From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: What is an Employer's recourse when it fails to receive an Industrial Commission Order?

Employers are entitled to actually receive Industrial Commission Orders so that they may make a decision whether to appeal. However, the Industrial Commission recognizes a "rebuttable presumption" called the "mailbox rule," holding that documents mailed to a correct address are deemed to be received by the parties within three days of mailing. *See OAC 4123-3-18.* R.C. 4123.522 provides that employers who fail to receive an order can "rebut" the presumption if they can establish that they (1) did not receive the order; (2) the failure was due to circumstances beyond their control and not due to neglect or fault; and (3) that neither the party nor its representative had actual notice of the order. Recently, the Tenth District Court of Appeals considered a case involving an employer's appeal from a denial of ".522" relief, and the question of what evidence could be used for rebuttal.

State ex rel. Rumpke Consol. Cos., Inc. v. Indus. Comm., 2017-Ohio-6988, involved a 2014 claim that was allowed for a left knee injury. The claimant moved for an additional allowance, a request that was denied by the employer. The employer retained counsel, who submitted a representation form (R-1) with a post office box. The Industrial Commission conducted a DHO hearing and mailed an order granting the conditions to the parties on September 22, 2015. On October 20, 2015, the attorney filed a motion seeking ".522" relief claiming that his office never received the order, accompanied by an affidavit from a legal assistant reflecting this. An SHO conducted a hearing on November 13, 2015, and denied relief, citing the fact that the Order was sent to the post office box on the R-1, and never mentioned the affidavit. The employer subsequently filed a *mandamus* action in the Tenth District, alleging that the SHO abused his discretion by summarily referring to the "mailbox rule" and by not commenting on or mentioning the affidavit. A magistrate issued a decision finding no abuse of discretion, from which the employer appealed.

The Tenth District affirmed, finding no abuse of discretion. The Court first addressed the "mailbox rule," and a moving party's affirmative obligation to "rebut" the presumption that items mailed by the Industrial Commission to a correct address are actually received. In this case, the SHO conducted a hearing and made a determination that the Order was mailed to the attorney's post office box, and was not required to issue additional findings. As to the affidavit, the Court found that the SHO was not required to list the evidence that was considered but rejected, and there was nothing in the record indicating that the employer did not have an opportunity to fully present its evidence. The SHO simply identified the evidence it found credible, which the employer obviously failed to overcome.

Long time practitioners will recognize a deviation from prior practice, where an attorney affidavit would almost certainly result in ".522" relief. *Rumpke* demonstrates that the Industrial Commission can and will fall back on the "mailbox rule," particularly where an affidavit is sparse or the address is a post office box. Additionally, with the more recent adoption of e-mail

notifications (which are also subject to the “mailbox rule”) it will be even more difficult to obtain relief in the future.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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