facts here, service and the proof of service filed by the arbitrator did not become effective until three days after the award was filed with the court and mailed to Seto. The 20-day period in which to file the notice of appeal was tolled an additional three days by virtue of service by mail; it was not enlarged as the majority characterizes it.

The interpretation given by the majority creates a rule which provides a 20-day appeal period for a party served with the arbitrator's award by personal service, but an appeal period of less than 20 days for a party served with the award by mail. We would not interpret the proof of service as being effective upon filing if it provided the party will be personally served with the award three days after it was filed. Nor should we interpret effective date of proof of service on a party served by mail to be the date of filing, when service will not be effective as a matter of law until three days after mailing and when doing so has the effect of shortening the appeal period.

No. 54705-4-1/3

By serving the award by mail the arbitrator tolled the 20-day appeal period an additional three days. Seto filed the notice of appeal on the 18th day of the 20-day appeal period. The notice of appeal was timely. The trial court erred in dismissing the appeal.

I would reverse.

Appelwick, J

Court of Appeals of Washington,
Division I.
Matthew SETO, a single person, Appellant,
v.
AMERICAN ELEVATOR, INC., a Washington
corporation, Respondent.
No. 54705-4-I.

Aug. 22, 2005.

Background: The Superior Court, King County, Robert H. Alsdorf, J., denied litigant's request for a trial de novo following adverse arbitration award as untimely under the Mandatory Rules of Arbitration (MAR) and entered judgment on award for other party. Litigant appealed.

Holding: The Court of Appeals, Schindler, J., held that request for trial de novo was not timely filed within 20-day time period following filing of award. Affirmed.

Applewick, J., dissented with opinion.

West Headnotes

[1] Appeal and Error 893(1)

30k893(1) Most Cited Cases

Interpretation and construction of a court rule is a question of law reviewed de novo.

[2] Arbitration 73.7(4)

33k73.7(4) Most Cited Cases

Supreme Court has strictly interpreted the requirements of Mandatory Rules of Arbitration (MAR) rule that the 20-day period to file a request for trial de novo begins on the day the award is filed with the clerk. MAR 7.1.

[3] Courts 85(2)

106k85(2) Most Cited Cases

Where the language in a court rule is unambiguous, courts give it its plain meaning; only where language is ambiguous do courts construe it to fulfill what courts discern to be the drafter's intent.

[4] Process 127

313k127 Most Cited Cases

"Proof of service" is a term of art, which does not

mean proof that the party has actually received service.

[5] Arbitration 54

33k54 Most Cited Cases

Use of the phrase "proof of service" in Mandatory Rules of Arbitration (MAR) rule requiring arbitrator to file "proof of service" when filing the award, drafters approved the use of a certificate or affidavit indicating that the arbitrator had put the award in the mail; drafters did not require the arbitrator to certify that service was complete. MAR 6.2.

[6] Arbitration 73.7(4)

33k73.7(4) Most Cited Cases

Request for trial de novo following arbitration award filed 21 days after award was filed was untimely; the unambiguous language of Mandatory Rules of Arbitration (MAR) rule which requires the arbitrator to file "proof of service" together with the award, is satisfied by proof that the award has been put in the mail, and rule does not require the arbitrator to wait until service is complete before the arbitrator files "proof of service" and thereby starts the running of the MAR 20-day time period to file a request for trial de novo. MAR 6.2, 7.1.

*374 Tucker F. Blair, Blair & Meeker LLP, Scott A. Sayre, Brown Sayre PLLP, Seattle, for Appellant.

Erik B. Anderson, Jerrett E. Sale, Deborah L. Carstens, Bullivant Houser Bailey PC, Seattle, for Respondent.

SCHINDLER, J.

¶ 1 The trial court denied Matthew Seto's request for a trial de novo as untimely under the Mandatory Rules of Arbitration (MAR). The question presented is whether service must be complete before the 20-day time period to request a trial de novo begins. The plain language of MAR 7.1 says that the 20-day period to file a request for trial de novo begins on the day the award is filed with the clerk. We conclude the arbitrator's MAR 6.2 obligation to file "proof of service" when filing the award does not extend the 20-day period by the time it takes to complete service. Because Seto filed his request for trial de novo 21 days after the award was filed, the trial court correctly entered judgment on the arbitration award. We affirm.

FACTS

¶ 2 The facts are undisputed. Matthew Seto sued American Elevator, Inc., and the case proceeded to arbitration. On April 28, the arbitrator ruled in favor of American Elevator and by e-mail provided the attorneys with a copy of the arbitration award and the certificate of mailing. The arbitrator said in the e-mail that he would file the award "no later than" April 29.

¶ 3 The arbitrator filed the arbitration award and the certificate of mailing on April 28 with the King County Clerk. The certificate states:

I certify under penalty of perjury under the laws of the State of Washington that I mailed on this date a copy of the **ARBITRATION AWARD**, properly addressed and postage prepaid, to the parties listed.... [FN1]

FN1. Clerk's Papers (CP) at 56.

¶ 4 Seto received his copy of the arbitration award in the mail on April 29. He filed a request for trial de novo on May 19, which was 21 days after the arbitrator filed the award and certificate of mailing and 20 days after Seto received his copy. On May 21, the King County Superior Court Arbitration Department filed a "Notice of Waiver of Right to Trial De Novo." [FN2] Citing MAR 7.1, the Notice states that because the arbitration award and proof of service were filed on April 28, Seto's request for trial de novo was untimely. On May 24, American Elevator *375 filed a motion to set aside Seto's request for a trial de novo and asked the court to enter judgment on the arbitration award. The court entered judgment on the arbitration award and Seto appeals.

FN2. CP at 4.

ANALYSIS

¶ 5 Seto contends that the MAR 7.1 20-day period for the aggrieved party to file a request for a trial de novo should not begin until the party has actually received service of the arbitration award. His argument is based on the "proof of service" language in MAR 6.2.

¶ 6 MAR 6.2 FILING OF AWARD, provides in pertinent part:

Filing and Service of Award. Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party.

¶ 7 MAR 7.1 REQUEST FOR TRIAL DE NOVO, provides:

(a) **Service and Filing.** Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

If the aggrieved party does not request a trial de novo by the 20-day deadline in MAR 7.1(a), the prevailing party is entitled to entry of judgment on the award. MAR 6.3.

[1][2] ¶ 8 Interpretation and construction of a court rule is a question of law reviewed de novo. Nevers v. Fireside, Inc., 133 Wash.2d 804, 809, 947 P.2d 721 (1997). Our Supreme Court has strictly interpreted the requirements of MAR 7.1. See Roberts v. Johnson, 137 Wash.2d 84, 90-93, 969 P.2d 446 (1999); Simmerly v. McKee, 120 Wash.App. 217, 84 P.3d 919, rev. denied, 152 Wash.2d 1033, 103 P.3d 201 (2004). The MAR implement the basic procedural requirements of RCW 7.06.050. [FN3]

FN3. RCW 7.06.050(1) provides:

Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

¶ 9 Seto argues that the words "proof of service" in MAR 6.2 should be interpreted as requiring the arbitrator to effect actual and completed service before filing a certificate of proof of service. [FN4] Seto contends his interpretation is preferable because it would be more consistent with the proof of service requirement in MAR 7.1.

FN4. Here, there is no dispute the proof of service was a certificate of an attorney that conformed to the requirements of CR 5(b)(2)(B). According to this rule, "proof of service" by mail means an affidavit or certificate from the person who mailed the papers. CR 5(b)(2)(B).

[3][4] ¶ 10 The unambiguous language of MAR 6.2 requires "proof of service." Where the language in a court rule is unambiguous, "we give it its plain meaning." Only where language is ambiguous do we construe it to fulfill what we discern to be the drafter's intent. Simmerly, 120 Wash.App. at 221, 84 P.3d 919. "Proof of service" is a term of art. It does not mean proof that the party has actually received service. Id., at 222, 84 P.3d 919.

[5] ¶ 11 The drafters used the language "proof of service" in MAR 6.2 rather than using the MAR 7.1 language, "has been served." If the drafters had intended MAR 6.2 to require actual service or proof that a copy of the award "has been served" as stated in MAR 7.1, they would have used the same language. See Id. at 221, 84 P.3d 919. We conclude that by using the phrase "proof of service" in MAR 6.2 the drafters approved the use of a certificate or affidavit indicating that the arbitrator had put the award in the mail. The drafters did not require the arbitrator to certify that service was complete. The 20-day period for filing a request for a *376 trial de novo under MAR 7.1 begins to run when the arbitrator has filed both the award and proof of service under MAR 6.2. Roberts, 137 Wash.2d at 92, 969 P.2d 446. [FN5]

FN5. This means the aggrieved party may have fewer than 20 days after receiving service to file for a trial de novo.

¶ 12 This interpretation of MAR 6.2 is supported by our decision in Terry v. City of Tacoma, 109 Wash.App. 448, 36 P.3d 553 (2001), and the recent Supreme Court decision in Alvarez v. Banach, 153 Wash.2d 834, 109 P.3d 402 (2005). In Terry, the aggrieved party served a request for trial de novo on the opposing party, and then filed a copy of the request with a "received" stamp from the clerk's office and the opposing attorney's office. Terry, 109 Wash.App. at 451, 36 P.3d 553. The trial court held that the request for trial de novo did not strictly comply with MAR 7.1 because the manner of service of the request was not stated, and dismissed the litigant's request as untimely. Id. at 451, 36 P.3d 553. This court reversed and held that the requirement of MAR 7.1(a) for "proof that a copy has been served," does not mandate an affidavit of service, but only "some evidence" of time, place and manner of service. Id. at 457, 36 P.3d 553. To reach this conclusion, the court in Terry described and contrasted the language used in MAR 7.1 with the language in MAR 6.2:

MAR 7.1 does not use the phrase 'proof of service,' but rather requires proof that a copy [of the trial de novo request] has been served.' It is well established that when different words are used in the same statute we will presume that the legislature intended a different meaning to attach to each word ... Here, the drafters of the MAR chose not to use the phrase 'proof of service'; therefore, they must have contemplated something different from 'proof of service' as it is ordinarily understood. This is more than mere semantics, for 'proof of service' is a term of art meaning an affidavit attested by the person who effected service. [FN6]

FN6. Terry, 109 Wash.App. at 457, 36 P.3d 553.

¶ 13 In Alvarez, the Supreme Court held that by using the past tense in MAR 7.1 to require that the request for trial de novo must be filed "along with proof that a copy *has been served* upon all other parties appearing in the case," the drafters intended that the opposing party had actually received service of the request for trial de novo. Alvarez, 153 Wash.2d at 840, 109 P.3d 402 (emphasis added). By contrast, the drafters did not use the past tense in MAR 6.2. We must therefore conclude that the drafters did not intend the opposing party to actually receive service of the request for trial de novo. An interpretation of the language used in MAR 6.2 that requires something other than what a strict reading of the rule requires is not in accord with the appellate courts' strict interpretation of the MAR. See, Simmerly, 120 Wash.App. at 221, 84 P.3d 919.

¶ 14 Our interpretation defeats Seto's argument that he actually could have waited until May 23 to file his request because under CR 5(b)(2)(A) and CR 6(e) service was not complete until three days after the award was mailed on April 28. [FN7] These rules which provide that service by mail is deemed complete three days after mailing, do not change the time when the 20-day MAR 7.1 period begins to run. And MAR 6.2 does not require completed service, only that the arbitrator file "proof of service."

FN7. CR 5(b)(2)(A) provides:

If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail ...

CR 6(e) provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

CONCLUSION

[6] ¶ 15 We conclude the unambiguous language of MAR 6.2, which requires the arbitrator to file "proof of service" together with the award, is satisfied by proof that the award has been put in the mail. MAR 6.2 *377 does not require the arbitrator to wait until service is complete before the arbitrator files "proof of service" and thereby starts the running of the MAR 7.1 20-day time period. Here, the arbitrator complied with MAR 6.2 when he filed the award and certificate of mailing on April 28. Seto's request for trial de novo 21 days later was untimely. We affirm the trial court's decision to enter judgment on the arbitration award. American Elevator is entitled to attorneys' fees on appeal under MAR 7.3 after compliance with RAP 18.1. [FN8]

FN8. The court in Kim v. Pham, 95 Wash.App. 439, 446-47, 975 P.2d 544 (1999), interpreted MAR 7.3 "as requiring a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial because they failed to comply with requirements for proceeding to a trial de novo such as MAR 7.1(a)."

BECKER, J., concurs.

APPELWICK, J (dissenting) - I respectfully dissent.

The question is not whether the 20-day period for filing a request for trial de novo following a mandatory arbitration can be enlarged. Clearly it cannot. MAR 7.1 says so. The question is when the 20-day period commences.

The Supreme Court made it clear that the arbitrator merely filing the award is not sufficient. Roberts v. Johnson, 137 Wash.2d at 92, 969 P.2d 446. As Terry v. City of Tacoma notes, Roberts holds the 20-day period to file for trial de novo is tolled until the arbitrator files both the award and the proof of service. Terry, 109 Wash.App. at 454, 36 P.3d 553. Roberts involved ineffective proof of service in a personal service case.

This case involves service by mail, but the question here is not whether the arbitrator took the proper steps to comply with MAR 6.2. In this case it is undisputed that the arbitrator mailed the award to Seto, filed the award with the court, and filed the certificate of mailing the award all on the same day. The certificate of mailing was a proper form of "proof of service" under CR 5(b)(2)(B). These steps comply with MAR 6.2. The question is when the acts which were taken to comply with MAR 6.2 became effective to commence the 20- day appeal period under MAR 7.1.

MAR 1.3(b)(2) makes it clear that CR 5 applies to service of all papers in a MAR proceeding. Under CR 5(b)(2)(A) it is clear that service is complete on the third day following the day upon which the papers are placed in the mail (the exception for weekends and holidays is not relevant here). The Supreme Court cited CR 5(b)(2)(A) for the proposition that, "Proof of service by mail is not deemed complete until the third day after mailing." Alvarez v. Banach, 153 Wash.2d at 838, 109 P.3d 402 (emphasis added).

MAR 1.3(b)(3) states unambiguously that time must be computed under CR 6(a) and (e). Further, CR 6(e) makes it clear that "whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or [some] other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Applied to the facts here, service and the proof of service filed by the arbitrator did not become effective until three days after the award was filed with the court and mailed to Seto. The 20-day period in which to file the notice of appeal was tolled an additional three days by virtue of service by mail; it was not enlarged as the majority characterizes it.

The interpretation given by the majority creates a rule which provides a 20- day appeal period for a party served with the arbitrator's award by personal service, but an appeal period of less than 20 days for a party served with the award by mail. We would not interpret the proof of service as being effective upon filing if it provided the party will be personally served with the award three days after it was filed. Nor should we interpret effective date of proof of service on a party served by mail to be the date of filing, when service will not be effective as a matter of law until three days after mailing and when doing so has the effect of shortening the appeal period.

118 P.3d 373
118 P.3d 373
(Cite as: 118 P.3d 373)

Page 5

*378 By serving the award by mail the arbitrator tolled the 20-day appeal period an additional three days. **Seto** filed the notice of appeal on the 18th day of the 20-day appeal period. The notice of appeal was timely. The trial court erred in dismissing the appeal.

I would reverse.

118 P.3d 373

END OF DOCUMENT

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on the 21st day of September, 2005, I caused to be delivered and correct copy of the foregoing PETITION FOR DISCRETIONARY REVIEW to the following counsel of record:

Mr. Erik B. Anderson
Bullivant Houser Bailey, PC
2300 Westlake Office Tower
1601 Fifth Avenue
Seattle, WA 98101-1618

VIA:

- Facsimile
- Hand-delivery
- US Mail
- Certified/Return Receipt Requested
- Legal Messenger

Signed: 
Esther Booker

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