

IN THE SUPREME COURT OF IOWA

No. 18-0047

ISAAC ORTIZ,

Ortiz-Appellant,

vs.

**LOYD ROLING CONSTRUCTION AND GRINNELL MUTUAL
REINSURANCE,**

Defendants-Appellees.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY**

Polk County No. CVCV054944

APPELLANT'S APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in affirming the District Court's dismissal of Isaac Ortiz's Petition for Judicial Review on the grounds that Mr. Ortiz failed to substantially comply with the service requirements of Iowa Code Section 17A.19(2), where Ortiz's Counsel sent Defendants the Petition electronically within the required ten-day statutory period and where Defendants were not prejudiced by any delay in receiving the Petition by regular mail?

STATEMENT SUPPORTING FURTHER REVIEW

Further review is warranted on several grounds. First, the Supreme Court should grant further review of this case because the Court of Appeals has entered a decision in conflict with a decision of this Court on an important matter. Iowa R. App. P. 6.1103(1)(b)(1). The decision of the Court of Appeals conflicts with this Court's case of *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193 (Iowa 1988). The decision of the Court of Appeals uses an abstract, "one size fits all" approach rather than following the fact-sensitive, purposive approach set forth in *Brown*. Such abstract analysis is in direct conflict with *Brown* and the broader purpose of the Administrative Procedure Act, which is "to simplify the process of judicial review of agency action as well as increase its ease and availability." *Brown*, 423 N.W.2d at 195. Thus, the Court of Appeals' decision eschews the fact-sensitive and purposive interpretive analysis required by the substantial compliance standard.

Second, the Supreme Court should grant further review of this case because the Court of Appeals has decided an important question of law that has not been, but should be, settled by the Iowa Supreme court. Iowa R. App. P. 6.1103(1)(b)(2). The Court of Appeals' general conclusion that service by email or EDMS will never satisfy the service requirements of

Iowa Code section 17A.19(2) under any circumstances is an important question of law, which has not been settled by the Iowa Supreme Court. The Court of Appeals cites to no legal authority to support its position. The cases cited by the decision of the Court of Appeals do not involve the substantial compliance standard, or the cases do not involve service through electronic mail or electronic service.

Lastly, and related to the important question of law decided by the Court of Appeals, this case presents an issue of broad public importance that the Iowa Supreme Court should ultimately determine. Iowa R. App. P. 6.1103(1)(b)(4). Meaningful access to justice is of broad public importance. It is vital that this Court interpret the substantial compliance standard in light of everchanging modes of communication available with modern technology. The Court of Appeals refused to perform such an analysis, nor did it cite to any cases that contemplated modern modes of communication. Thus, this case should be reviewed by the Supreme Court so that it can determine what effect, if any, electronic mail and/or electronic service have when determining substantial compliance with § 17A.19(2).

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PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that this Appellant’s Application for Further Review was served and filed on the 10th day of December 2018, upon the following persons and upon the Clerk of the Supreme Court by electronic filing and electronic delivery to the parties via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2) to the following:

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STATEMENT OF THE FACTS

On September 19, 2017, Isaac Ortiz filed a Petition for Judicial Review utilizing the Iowa Electronic Document Management System (EDMS). App. 26. Ortiz was seeking review of a September 1, 2017 decision issued by the Iowa Workers' Compensation Commissioner. App. 24. Ortiz's Counsel for the Petition for Judicial Review, Andrew Bribriesco, had also represented Ortiz in front of the Iowa Workers' Compensation Commissioner. App. 18.

Attorney Stephen Spencer represented Defendants in front of the Iowa Workers' Compensation Commissioner. App.18. On September 19, 2017, Ortiz's Counsel added Stephen Spencer, a registered user of EDMS, as a party to be served with the Petition for Judicial Review via EDMS. App. 14. During litigation in front of the Commissioner, Ortiz's Counsel served documents on Attorney Stephen Spencer by e-mail and Mr. Spencer never objected to receiving electronic service by e-mail in the administrative proceedings. App. 14.

Defendants' Attorney of Record, Attorney Stephen W. Spencer, received a copy of the Petition for Judicial Review by EDMS on or about September 19, 2017. App. 14. There is no dispute that Attorney Stephen W.

Spencer received the Petition by EDMS within the ten (10) day time frame.

App. 14.

On September 19, 2017, Ortiz's Counsel e-mailed Attorney Stephen Spencer a copy of the Petition for Judicial Review. App. 14. On September 20, 2017, Ortiz's Counsel filed a proof of service stating he e-mailed a copy of the petition to Defendants' Counsel. App. 26. Ortiz's Counsel also e-mailed Defendants' Counsel a filed-stamped copy of the Petition on September 20, 2017. App. 14.

On September 28, 2017, nine days after the filing of the Petition, Attorney Christopher Spencer sent an e-mail to Ortiz's Counsel on behalf of Defendants. App. 18. Attorney Christopher Spencer was never an attorney of record for Defendants during litigation in front of the Iowa Workers' Compensation Commissioner. App. 19. Attorney Christopher Spencer wrote the following in his September 28, 2017 e-mail:

I have been given documents that were recently filed with the Polk County District Court on Isaac Millanes Ortiz. I was wondering if you were going to be sending the Petition to us via regular mail? Please let me know as soon as you can.

App. 16. The next day, September 29, 2017, Ortiz's Counsel responded that he would have his paralegal send a copy of the Petition via regular mail.

App. 16.

On September 29, 2017, Ortiz's Counsel instructed his paralegal to send a copy of the Petition for Judicial Review by regular mail. App. 16. On October 3, 2017, Ortiz's Counsel sent another copy of the Petition for Judicial Review to Defendants' Counsel by regular mail. App. 21; App. 23.

PROCEDURAL HISTORY

On September 19, 2017, Ortiz filed his Petition for Judicial Review in EDMS following the adverse decision by the Iowa Workers' Compensation Commissioner. On September 20, 2017, Ortiz's Counsel filed an affidavit of service stating he e-mailed a copy of the Petition for Judicial Review to Defendants' Counsel.

On October 9, 2017, Defendants filed a Motion to Dismiss Ortiz's Petition, arguing Ortiz failed to substantially comply with the service requirements of Iowa Code Section 17A.19(2) and that the Polk County District Court therefore lacked jurisdiction. Ortiz resisted.

Following a hearing, on December 30, 2017 the District Court granted Defendants' Motion to Dismiss, concluding Ortiz failed to substantially comply with the service requirements of Section 17A.19(2) and that it therefore lacked jurisdiction on judicial review.

On January 8, 2018, Ortiz filed a Notice of Appeal. On November 21, 2018, the Court of Appeals entered an Order affirming the District Court's

dismissal of Ortiz's Petition for Judicial Review.

Ortiz has now timely filed this Application for Further Review.

ARGUMENT

- I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITION ON JUDICIAL REVIEW BECAUSE ORTIZ SUBSTANTIALLY COMPLIED WITH THE SERVICE REQUIREMENTS OF IOWA CODE SECTION 17A.19(2) BY SENDING DEFENDANTS A FILE-STAMPED COPY OF THE PETITION WITHIN THE REQUIRED TEN-DAY STATUTORY PERIOD AND BECAUSE DEFENDANTS WERE NOT PREJUDICED BY ANY DELAY IN RECEIVING THE PETITION BY REGULAR MAIL.

The District Court erred in dismissing Plaintiff's Petition for Judicial Review because Plaintiff substantially complied with statutory requirements in service of Section 17A.19(2)'s purpose. Defendants' Counsel received the Petition through both EDMS and e-mail within days of its filing and Defendants were not prejudiced in any way by Ortiz's Counsel sending the Petition by regular mail after September 29, 2017.

A. Standard of Review

This Court reviews the granting of a motion to dismiss for errors at law. *Cooksey v. Cargill Meat Sols. Corp.*, 831 N.W.2d 94, 96 (Iowa 2013). To the extent this Court is required to engage in statutory interpretation, the review is also for correction of errors at law. *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017).

B. Iowa Code Section 17A.19 and *Brown*

“Unless another statute expressly provides otherwise, the provisions of Iowa Code Section 17A.19 are the ‘exclusive means’ for seeking judicial review of administrative action.” *Brown*, 423 N.W.2d at 193 (quoting *Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980)). Iowa Code section 17A.19(2) provides, in relevant part, the following:

Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional. The delivery by personal service or mailing referred to in this subsection may be made upon the party’s attorney of record in the proceeding before the agency. A mailing shall be addressed to the parties or their attorney of record at their last known mailing address. Proof of mailing shall be by affidavit.

The statute requires that service be completed within ten days of the filing of the petition for judicial review. Iowa Code § 17A.19(2). Failure to comply with Iowa Code § 17A.19(2) is a subject matter jurisdiction issue and deprives a District Court of appellate jurisdiction over a case. *Brown*, 423 N.W.2d at 194. However, “[S]ubstantial—not literal— compliance with section 17A.19(2) is all that is necessary to invoke the jurisdiction of the district court.” *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988). What constitutes substantial compliance depends on

the facts of each particular case. *Id.*

In *Brown*, the petitioner mailed a copy of the petition for judicial review to the respondent's attorney of record on a Saturday. *Id.* at 193. The petition, however, was not actually filed with the court until two days later on a Monday. *Id.* This Court held that the petitioner had nonetheless substantially complied with Section 17A.19(2). *Id.* at 194.

In considering whether the petitioner substantially complied with Section 17A.19(2), the *Brown* Court defined "substantial compliance" as follows:

"substantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Id. (citations omitted). Courts must construe the Administrative Procedure Act broadly to effectuate its purposes. *Id.*

As the *Brown* Court notes, Section 17A.19(2) is to be construed broadly to effectuate the purposes of the Administrative Procedure Act. The *Brown* Court specifically refers to the following purpose: "to simplify the process of judicial review of agency action as well as increase its ease and

availability.” *Brown*, 423 N.W.2d at 195. The Court of Appeals nowhere mentions this purpose, and thus does not answer whether excluding electronic communication from the substantial compliance analysis “simplifies the process” of judicial review, or increases the “ease and availability” of the process. Ortiz contends that the decision of the Court of Appeals has the exact opposite effect.

The decision of the Court of Appeals completely disregards the purposive approach to substantial compliance and undermines the core of the *Brown* decision. One major reason that the *Brown* Court explicitly endorsed the substantial compliance standard when interpreting Section 17A.19(2) was because the legislature amended the statute to provide alternative forms of service. *See, e.g.*, 1981 Iowa Acts Ch. 24, § 1 (deleting the requirement that mail must be “file stamped,” and permitting personal service).

This amendment was in direct response to the literalist approach to the service requirements previously endorsed by the Court. *See, e.g.*, *Dawson v. Iowa Merit Emp’t Comm’n*, 303 N.W.2d 158, 160 (Iowa 1981); *Neumeister v. City Dev. Bd.*, 291 N.W.2d 11, 14 (Iowa 1980). As the *Richards* Court recognized, “the purpose of the amendment was to *relax the statutory service requirements* for persons seeking judicial review of agency

decisions[.]” *Richards*, 362 N.W.2d at 488 (emphasis added). By ignoring the purpose of the Act, and the legislative history relaxing the service requirements, the decision of the Court of Appeals is in direct conflict with *Brown*, which clearly identifies the simplification of the judicial review process, to increase its ease and availability, as the polestar of the substantial compliance analysis.

C. Plaintiff Substantially Complied with Section 17A.19(2)

Plaintiff substantially complied with the service requirements of Section 17A.19(2) where Plaintiff sent Defendants the Petition within ten days of its filing.

Section 17A.19(2) provides that service via mailing is jurisdictional, “but that subsection should not be construed to make all errors or omissions in service jurisdictional.” *Frost v. S. S. Kresge Co.*, 299 N.W.2d 646, 648 (Iowa 1980). There are numerous cases where a plaintiff has been found to substantially comply with Sections 17A.19(2) despite failing to literally comply with the Statute where the plaintiff’s efforts gave the defendant notice of the petition within ten days of its filing. *See, e.g., Monson v. Iowa Civil Rights Comm’n*, 467 N.W.2d 230, 232 (Iowa 1991) (finding substantial compliance as a result of the plaintiff’s efforts despite tardy service beyond the ten-day deadline); *Richards v. Iowa Dep’t of Revenue*, 362 N.W.2d 486,

487–89 (Iowa 1985) (finding compliance with delivery-by-personal-service alternative was sufficient where the petitioner timely, but personally, served opposing party contrary to statutory prohibition of such service); *Buchholtz v. Iowa Dept. of Pub. Instruction*, 315 N.W.2d 789, 792 (Iowa 1982) (the petitioner’s failure to serve the proper respondent constituted substantial compliance where the plaintiff served a closely related agency and the respondent thus received notice of the petition within ten days); *Cowell v. All American, Inc.*, 308 N.W.2d 92 (Iowa 1981) (the respondent was never served but its attorney was timely served); *Brown*, 423 N.W.2d 193 (the respondent was served before the petition was filed); *Frost*, 299 N.W.2d 646 (the respondent had been misnamed but was still timely served).

In *Cowell*, a plaintiff served the petition on the defendant’s attorney and this Court found substantial compliance under a prior version of Section 17A.19(2) that did not explicitly approve service on a party’s attorney and rather stated that the mailing “shall be addressed to the parties at their last known mailing address.” *Cowell*, 308 N.W.2d 92. Here, similarly, though Section 17A.19(2) does not explicitly approve service on a party’s attorney through EDMS or e-mail, the purpose of the Statute is still served where Plaintiffs in fact delivered the petition to Defendants within the ten-day window.

This Court has held that failure to serve a petition for judicial review within ten days from filing of the petition does *not* defeat the district court’s jurisdiction. *See Monson*, 467 N.W.2d at 232. In *Monson*, the plaintiff instructed a Polk County sheriff to serve the defendants but the sheriff failed to do so before the ten-day deadline. *Id.* This Court found substantial compliance despite the tardy personal service where the delay amounted to a mere “technical error and was a result of a mistake by the sheriff’s office and not the petitioner. *Id.* *Monson* does not stand for the proposition that a time delay can never constitute substantial compliance unless the delay can fairly be attributed to someone other than the plaintiff. *Id.* Rather, *Monson* merely demonstrates that under the facts of that case, the plaintiff had attempted to comply with the statute and provide the defendant with the petition within the ten-day statutory window, even if technically the plaintiff did not in fact serve the petition within ten days. *Id.*

While the relevant Iowa cases involving Section 17A.19(2) here took place before the advent of electronic filing and e-mail, a finding of substantial compliance here is within the spirit of the above cases where each plaintiff made efforts to notify the defendant of the relevant petition within the required ten-day period.

Any cases where a plaintiff made no attempt to serve the defendant within the statutory time period are distinguishable because in this instance, Plaintiff made multiple attempts to provide Defendants with the Petition within the statutory time period. *See Van Baale v. Employment Appeal Bd.*, 728 N.W.2d 853 (Iowa Ct. App. 2007) (plaintiff made no attempt at all to send the petition to the defendants within the ten-day period); *Birchansky v. Iowa Dept. of Pub. Health*, 2013 WL 3830196, at *4 (Iowa App. July 24, 2013) (the petitioner failed to substantially comply with Section 17A.19(2) because the petitioner only served one respondent and the other defendants got the petition within ten days of its filing only because the properly served respondent sent the other defendants copies); *Neumeister v. City Dev. Bd.*, 291 N.W.2d 11, 14 (Iowa 1980) (the plaintiff *never* sent the defendant a file-stamped copy of the petition); *Record v. Iowa Merit Employment Dept.*, 285 N.W.2d 169, 171 (Iowa 1979) (the plaintiff did not notify the defendant *in any way* of the filing of his petition for judicial review).

However, the decision of the Court of Appeals creates a bright-line rule that electronic mailing and electronic service of a Petition within the ten-day period *never* amounts to even an *attempt* to comply with the service requirements of § 17A.19(2), including in situations like the instant case, where opposing counsel acknowledged receipt of the Petition.

The decision of the Court of Appeals decides an important question of law yet to be settled by the Supreme Court as none of the cases cited by the Court of Appeal involve electronic mail or electronic service at all. *See, e.g., Monson v. Iowa Civil Rights Comm'n*, 467 N.W.2d 230, 232 (Iowa 1991); *Brown*, 423 N.W.2d at 193–94; *Richards v. Iowa Dep't of Revenue*, 362 N.W.2d 486, 487–89 (Iowa 1985); *Buchholtz v. Iowa Dep't of Pub. Instruction*, 315 N.W.2d 789, 792–93 (Iowa 1982); *Cowell v. All-American, Inc.*, 308 N.W.2d 92, 94–95 (Iowa 1981); *Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980); *Frost v. S.S. Kresge Co.*, 299 N.W.2d 646, 647–48 (Iowa 1980).

The decision of the Court of Appeals involves an issue of broad public importance, namely, meaningful access to justice. The decision of the Court of Appeals that electronic mailing and/or electronic service never amounts to an attempt to satisfy the service requirements of § 17A.19(2) is detrimental to meaningful access to justice, and the provision of more complete and just outcomes for litigants. For example, according to the Court of Appeals, access to justice is to be denied even where an opposing party who has already been electronically served with the Petition for Judicial Review, *in complete bad faith* tells Petitioner that it would be permissible for the Petitioner to physically mail the Petition past the ten-day service window, merely in order

to generate grounds for dismissal. Is it unclear how such a conclusion provides meaningful access to justice, and it is even more unclear how this conclusion is consistent with the purposes of the Iowa Administrative Procedures Act.

Here, Plaintiff did in fact attempt to comply with Section 17A.19(2) and undertake proper service prior to the ten-day deadline. Plaintiff added Defendants' Counsel to EDMS so that Defendants would receive a file-stamped copy of the Petition. Plaintiff additionally e-mailed two copies of the Petition to Defendants' Counsel. Ortiz's Counsel instructed his paralegal to send a copy of the Petition for Judicial Review by regular mail within the ten-day period.

It is true that Ortiz did not *literally* comply with Iowa Code section 17A.19(2) as Defendants did not receive a copy of the Petition for Judicial Review *by regular mail* within ten (10) days of it being filed. This is not the issue. The issue is whether Ortiz substantially complied with Iowa Code section 17A.19(2) and the decision of the Court of Appeals created a bright line rule here that is tantamount to an improper shift from a standard of substantial compliance to the standard of literal compliance.

The District Court created a rule, affirmed by the Court of Appeals, that a party must attempt to mail or personally serve a petition for judicial review within ten days for there to be substantial compliance. The *Brown*

decision did not mandate that certain part(s) of Section 17A.19(2) must be literally complied with or that other part(s) of the statute should have leniency; rather, the *Brown* Court held that each case must be determined upon the particular circumstances of the case while keeping with the purposes of the Act in mind. *Brown*, 423 N.W.2d at 194-95.

The decision of the Court of Appeals did not adequately take into account the background adversarial proceedings in its analysis. For example, here opposing counsel acknowledged receipt of the petition by electronic mail and was electronically served through EDMS, a form of service to which he had previously consented. *See* Iowa R. Elec. P. 16.315(1)(a) (“Completing the registration process [for EDMS] constitutes a request for, and consent to, electronic service of court-generated documents and documents other parties file electronically.”).

Defendants argue that the *Brown* Court’s reference to the agency-specific adversarial process makes the forms of service applicable to the Iowa Workers’ Compensation Agency relevant. Thus, it is appropriate to consider that the Iowa Workers’ Compensation Agency serves orders, rulings, and decisions by email and the parties accept notice of those orders, rulings, and decisions by email only. The Court of Appeals does not address

this in its analysis, and thus does not properly apply the agency-specific analysis that the *Brown* Court envisioned.

Under the facts here, Plaintiff made a good-faith effort to comply with the requirements of Section 17A.19(2) and provide Defendants proper notice through reasonable methods appraised to give Defendants notice of the Petition's filing. Defendants timely received a file-stamped copy of the Petition and then later received a copy by regular mail. This Court should find Plaintiff substantially complied with Section 17A.19(2).

1. Ortiz's delivery of the Petition served Section 17A.19(2)'s purpose.

Plaintiff's timely electronic transmittal of the Petition to Defendants served Section 17A.19(2)'s purpose where Plaintiff provided Defendants notice of the Petition within ten days.

Substantial compliance means that a court should determine whether a statute has "been followed sufficiently so as to carry out the intent for which it was adopted." *Brown*, 423 N.W.2d at 194. In order for a court to find substantial compliance, a plaintiff must show that the purpose of the statute was served. *Id.* The Court in *Brown* also found that it must construe the Administrative Procedure Act broadly to effectuate its purposes. *Id.* One of these purposes is:

to simplify the process of judicial review of agency action as well as increase its ease and availability. In accomplishing its objectives, the intention of this chapter is to strike a fair balance between these purposes and the need for efficient, economical and effective governmental administration.

Frost v. S. S. Kresge Co., 299 N.W.2d 646, 648 (Iowa 1980) (internal citations and quotation marks omitted).

One of the Administrative Procedure Act's purposes is "to simplify the process of judicial review of agency action as well as increase its ease and availability." Iowa Code § 17A.1. Another purpose is to provide a procedure whereby the preferred disposition of cases is on their merits. *Cunningham v. Iowa Dept. of Job Serv.*, 319 N.W.2d 202, 205 (Iowa 1982) (Justice Larson dissenting) (citing Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 Iowa L.Rev. 731, 736-37 (1975)).

The legislature last amended section 17A.19(2) in 1981 by expanding the means available to petitioners to accomplish service of petitions.

Richards v. Iowa Dept. of Revenue, 362 N.W.2d 486, 488 (Iowa 1985) (citing 1981 Iowa Acts Ch. 24, § 1). This Court has held that 1981 amendments "were intended to relax the statutory service requirements for persons seeking judicial review of agency decisions." *Richards v. Iowa Dept. of Revenue*, 362 N.W.2d 486, 488 (1985).

The law in Iowa has long sought to avoid “highly technical requirements that might serve no useful purpose and yet deprive parties of their day in court.” *Cooksey v. Cargill Meat Sols. Corp.*, 831 N.W.2d 94, 103–04 (Iowa 2013). “The overarching goal of the law must be to achieve substantial justice among the parties.” *Id.* (citing *Arnold v. Collins*, 195 Iowa 1140, 1141, 193 N.W. 408, 409 (1923) (“The controversy is largely one in which the mere technicalities of procedure and practice have been so magnified and exaggerated as to obscure the proper end and aim of all litigation, the effectuating of substantial justice between the contending parties.”)). The ultimate goal in interpreting a statute is to determine the legislative intent by considering the statute’s language, objects sought to be accomplished, and evils sought to be remedied. *Brown*, 423 N.W.2d at 195–96 (Iowa 1988) (citing *LeMars Mut. Ins. Co. v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981) (superseded on other grounds)).

If a defendant actually receives timely notice from the plaintiff and there is no prejudice, this Court may properly find substantial compliance and that the purpose of Section 17A.19(2) has been served. *See Buchholtz v. Iowa Department of Public Instruction*, 315 N.W.2d 789, 792 (Iowa 1982); *see also Frost v. S.S. Kresge Co.*, 299 N.W.2d 646, 647–48 (Iowa 1980); *Cooksey v. Cargill Meat Sols. Corp.*, 831 N.W.2d 94, 104 (Iowa 2013).

In *Buchholtz*, this Court concluded that proper service cured a naming defect in the caption, explaining: “[I]t is undisputed that the board received timely mailed notice of the petition and suffered no prejudice from the mistaken designation.” *Buchholtz*, 315 N.W.2d at 792. In *Frost*, the Court found sufficient compliance with Section 17A.19(2) “because the record showed the [defendant] actually received notice of the proceeding and no prejudice occurred.” *Id.* (discussing *Frost*, 299 N.W.2d at 647–48. Conversely, in *Iowa Department of Transportation*, the defendant never received any notice of the proceedings and this Court refused to excuse a naming error and find substantial compliance. *Iowa Department of Transportation v. Iowa District Court*, 534 N.W.2d 457 (Iowa 1995).

The Defendants in this case received timely notice and there was no prejudice. Thus, this Court may properly find substantial compliance. *See Buchholtz*, 315 N.W.2d at 792; *Frost*, 299 N.W.2d at 647–48. The issue of core importance in these cases involving naming mistakes was that the actual defendants had in fact received timely notice of the Petition and that the defendants did not suffer any prejudice, not that the Petitions were sent via regular mail. *See Buchholtz*, 315 N.W.2d at 792; *Frost*, 299 N.W.2d at 647–48. The purpose of Section 17A.19(2) is to ensure defendants receive timely notice of a Petition. Such notice was made in this instance.

As written, the statute merely provides that service shall be by “mailing.” Section 17A.19(2). It does not specify whether the mailing must be through post or regular mail, e-mail, or certified mail. Sending a petition to a defendant’s counsel via electronic mailing comports with the purpose of the statute where it is a quick, efficient, and reliable means for providing notice of the filing of a petition for judicial review. Ultimately, the purpose of Section 17A.19(2) is to ensure respondents receive timely notice of a judicial action against them. The Plaintiffs’ efforts here certainly satisfied the purpose of Section 17A.19(2): to ensure the defendants received notice of the Petition for Judicial Review within ten days of its filing. *See Brown*, 423 N.W.2d at 196 (the purpose of the ten-day notice requirement in section 17A.19(2) was more than served by the Court’s substantial compliance determination where the defendant had “constructively” received twelve days’ notice).

Further, Section 17A.19 provides that “[N]othing in this chapter shall abridge or deny to any person or party who is aggrieved or adversely affected by any agency action the right to seek relief from such action in the courts.” The result of the Court of Appeals’ decision here is to deprive Plaintiff of his right to seek relief in the courts. Such a result contravenes the purposes of the Administrative Procedure Act where Plaintiff timely sent

Defendants the Petition, Defendants were in no way prejudiced by Plaintiff's late transmittal of the Petition via regular mail, and Plaintiff is nonetheless deprived of his day in court.

No undesirable potential or "evils sought to be remedied" exist with electronically serving a respondent's attorney a file-stamped copy of a petition via EDMS. *See Brown*, 423 N.W.2d at 195–96 ("Nor do we discern any other mischief that the legislature might have intended to prevent by a jurisdictional requirement forbidding the type of notice effected here."). EDMS allows the court system to directly deliver a file-stamped document to a party's attorney of record, the same ultimate result as if a party sends a file-stamped document to that attorney through regular mail.

The purposes of the Administrative Procedure Act, to simplify administrative proceedings and procedure and dispose of cases on the merits wherever possible, would not be served in preventing Plaintiff from bringing his Petition where Plaintiff provided Defendants with actual and timely notice but merely failed to send the Petition via regular mail within ten days. This technicality would serve no useful purpose, as Defendants did in fact timely receive the Petition, albeit by *electronic* mailing rather than *regular* mailing, yet Plaintiff would still be deprived of his day in court. It is unlikely the legislature would intend such consequences.

In the absence of prejudice, Petitioner carried out the intent of Iowa Code Section 17A.19(2) by serving a copy of the Petition within ten days by a competent and reliable means of mailing service. Utilizing EMDS in this case merely simplified the process of judicial review of agency action as well as increase its ease and availability—exactly the purpose of the Administrative Procedure Act.

The legislative purpose behind Section 17A.19(2)'s “service” requirements—the provision of timely notice to all parties of the nature of the action—has been satisfied. Defendants timely received multiple copies of the Petition, which alerted them that their rights might be affected. Plaintiff substantially complied with Section 17A.19(2) as Plaintiff's efforts to provide Defendants with the Petition within ten days served the Statute's purpose.

2. Defendants were not prejudiced by receiving Petition by regular mail late.

Defendants were not prejudiced by Plaintiff's failure to send the Petition by regular mail where Defendants certainly knew the Petition existed within the ten-day notice period and Plaintiff timely provided the Defendants with multiple copies of the Petition.

This Court has previously considered prejudice to the defending party as a factor when deciding whether or not a plaintiff substantially complied

with Section 17A.19(2). *See, e.g., Brown*, 423 N.W.2d at 195-196; *Frost*, 299 N.W.2d at 647 (Iowa 1980) (noting the defendant had not been prejudiced in determining substantial compliance); *Monson*, 467 N.W.2d at 232 (holding the plaintiff had substantially complied with Section 17A.19(2) where (1) a technical error that was not attributable to the petitioner caused a “brief” delay in timely service and (2) the defendant failed to establish any prejudice from the delay).

In *Brown*, the Court held that the plaintiff’s notice substantially complied with Section 17A.19(2) and specifically reasoned that this holding served to accomplish the Administrative Procedure Act’s purpose *because the defendant made no claim of prejudice as a result of the notice. Brown*, 423 N.W.2d at 195-196. While an allegation of prejudice is not a requirement for substantial compliance, whether a party has been prejudiced is nonetheless a factor this Court considers in determining whether there has been substantial compliance with section 17A.19(2). *Brown*, 234 N.W. 2d at 195; *Buckholtz*, 315 N.W.2d at 793; *Sparks v. Iowa Dept. of Inspections & Appeals*, 779 N.W.2d 495 (Iowa Ct. App. 2010).

Defendants have failed to make a single claim that Ortiz’s late mailing of the Petition prejudiced them. Even if Defendants had raised such an argument, any purported claim of prejudice is particularly dubious here

where Defendants had already received multiple copies of the Petition within ten days of its filing. Ortiz timely served a copy of the Petition on Defendants' Counsel by EDMS and e-mail. Defendants were not prejudiced here where they merely received an additional copy of the Petition by regular mail after the ten-day period following Ortiz's filing of the Petition.

The Court of Appeals and District Court here failed to consider the fact that there was no prejudice to Defendants, a factor this Court has determined has weight in the substantial compliance and statutory purpose analysis.

3. The Parties here were already engaged in adversarial proceedings.

The fact that the parties had already been engaged in adversary proceedings supports a finding of substantial compliance where Plaintiff's method of service comported with prior dealings between the parties.

In *Brown*, this Court found that there is a difference between an original action and judicial review of an administrative decision, as the parties involved in a judicial review action "have already been engaged in adversary proceedings within the agency and know what the case is all about." *Brown*, 423 N.W.2d at 195 (quoting *Richards*, 362 N.W.2d at 488-89). While filing a petition in an original action commences the litigation process, "petitions for judicial review merely initiate a further proceeding,

appellate in nature, in litigations previously commenced before an agency.”
Richards, 362 N.W.2d at 488-89 (citation omitted).

In *Cowell*, the plaintiff sent a copy of the petition to the defendant’s attorney even though Section 17A.19(2) in effect at the time did not explicitly provide for service to a party’s attorney. 308 N.W.2d at 95. This Court nonetheless found substantial compliance where the defendant appeared through its attorney at all times in the prior proceeding, where all filings required to be served on the defendant were served on the attorney, and all communications were previously sent to the attorney. *Id.* This Court reasoned that in these circumstances, the plaintiff could reasonably conclude that the petition should be sent to the defendant’s attorney. *Id.*

In the administrative proceedings, Plaintiff and Defendants regularly communicated and exchanged all documents by e-mail. All documents required to be served on Defendants were served on Defendants’ Attorneys by e-mail. Nothing occurred during the course of these proceedings to indicate Defendants either desired or expected any documents to be sent via regular mail. In these circumstances, Plaintiff could reasonably conclude that Defendants desired to receive documents electronically and that electronic means were a sufficient method of serving litigation-related documents on Defendants.

Like in *Cowell*, even though Section 17A.19(2) does not explicitly provide for electronic service to a party's attorney, this Court may nonetheless find substantial compliance where Plaintiff could reasonably conclude that the Petition should be sent to Defendants' Counsel via e-mail. *Id.*

4. Other jurisdictions have recognized that electronic service is sufficient.

This Court has previously considered case law from other jurisdictions in considering substantial compliance under Section 17A.19. *See Cooksey*, 831 N.W.2d at 101. The following non-precedential case law is apposite here where this Court has not previously considered the issue of electronic service in connection with Section 17A.19(2).

Other jurisdictions have recognized electronic filing and the concomitant service via electronic service to be sufficient for substantial compliance. *See Rohrer v. County of Adams*, No. 10-cv-01453, 2011 WL 805770 (D. Colo. Mar. 1, 2011) (finding substantial compliance with statutory notice requirements of the Colorado Governmental Immunity Act where plaintiff provided electronic service via a County website).

Various federal courts have considered whether court-ordered service of process by e-mail and fax for foreign defendants comports with due process requirements and have concluded that it is proper as long

as there has been a showing that those methods are “reasonably calculated to apprise defendants of the pendency of the action.” See *Philip Morris USA Inc. v. Veles Ltd.*, 2007 WL 725412, *3, 2007 U.S. Dist. LEXIS 19780, *9 (S.D.N.Y., Mar. 12, 2007); *Rio Props. Inc. v. Rio Intl. Interlink*, 284 F.3d 1007, 1017 (9th Cir.2002); *Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l.*, 78 A.D.3d 137, 142, 910 N.Y.S.2d 418, 422–23 (2010).

There are cases in which service by e-mail has been held improper where the plaintiff was unable to make a showing that the defendant would likely receive the transmitted information. See *Ehrenfeld v. Bin Mahfouz*, No. 04 Civ. 9641[RCC], 2005 WL 696769 at *3–4 (S.D.N.Y., Mar. 23, 2005); *Pfizer Inc. v. Domains by Proxy*, No. 3:04cv741 [SRU], 2004 WL 1576703 at *1–2 (D. Conn., July 13, 2004). However, the present matter is not such a case. Plaintiff and Defendants regularly communicated by e-mail and exchanged legal documents via e-mail in the administrative proceedings. Plaintiff had Defendants’ Counsel’s e-mail and not only was Defendants’ Counsel likely to receive the Petition via both EMCS and e-mail, Defendants’ Counsel did in fact receive multiple copies of the Petition within the ten-day statutory window. Service of process by electronic means was reasonably calculated to apprise Defendants of the District Court filing here and thus comported with due process.

CONCLUSION

For the reasons stated above, the Petitioner-Appellant respectfully requests that this Court GRANT further review in this matter and REMAND this case back to the District Court so his Petition for Judicial Review can be heard on the merits.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

We hereby certify that the costs paid for printing Appellant's Application for Further Review was the sum of \$_____.

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IN THE COURT OF APPEALS OF IOWA

No. 18-0047
Filed November 21, 2018

ISAAC ORTIZ,
Petitioner-Appellant,

vs.

LOYD ROLING CONSTRUCTION and GRINNELL MUTUAL REINSURANCE,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge.

Isaac Ortiz appeals the district court's dismissal of his petition for judicial review of a determination of the workers' compensation commissioner.

AFFIRMED.

Anthony J. Bribriesco and Andrew W. Bribriesco of Bribriesco Law Firm, Bettendorf, for appellant.

Stephen W. Spencer and Christopher S. Spencer of Peddicord Wharton, LLP, West Des Moines, for appellees.

Considered by Tabor, P.J., Mullins, J., and Scott, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2018).

SCOTT, Senior Judge.

Isaac Ortiz appeals the district court's dismissal of his petition for judicial review of a determination of the workers' compensation commissioner, contending the district court erred in concluding he failed to substantially comply with the service requirements of Iowa Code section 17A.19(2) (2017).

I. Background Facts and Proceedings

On September 19, 2017, Ortiz filed a petition for judicial review in the Iowa Electronic Document Management System (EDMS). Respondents' counsel of record in the underlying administrative proceedings was "added . . . to the case as a party to the litigation" in EDMS. The same day, Ortiz's counsel's paralegal emailed a copy of the petition for judicial review to respondents' counsel. On September 20, Ortiz's counsel filed an "affidavit of service," noting he emailed a copy of the petition to respondents' counsel. The same day, Ortiz's counsel's paralegal "emailed a copy of the Notice of Filing Petition for Judicial Review and Request for Transmittal of Record, with a copy of the file-stamped Petition for Judicial Review" to respondents' counsel.

On September 28, an attorney for the respondents emailed Ortiz's counsel the following:

I have been given the documents that were recently filed with the Polk County District Court on . . . Ortiz. I was wondering if you were going to be sending the Petition to us via regular mail? Please let me know as soon as you can.

The next day, September 29, counsel for Ortiz responded that he would have his paralegal send a copy of the petition via regular mail. The petition was not placed in the mail until October 3.

On October 9, respondents filed a motion to dismiss the petition, arguing Ortiz failed to substantially comply with the service requirements of section 17A.19(2) and the district court therefore lacked jurisdiction. Ortiz resisted. Following a hearing, the district court granted respondents' motion to dismiss, concluding Ortiz failed to substantially comply with the service requirements of section 17A.19(2) and it therefore lacked jurisdiction on judicial review. As noted, Ortiz appeals.

II. Standard of Review

"We review the district court's dismissal of a petition for judicial review for correction of errors at law." *Strickland v. Iowa Bd. of Med.*, 764 N.W.2d 559, 561 (Iowa Ct. App. 2009). To the extent we are required to engage in statutory interpretation, our review is also for correction of errors at law. *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017). "The sole question is whether the district court correctly applied the law." *Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 600 (Iowa 1998).

III. Analysis

Ortiz argues the district court erred in concluding he failed to substantially comply with the Iowa Administrative Procedure Act's service requirements for judicial review proceedings. Iowa Code section 17A.19(2) provides, in relevant part, the following:

Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional. The delivery by personal

service or mailing referred to in this subsection may be made upon the party's attorney of record in the proceeding before the agency. A mailing shall be addressed to the parties or their attorney of record at their last known mailing address. Proof of mailing shall be by affidavit.

The statute allows for two avenues for service in a judicial review proceeding following a contested agency case: (1) service by the means provided in the Iowa rules of civil procedure for the personal service of an original notice¹ and (2) service by mailing of copies of the petition to all parties named in the petition and all parties of record in the case before the agency. Iowa Code § 17A.19(2). Service under either alternative may be made upon a party's attorney of record in the underlying agency proceedings. *Id.* The statute requires that service be completed within ten days of the filing of the petition for judicial review. *Id.* “[S]ubstantial—not literal—compliance with section 17A.19(2) is all that is necessary to invoke the jurisdiction of the district court.” *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988).

It is generally undisputed that Ortiz's attempt at service does not comply with the delivery-by-personal-service alternative. We therefore only consider whether Ortiz was in substantial compliance with the delivery-by-mailing alternative. Ortiz maintains he substantially complied with the statute because respondents' counsel of record in the administrative proceedings received a file-stamped copy of the petition through email and EDMS within the ten-day period.

¹ See Iowa Rs. Civ. P. 1.302(3)–(5), .305.

Other cases in which Iowa courts have found substantial compliance have involved situations in which the petitioner has made some attempt to comply with the personal service or mailing delivery requirements of section 17A.19(2) before the ten-day period expired. See, e.g., *Monson v. Iowa Civil Rights Comm'n*, 467 N.W.2d 230, 232 (Iowa 1991) (finding substantial compliance where tardy personal service was a result of a mistake by the sheriff's office and not attributable to petitioner); *Brown*, 423 N.W.2d at 193–94 (finding substantial compliance even though service of petition by mailing was made *before* rather than *after* filing of petition); *Richards v. Iowa Dep't of Revenue*, 362 N.W.2d 486, 487–89 (Iowa 1985) (finding compliance with delivery-by-personal-service alternative where petitioner timely, but personally, served opposing party contrary to prohibition of such service under now Iowa Rule of Civil Procedure 1.302(4)); *Buchholtz v. Iowa Dep't of Pub. Instruction*, 315 N.W.2d 789, 792–93 (Iowa 1982) (finding substantial compliance with service-by-mailing alternative where the agency received timely mailed notice but the petition contained a mistaken designation of the agency); *Cowell v. All-American, Inc.*, 308 N.W.2d 92, 94–95 (Iowa 1981) (finding substantial compliance under prior version of section 17A.19(2) where petitioner timely mailed copy of petition to a party's attorney despite statute requiring the mailing "shall be addressed to the parties at their last known mailing address"); *Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980) (finding compliance with section 17A.19 where a party of record before the agency was properly served but was not named as a party in the caption of the petition); *Frost v. S.S. Kresge Co.*, 299 N.W.2d 646, 647–48 (Iowa 1980) (finding compliance with section 17A.19(2)

where petitioner satisfied the mailing requirement but misnamed the agency in her petition).

The statutory service alternative relevant in this case requires the petitioner to “mail” copies of the petition to the relevant parties within ten days of the filing of the petition. Ortiz asks us to conclude that delivery through email or EDMS substantially complies with the mailing requirement. This would require us to read into the statute language that the legislature could supply if it so desires, a measure the supreme court has previously declined to partake in as to section 17A.19(2). See *Dawson v. Iowa Merit Emp’t Comm’n*, 303 N.W.2d 158, 160 (Iowa 1981); *Neumeister v. City Dev. Bd.*, 291 N.W.2d 11, 14 (Iowa 1980); see also *Record v. Iowa Merit Emp’t Dep’t*, 285 N.W.2d 169, 172–73 (Iowa 1979). If the legislature desires to add additional means of service that would provide the district court with jurisdiction once accomplished, it certainly knows how to. See 1981 Iowa Acts ch. 24, § 1 (expanding the means available to petitioners to accomplish service under section 17A.19(2) to bestow jurisdiction upon the district court).

Here, Ortiz made no attempt to comply with the service requirements of section 17A.19(2) before the ten-day period expired. While acknowledging that substantial, as opposed to literal, compliance with the statute is all that is required to provide the district court with jurisdiction, we decline to expand the means of service beyond those expressed by the legislature. We agree with the district court’s conclusion that Ortiz failed to substantially comply with the service requirements of section 17A.19(2) and it therefore lacked jurisdiction on judicial review. We therefore affirm.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
18-0047

Case Title
Ortiz v. Loyd Roling Construction

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