

IN THE SUPREME COURT OF IOWA

No.: 18-0047

Polk County No.: CVCV054944

ISAAC ORTIZ,
Petitioner-Appellant,

v.

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

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. JEANIE VAUDT, JUDGE

RESPONDENTS/APPELLEES' RESISTANCE TO
PETITIONER/APPELLANT'S APPLICATION FOR FURTHER
REVIEW OF THE IOWA COURT OF APPEALS DECISION
FILED NOVEMBER 21, 2018

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RESISTANCE TO APPLICATION FOR FURTHER REVIEW

The first asserted ground for the Iowa Supreme Court to take further review of the decision of the Iowa Court of Appeals is that the Claimant believes the Court of Appeals decision conflicts with the case of *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193 (Iowa 1988). *Iowa R. App. P.* 6.1103(1)(b)(1). There is no conflict with any prior decisions of either the Iowa Court of Appeals or Iowa Supreme Court in this matter.

The Iowa Supreme Court has already addressed the issue presented regarding service of a Petition for Judicial Review under *Iowa Code* § 17A.19(2) and declined to read into the statute additional methods of service beyond those actually provided for in the statute. *Neumeister v. City Development Board*, 291 N.W.2d 11, 14 (Iowa 1980); *Dawson v. Iowa Merit Employment Commission*, 303 N.W.2d 158, 160 (Iowa 1981). The Iowa Court of Appeals merely followed the prior precedent in declining to essentially modify the provisions of *Iowa Code* § 17A.19(2) by reading into the statute language that the Legislature has not included. This approach follows the prior Iowa Supreme Court precedent and is consistent with the holdings of the Iowa Supreme Court and Court of Appeals on this matter.

This case only presents an issue of whether service of a Petition for Judicial Review via EDMS or email would constitute valid service when

Iowa Code § 17A.19(2) requires that the service method be either personal service or by regular mail. The record in this case is undisputed that the Claimant undertook neither of the two required methods of service within the statutorily prescribed 10 days.

The second purported grounds advanced by the Appellant for the request of further review is that 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). While it is true that the Iowa Supreme Court has not specifically addressed whether EDMS or email are to be considered valid methods of service under *Iowa Code* § 17A.19(2), this ignores the prior precedent wherein the Iowa Supreme Court has already addressed alternative means of service beyond those enumerated by the provisions of *Iowa Code* § 17A.19(2). *Neumeister v. City Development Board*, 291 N.W.2d at p. 14 (Iowa 1980); *Dawson v. Iowa Merit Employment Commission*, 303 N.W.2d at p.160 (Iowa 1981). The Iowa Supreme Court has thus already addressed essentially the same arguments and reasoning being advanced by Appellant. So, while precisely the same set of facts have not been addressed, the actual arguments and issues have been settled. New methods of transmitting and exchanging

documents do not change the underlying reasoning of the case law and language of the statute in question.

The final grounds advanced to take further review is that this case presents an issue of broad public importance that the Iowa Supreme Court should ultimately decide. *Iowa R. App. P.* 6.1103(1)(b)(4). As cited in the foregoing, this particular issue has already been decided by the Iowa Supreme Court. The arguments being lodged by the Claimant in this matter are those that have already been rejected, as *Iowa Code* § 17A.19(2) is written with specific methods of service listed. If the Claimant would desire additional methods of service, that is an issue for the Legislature to decide in revising the statute.

STATEMENT OF FACTS

The facts pertinent to the issues presented on appeal are mostly undisputed. The Iowa Workers' Compensation Commissioner issued a decision on September 1, 2017, and the Claimant subsequently filed a Petition for Judicial Review of the administrative decision on September 19, 2017. (App. pp. 24 - 26). Shortly thereafter, on September 20, 2017, counsel for the Appellant filed an Affidavit of Service indicating that the Petition for Judicial Review was sent by email to Stephen Spencer, attorney for the Respondents. (September 20, 2017 Affidavit of Service). The

Judicial Branch filing system generated an EDMS Notice of the filing of the Petition for Judicial Review within ten (10) days of its filing.

On September 28, 2017 counsel for the Respondents sent an email communication to counsel for the Appellant inquiring whether a copy of the Petition for Judicial Review was going to be sent by regular mail. (App. p. 22). On September 29, 2017 counsel for the Appellant responded indicating that the Petition would be sent by mail. (App. p. 22). The Petition for Judicial Review was not sent out by mail on September 29, 2017, and was later postmarked as being sent on October 3, 2017. (App. p. 23).

BRIEF POINT I

THE COURT OF APPEALS AND THE DISTRICT COURT WERE CORRECT IN THE DISMISSAL OF THE CLAIMANT'S PETITION FOR JUDICIAL REVIEW AS HE FAILED TO COMPLY WITH THE SERVICE REQUIREMENTS OF *IOWA CODE* § 17A.19(2) AND THE DISTRICT COURT WOULD NOT HAVE JURISDICITON TO HEAR THIS CLAIM.

ARGUMENT

The right to appeal from a final agency action is purely statutory, and that right is governed by *Iowa Code* § 17A.19. *Iowa Public Service Company v. Iowa State Commerce Com'n*, 263 N.W.2d 766, 768 (Iowa 1978). Pertinent to the issue presented here, *Iowa Code* § 17A.19(2) specifies that service of a Petition for Judicial Review must be accomplished

either by personal service or by mailing within ten (10) days of the filing of Petition for Judicial Review. *Iowa Code* § 17A.19(2).

The Claimant appears to be arguing that there is some type of conflict with the decision of the Iowa Supreme Court in *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193 (Iowa 1988). Indeed, the Iowa Supreme Court has stated that substantial compliance will be what is required under *Iowa Code* § 17A.19. *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988). In the *Brown* case, the Petitioner mailed a copy of the Petition for Judicial Review to the Respondents' attorney of record prior to the filing of the Petition. *Id.* at 193. The issue dealt with in that particular case was whether the Petition for Judicial Review should be dismissed as it was not served within ten (10) days after the Petition was filed, but was served prior to the filing. *Id.* In that particular circumstance, the Iowa Supreme Court determined that the Petitioner substantially complied with the statute by providing the appropriate service method prior to the expiration of the ten (10) day service deadline. *Id.* at 193–194. What the Claimant herein fails to mention in his argument is that the *Brown* decision clearly recognizes earlier Iowa Supreme Court precedent that directly addresses the question of whether alternative means of service are adequate. *Id.* at 194.

The Iowa Supreme Court has already examined the arguments and issues related to the methods of service under *Iowa Code* § 17A.19(2). The Court looked at a prior version of *Iowa Code* § 17A.19(2) that at the time only permitted service by mail, and held that it would not read this *Code* section so as to include personal service as an acceptable means for the service of a Petition for Judicial Review. *Neumeister v. City Development Board*, 291 N.W.2d 11, 14 (Iowa 1980); *Dawson v. Iowa Merit Employment Commission*, 303 N.W.2d 158, 160 (Iowa 1981). In interpreting *Iowa Code* § 17A.19(2), the Iowa Supreme Court declined to read into the Act alternative methods of service beyond those actually enumerated in the statute with the reasoning being that to do otherwise would make the chosen language of the statute meaningless. *Neumeister v. City Development Board*, 291 N.W.2d at 14. In addition, the Iowa Supreme Court has also held that when a party is entitled to service of a Petition for Judicial Review, and that Petition is not served upon that party, the failure to complete the service as required is a jurisdictional flaw. *Record v. Iowa Merit Employment Department*, 285 N.W.2d 169, 173 (Iowa 1979).

The Claimant does not address the above holdings other than to state that *Iowa Code* § 17A.19(2) was amended by the Legislature in response to these opinions. Of course, that is exactly what the District Court and the

Iowa Court of Appeals held herein: It would be up to the Legislature to modify the statute so as to permit additional methods of service, should it see fit to do so. The fact that the Iowa Legislature chose to previously modify the service requirements of *Iowa Code* 17A.19(2) in response to Court decisions is not a reason to simply abandon the service requirements altogether making the language of the *Code* meaningless. Indeed, the opposite is true showing the Legislature is sensitive to changing the service requirements when deemed necessary. The Appellant is essentially making the same argument that was previously rejected by the Iowa Supreme Court.

In contrast to the Claimant's assertion that the Iowa Court of Appeals decision herein is in conflict with the *Brown* decision, the fact is that the Iowa Court of Appeals' decision is consistent with Iowa Supreme Court precedent on the particular issue presented. The Court of Appeals merely applied longstanding Iowa precedent regarding service of a Petition for Judicial Review under *Iowa Code* § 17A.19(2) and the actual language of the statutory section.

The facts are undisputed in this case that neither personal service nor mailing was undertaken or completed within the prescribed ten (10) day statutory deadline. The flaw is a jurisdictional one, and this would deprive the District Court of jurisdiction to hear the appeal. *Cooper v. Kirkwood*

Community College, 72 N.W.2d 160, 164 (Iowa 2010) A Court without jurisdiction may not proceed in any action, and subject matter jurisdiction may not be conferred by agreement of the parties or otherwise. *Id.* A court may even raise the issue upon its own motion. *Record v. Iowa Merit Employment Department*, 285 N.W.2d 169, 173 (Iowa 1979).

The Claimant then goes on to argue that he “substantially complied” with the service requirements of *Iowa Code* § 17A.19(2). However, what Appellant fails to note is that in the cases where substantial compliance was found, all those Petitioners undertook to serve via a proper method and in a timely manner. The Iowa Court of Appeals recognized this stating as follows:

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).

Ortiz v. Lloyd Roling Construction, 2018 WL 6130302 (Iowa App. 2018).

Thus, the Iowa Court of Appeals recognized and considered the cases dealing with substantial compliance, and an actual reading of all of those cases indicates that the serving party made some attempt to timely either mail or personally serve the Respondents. None of those cases actually deal with the method of service. In each of those cases, there was a technical defect, but the Respondents actually received the mailing or personal service.

The closest case the Claimant could cite would be *Monson v. Iowa Civil Rights Commission*, 467 N.W.2d 230 (Iowa 1991). In that particular

case, the Petitioner attempted personal service by providing the Sheriff with a copy of the Petition, but the Petition was not served by the Sheriff within the ten (10) day timeframe specified by statute. *Id.* at 232. However, the *Monson* case shows that the Petitioner actually made an effort to obtain personal service before the ten (10) day deadline, but the service occurred shortly after the ten (10) day requirement due to no fault attributable to the Petitioner. *Id.* at 232. *Monson* actually demonstrates that for a petitioner to avail themselves of “substantial compliance” they must actually undertake one of the statutorily approved means of service within the appropriate ten (10) day deadline. This Appellant herein did not do.

The Appellant then attempts to distinguish the present case from one wherein the Petitioner made no attempt to serve the Respondent within the statutory timeframe. However, the record is clear that the Petitioner in this case did not undertake actual mailing of the Petition for Judicial Review until after the ten (10) day time limit expired. Indeed, the Petitioner filed an Affidavit of Service indicating that they were actually emailing the Petition for Judicial Review, not mailing. As such, there is no indication in the record that the Petitioner took any actions to actually mail or personally serve the Petition for Judicial Review until after September 29, 2017, which would be outside the ten (10) day deadline. This is not a situation like

Monson wherein some third party did not complete service. The Claimant herein failed to complete the required service himself. This is not a situation wherein the service occurred after the ten (10) day deadline due to no fault on the part of the Petitioner.

As indicated in the foregoing, the Court of Appeals has merely applied prior Iowa Supreme Court precedent regarding methods of service. While the earlier cases do not deal with email or EDMS, the same arguments are present in the instant case. The statute specifies the methods of service, as it did at the time of the *Neumeister* and *Dawson* cases. Here the Petitioner has undertaken some other alternative method of service just as the petitioners in those cases. Such liberty with statutory compliance was not condoned then even though the alternatives being considered by the Court at the time included actual personal service that arguably would be most highly likely to get the Petition for Judicial Review into the hands of the parties served. *Neumeister v. City Development Board*, 291 N.W.2d at 14; *Dawson v. Iowa Merit Employment Commission*, 303 N.W.2d at 160. As such, this case does not present an important question of law yet to be settled by the Iowa Supreme Court, but instead one that has been settled in Iowa for a great length of time.

The last contention of the Appellant is that this case involves an issue of such broad public importance that the Iowa Supreme Court should review the decision of the Court of Appeals. To try to support this argument, the Appellant resorts to some false analogy wherein a Petition for Judicial Review is served electronically, and then the receiving party states that it would be permissible to later mail the Petition after the ten (10) day deadline, in supposedly an underhanded attempt to generate an issue to dismiss the Petition for Judicial Review. What this analogy fails to recognize is that *Iowa Code* § 17A.19(2) specifically spells out the requirements for service and the permissible methods to be used. The Code also states that failure to make the appropriate service within the deadline prescribed is a jurisdictional defect. As cited in the foregoing, the lack of jurisdiction is not something that can be conferred by consent of the parties. As such, in the analogy created by the Claimant, the serving party should not justifiably rely on such an assertion as they should be aware of: 1) the service requirements, 2) failure to complete the service as prescribed would deprive the court of jurisdiction, and 3) should be equally be aware that the parties could not confer jurisdiction back upon the court by consent or waiver.

The Claimant attempts to argue that he should be found to have attempted service within the appropriate time window. However, the Claimant must admit that he did not timely undertake any of the statutorily specified means of service. In terms of looking at the EDMS system, the *Iowa Administrative Procedure Act* makes it explicitly clear that, unless a statute refers to the *Iowa Administrative Procedure Act* by name, the statutory provisions contained in *Iowa Code* § 17A.19 are the exclusive means by which a review of an administrative action may be taken. *Iowa Code* § 17A.19. The Iowa Supreme Court is empowered by statute to promulgate rules governing pleading, practice, evidence and procedure governing the Courts. *Iowa Code* § 602.4201. However, this section does not specifically refer to the *Iowa Administrative Procedure Act* or Chapter 17A of the *Iowa Code* by name. In fact, the Iowa Rules of Civil Procedure make clear that the Rules will only be applied to judicial review proceedings to the extent that they are consistent with Chapter 17A of the *Iowa Administrative Procedure Act*. Iowa R. Civ. P. 1.1601. Thus, EDMS does not save the Claimant as it, by its own terms, does not supersede the service requirements of *Iowa Code* § 17A.19(2).

The Appellant states that the District Court and Court of Appeals herein have created a rule wherein a party must attempt to mail or personally

serve a Petition for Judicial Review within ten (10) days in order for there to be possible substantial compliance. What the Claimant fails to recognize is that this is precisely what the Iowa Supreme Court precedent in this regard has mandated. To do otherwise would negate the language and terms of Iowa Code § 17A.19(2).

The Claimant's discussion of the Iowa Workers' Compensation Commissioner's rules does not provide any clarity to the analysis either. The Iowa Workers' Compensation Commissioner is free to serve its own Orders, Rulings, and Decisions by email, but this is due to the fact that the Iowa Workers' Compensation Commissioner has a rule that allows them to do so. *Iowa Administrative Code* § 876-4.7. However, even under the Commissioner Rules the service of an Original Notice and Petition before the Iowa Workers' Compensation Commissioner must be personally served or served via certified mailing. *Iowa Code* § 17A.12(1); *Iowa Administrative Code* § 876.4.7.

As to any other documents that are not an Original Notice and Petition, such as a Ruling or Decision of the Iowa Workers' Compensation Commissioner, *Iowa Administrative Code* § 876-4.12 would apply. In that regard any document that must be filed with the Iowa Workers' Compensation Commissioner has detailed specific requirements for service.

Iowa Administrative Code § 876-4.13. These rules do not permit email as a valid means of service either. *Id.*

In addition, the Iowa Workers' Compensation Commissioner's rules make the Iowa Rules of Civil Procedure applicable to proceedings before the Agency as well. *Iowa Administrative Code* § 876-4.35. As filings before the Iowa Workers' Compensation Commissioner will not involve the EDMS system, the Iowa Rules of Civil Procedure applicable would be those outside of EDMS. Even then, the Rules of Civil Procedure state email service must be with the written consent of the party upon whom service is going to be made. *Iowa R. Civ. P.* 1.442(2). Therefore, while the Claimant may have emailed documents, that does not mean that the rules would permit email as a valid method of service.

Indeed, the whole discussion of the EDMS rules, the Iowa Rules of Civil Procedure and the Iowa Workers' Compensation Commissioner rules does nothing to address the issue presented in this case. The issue presented in this case deals solely with the statutory provisions and the Iowa Supreme Court cases interpreting service under *Iowa Code* § 17A.19(2).

The Claimant appears also to be making a new argument that email should somehow be read as synonymous with mailing. However, even the *Iowa Rules of Civil Procedure* make a distinction between service through

mailing and through email. Iowa R. Civ. P. 1.442(2). In that regard a party must consent in writing to service via email. *Id.*

In the end, the Appellant's arguments amount to nothing more than an attempt to assail the wisdom of the Legislature in the methods of service chosen. Certainly, while there may be additional means of service that could be used, those are not the methods chosen by the Legislature. As the Legislature has done previous, it is free to expand the methods of service should it choose to do so. Certainly, the Legislature has shown that it is aware of the proper process to modify the service provisions of *Iowa Code* § 17A.19(2) if it would like to include additional methods of service. The methods already chosen are adequate, and sending a document by mail is not somehow unduly burdensome.

CONCLUSION

For the reasons stated, the Appellant's Application for Further Review should be denied and the Petition for Judicial Review properly dismissed.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of *Iowa Rs. App. P.* 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Time New Roman in 14 point font and contains 4,275 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Christopher S. Spencer

12/19/18

Date

CERTIFICATE OF SERVICE

I, Christopher S. Spencer, member of the Bar of Iowa, hereby certify that on December 19, 2018, I or a person acting on my behalf served the above Respondents-Appellees' Resistance to Application for Further Review to the Petitioner-Appellant's attorneys of record, Andrew William Bribiesco and Anthony John Bribiesco, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.



Christopher S. Spencer

CERTIFICATE OF FILING

I, Christopher S. Spencer, hereby certify that I, or a person acting in my direction, did file the attached Respondent-Appellees' Resistance to Application for Further Review upon the Clerk of the Iowa Supreme Court via EDMS on this 19th day of December, 2018.



Christopher S. Spencer

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Respondents-Appellees' Resistance to Application for Further Review was \$0 because of service and filing via EDMS.



Christopher S. Spencer