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

Question: When a claimant fails (for years) to file an appeal from an Order denying her claim, then attempts to perfect an appeal which is denied as untimely, does she have the right to appeal that decision to common pleas court pursuant to R.C. 4123.512?

The Ohio Revised Code prescribes a method for seeking relief when a claimant alleges that she has not received an order. R.C. 4123.522 provides that any party to a claim is entitled to seek relief from a failure to file an appeal if she can demonstrate that she (or her counsel) did not receive notice due to causes beyond her control, without fault or neglect, and without actual knowledge of the import of the information. *R.C. 4123.522.* Action must be taken within 21 days of receipt, but delivery to the proper address creates a "rebuttable presumption" that it was received. *Id.* The Tenth District Court of Appeals recently considered a case involving a claimant who claimed that the Industrial Commission abused its discretion in failing to grant relief for an order denying her claim that it was mailed ten (10) years earlier.

State ex rel. Hill-Foster v. Indus. Comm., 2015-Ohio-3745, presents facts that can seemingly only occur in the absence of counsel. The claimant first alleged that she was injured in October, 2003, when she filed a claim alleging to have injured her "neck, rotator cup *(sic)*, shoulder [and] arm" in January, 2001. A second claim was then filed alleging an injury in January, 2002 to "all other" body parts. The employer rejected the claims and the BWC sent an order on November 7, 2003 disallowing the claims. The claimant never filed an appeal from this order, but apparently sought advice from legal counsel in 2005, 2009, and 2012. (In each case, counsel filed representation notices but did nothing further.) In June, 2012, the claimant filed an appeal with the Industrial Commission seeking to present medical documentation, and seeking relief pursuant to R.C. 4123.522. An SHO heard the request for .522 relief and denied the request, finding the length of time and the fact that she consulted competent counsel at least three (3) times indicated she had actual knowledge of the order and its import years before her motion. The claimant then filed a *mandamus* action in the Tenth District Court of Appeals.

The Tenth District affirmed, finding that the Industrial Commission did not abuse its discretion in denying .522 relief. The Court did feel the need to clarify an argument presented by the Industrial Commission and discussed in the magistrate's opinion the availability of an appeal to common pleas court. The Industrial Commission argued that the case presented a "right to participate" issue, and not an "extent of disability" issue, and therefore the court did not have jurisdiction. The court agreed that while the claim was denied, the claimant alleged she never received the order in question. Therefore, her avenue of appeal was to obtain .522 relief, and failing that to seek *mandamus*. *State ex rel. Prestige Delivery Sys., Inc. v. Indus. Comm.* However, the Court concluded that despite the fact that the claimant's current address was different, there was no evidence that the claimant did not receive the order or its contents years before filing her motion.

Clearly, the facts presented by *Hill-Foster* are extreme, but the principal affirmed is that a denial of .522 relief can only be appealed via a *mandamus* action. 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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