
LAVERN SPRINGER,

Petitioner

DECISION AND ORDER

vs.

Case No. 91CV534

LABOR & INDUSTRY REVIEW
COMMISSION et al,

Respondents

The plaintiff, Lavern Springer, appeals from an order of the Labor and Industry Review Commission (LIRC) which found that his petition for review was not timely filed. LIRC dismissed his petition. This court concludes that if the petition for review arrived in LIRC's mailbox on May 31, 1991, it was timely filed. No fact finding hearing was ever held to determine the date of delivery to the box. Accordingly, the order of LIRC dismissing the petition for review is reversed and this matter is remanded to the Department for a hearing on the factual matter of date of delivery.

On May 30, 1991, Springer's attorney placed in the United States mail a petition for review addressed to LIRC's Madison post office box. It is undisputed that the date of mailing was May 30, 1991. The envelope containing the petition for review is postmarked from Wausau, Wisconsin on May 30, 1991. The last day to timely appeal was Friday, May 31, 1991. The petition for review

was stamped by the Labor and Industry Review Commission as being received on Monday, June 3, 1991. The June 3, 1991 date is outside of the 21 day time limit to appeal.

In Hilmes v. DILHR, 147 Wis. 2d 48 at 53, 433 N.W. 2d, 251 (1988) the court stated "Filing does not occur until the complaint is received....[and is] the physical receipt of a complaint by the department". However, in coming to this conclusion, the court preliminarily noted that the agency had played no part in causing the untimely filing. Id. at 50, 433 N.W. 2d at 253. Rather, the court held that Hilmes had neglected to file timely for various other reasons having nothing to do with the agency. Id. at 55, 433 N.W. 2d at 254. In this case, the situation differs.

The Labor and Industry Review Commission has as a mailing address a post office box. Accordingly, the petition for review was sent to the mailing address, the post office box. It is unclear from this record whether the petition for review arrived on May 31, 1991, after the box was emptied for that day, or whether it arrived after the May 31, 1991 date but sometime before the box was emptied on June 3, 1991. No hearing was held on this issue.

This court holds that if the petition for review arrived on May 31, 1991 after the box was emptied for that day that the petition for review was timely filed. Unlike the case in Hilmes, supra, the agency may have had a role in the late filing, if it

was late. LIRC directed applicants to file at the post office box. Under this circumstance, the mail box is the same as the physical plant of LIRC. This case is similar to the holding of the court in Gunderson v. State, 106 Wis. 2d 611, 318 N.W. 2d 779 (1982). There, the supreme court held that a petition was timely filed where appellant could prove the petition had been physically received by an agent for the clerk of the court on the day before it was actually in the physical possession of the clerk and date-stamped as received.

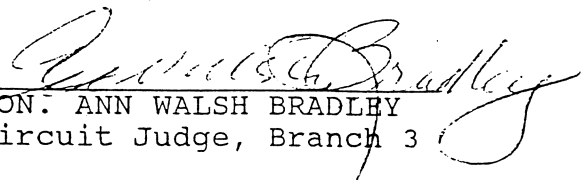
LIRC gave to applicants a post office box for a mailing address. If LIRC decided not to collect its mail for one day, or for a week, petitions which would otherwise be timely could be rejected for failure to comply with the statute of limitations. If LIRC advised the public that its post office box is the place to send petitions, then LIRC's post office box is its physical plant for the purpose of receiving mail.

The timeliness issue is not resolved by the holding of this court. Rather, the agency must now hold a hearing to determine what date the complaint arrived at the post office box. In this matter the burden of proof is necessarily on Springer. As was stated in Gunderson, supra, the reason Gunderson's petition was viewed as timely, was because Gunderson was able to prove the date his petition arrived.

THEREFORE, IT IS HEREBY ORDERED, that the order of the Labor and Industry Review Commission dismissing the petition for review is reversed and this matter is remanded to the agency for further proceedings.

Dated at Wausau, Wisconsin this 19 day of August, 1992.

BY THE COURT:


HON. ANN WALSH BRADLEY
Circuit Judge, Branch 3

cc:

Attorney James Kurth
Attorney Jeffery Strande
Attorney Stephen Sobota