COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0908

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JAMES KRAMER,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND WAYNE KUTAY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Vilas County: ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James Kramer, the employer, appeals from a judgment affirming a decision by the Labor and Industry Review Commission to deny Kramer's petition for review of a worker's compensation determination.

Kramer argues that he was denied his due process rights because he never "received" notice of the hearing before the administrative law judge. He argues that his due process rights were further violated when LIRC dismissed, as untimely, his petition for review of the ALJ's default order in favor of Wayne Kutay, Kramer's former employee. Because both the notice of hearing and subsequent order were received by Kramer at his post office box, we conclude that the default order in favor of Kutay and LIRC's dismissal of Kramer's untimely petition for review of that order were proper. Accordingly, we affirm the judgment.

BACKGROUND

¶2 LIRC found the following facts. In February 1997, Kutay filed an application for hearing on a worker's compensation claim with the Department of Industry, Labor and Human Relations. Kutay's application arose out of a claimed back injury he sustained while working construction for Kramer in August of 1990. Pursuant to § 102.17(1)(a), STATS., the department served the application by mail, using the following address: James Kramer, 2297 Boot Lake Road, P.O. Box 191, Eagle River, Wisconsin, 54521.[1]

¶3 Notice of the October 7, 1997, hearing on Kutay's application was mailed to Kramer's post office box, as was the denial of Kutay's petition to postpone the hearing. Kramer failed to appear at the hearing and the ALJ

[1] Section 102.17(1)(a), STATS., provides, in pertinent part, the following:

> The department shall cause notice of hearing on the application to be given to each party interested, by service of such notice on the interested party personally *or by mailing a copy to the interested party's last-known address* at least 10 days before such hearing. (Emphasis added.)

consequently issued a default order in Kutay's favor, which was dated and mailed to Kramer's post office box on November 10, 1997.

¶4 The order was received in Kramer's post office box and remained there unopened until March 1998. On March 13, the U.S. Postal Service returned Kramer's copy of the ALJ's order to the department. The unopened envelope read: "RETURN TO SENDER, BOX CLOSED, UNABLE TO FORWARD, RETURN TO SENDER." The department *re-mailed* the ALJ's order to Kramer's street address on March 17, and Kramer filed a petition for commission review of the order on March 30.

¶5 The commission found that Kramer's petition for review was not timely and that he had not shown probable good cause that the reason for his having failed to timely file the petition was beyond his control, within the meaning of § 102.18(3), STATS.[2] Kramer filed a complaint with the circuit court for judicial review of the commission's decision. The circuit court affirmed the commission's decision and this appeal followed.

[2] Section 102.18(3), STATS., provides, in pertinent part, the following:

> A party in interest may petition the commission for review of an examiner's decision awarding or denying compensation if the department or commission receives the petition within 21 days *after the department mailed a copy of the examiner's findings and order to the party's last-known address*. The commission shall dismiss a petition which is not timely filed unless the petition shows probable good cause that the reason for failure to timely file was beyond the petitioner's control. (Emphasis added.)

ANALYSIS

¶6 On appeal, we review LIRC's decision, and not that of the circuit court. *See* ***Knight v. LIRC***, 220 Wis.2d 137, 147, 582 N.W.2d 448, 453 (Ct. App. 1998). "Our standard of review for agency decisions depends upon whether the issues presented are questions of law or questions of fact." ***Id***. In the instant case, we are presented with the application of a statute to a set of undisputed facts, which creates a question of law. If, as here, we are presented a question of law, which includes questions of statutory interpretation, we apply one of three levels of deference to the agency conclusion: "great weight," "due weight" or "de novo." ***Id***. (quoting ***Sauk County v. WERC***, 165 Wis.2d 406, 413-14, 477 N.W.2d 267, 270-71 (1991)).

¶7 The "great weight" standard, which provides the highest level of deference, is accorded to an agency's conclusion of law or statutory interpretation when the following four elements are met: "(1) the agency is responsible for administering the statute, (2) the agency conclusion or interpretation is long standing, (3) the agency employed its specialized knowledge or expertise in forming the conclusion or interpretation, and (4) the agency interpretation provides consistency and uniformity in the application of the statute." ***Knight***, 220 Wis.2d at 148, 582 N.W.2d at 453. Under the "great weight" standard, we "must uphold the agency interpretation if it is reasonable and if it is not contrary to the clear meaning of the statute." ***Id***.

¶8 The "due weight" standard applies "if the agency interpretation is 'very nearly' one of first impression." ***Id***. Under this standard, a reasonable agency decision will not be overturned if it furthers the purpose of the statute, "unless we determine that there is a more reasonable interpretation under the

applicable facts than that made by the agency." ***Id***. (quoting ***Currie v. DILHR***, 210 Wis.2d 380, 388, 565 N.W.2d 253, 257 (Ct. App. 1997)).

¶9 Finally, the "de novo" standard is used "if the agency conclusion of law or interpretation is one of first impression." ***Id***. at 148-49, 582 N.W.2d at 453. Where this standard applies, we will afford no weight to the agency's conclusion of law or interpretation. *See* ***id***.

¶10 "LIRC and its predecessors have long been charged with the duty of administering Chapter 102 and have exercised their expertise in analyzing and interpreting its various sections for over 80 years." ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). As the issue here is procedural in nature, however, the agency did not need to utilize any expertise or specialized knowledge in interpreting the statute. Therefore, we need not give great weight deference to the commission's decision. *See* ***Knight***, 220 Wis.2d at 148, 582 N.W.2d at 453. The commission's order did, however, further the purpose of the statute and we have not determined there to be a more reasonable interpretation under the applicable facts. *See* ***id***. Accordingly, we will apply due weight deference to the commission's order.

¶11 Kramer does not dispute the accuracy of the post office box number, nor does he dispute that the box was rented in his name, nor even that the notice and subsequent order were delivered to his post office box. Kramer argues nevertheless that his failure to "receive" the notice of hearing and subsequent order resulted in the denial of his due process rights. However, Kramer's attempts to characterize the issues as constitutional in nature are unpersuasive. "To simply label an alleged procedural error as a constitutional want of due process does not make it so." ***State v. Schlise***, 86 Wis.2d 26, 29, 271 N.W.2d 619, 620 (1978).

Contrary to Kramer's arguments, "[d]ue process does not … require that the defendant in every civil case actually have a hearing on the merits." ***Boddie v. Connecticut***, 401 U.S. 371, 378 (1971). "A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance." ***Id***.

¶12 Consistent with the requirements of § 102.17(1)(a), STATS., the department mailed the notice of the hearing to Kramer's last-known address. Kramer repeatedly argues that he did not receive the notice; however, the focus, under § 102.17(1)(a), is on the mailing of the notice, not on its receipt. It has long been established that "the mailing of a letter creates a presumption that the letter was delivered and received." ***State ex rel. Flores v. State***, 183 Wis.2d 587, 612, 516 N.W.2d 362, 370 (1994). Beyond this presumption, however, the commission concluded that Kramer's post office box received the notice. It determined that to accept Kramer's allegation of a repeated failure of the mail strained credibility.

¶13 Subsequent to the commission's June 1998 decision, a friend of Kramer's allegedly discovered a box of mail that he had picked up from Kramer's post office box sometime during the fall of 1997. Consequently, Kramer now argues that the mail, "although sent to [his] post office box [was] never actually received by him." He further asserts that "[b]ecause he never actually received and reviewed those notices, [he] was not afforded an opportunity to be heard at the original hearing." Because this argument was not made to LIRC, it will not be considered for the first time on appeal. *See* ***Anderson v. Nelson***, 38 Wis.2d 509, 514, 157 N.W.2d 655, 658 (1968).

¶14 Even were we to address Kramer's argument on its merits, however, it would fail. His friend's failure to give him his mail does not overcome the

presumption of delivery and receipt upon mailing, *see* ***Flores***, 183 Wis.2d at 612, 516 N.W.2d at 370, nor can it erase the fact that the notice was actually delivered to Kramer's post office box. Kramer, in essence, contends that he could not have "received" the mail if he did not actually check his post office box and open his mail. Kramer is mistaken. Kramer's lack of diligence in checking his post office box will not erase the fact that the notice of hearing was mailed, delivered and received at Kramer's last known address. He cannot base his claim for relief upon his neglect of a common responsibility. As such, we conclude that Kramer was given reasonable notice of the October 7 hearing. Accordingly, because § 102.18(1)(a), STATS.,[3] allows default judgments where, as here, reasonable notice of hearing was made, we conclude that Kramer was afforded his due process rights with respect to the hearing before the ALJ.

¶15 Turning to Kramer's arguments regarding his appeal to LIRC of the ALJ's order, Kramer again focuses on receipt of the order. He asserts that because he did not "receive" the ALJ's order until after March 17, 1998, his March 30 petition for review was timely. Again, beyond the presumption that the order was delivered and received upon mailing, *see* ***Flores***, 183 Wis.2d at 612, 516 N.W.2d at 370, the commission determined that the November 10, 1997 order was, in fact, received in Kramer's post office box. It remained there until the lease on the post office box lapsed, at which time, it was sent back to the department. Under § 102.18(3), STATS., Kramer was allowed to petition the commission for review of the ALJ's order within twenty-one days of the order's mailing to Kramer's last

[3] Section 102.18(1)(a), STATS., provides: "All parties shall be afforded opportunity for full, fair, public hearing after reasonable notice, but disposition of application *may* be made by compromise, stipulation, agreement, *or default without hearing*." (Emphasis added.)

known address. Here, not only was the order mailed in November 1997, but the record supports the finding that it was received in Kramer's post office box.

¶16 Kramer nevertheless argues that notions of fair play, as discussed in ***Wright v. LIRC***, 210 Wis.2d 289, 296, 565 N.W.2d 221, 224 (Ct. App. 1997),[4] require a determination that the twenty-one-day time limit did not begin to run until his March 1998 "receipt" of the ALJ's order. This court, however, "has required strict compliance with … the procedures for the review of administrative determinations." ***Gomez v. LIRC***, 153 Wis.2d 686, 691, 451 N.W.2d 475, 477 (Ct. App. 1989).

¶17 In ***Gomez***, a worker appealed an order dismissing his action to review a decision of LIRC, which denied his application for worker's compensation benefits. *See* ***id***. at 687-88, 451 N.W.2d at 475-76. Gomez had failed to properly serve LIRC, thus depriving the circuit court of jurisdiction. *See* ***id***. at 693, 451 N.W.2d at 478. This court acknowledged the harshness of the result, "for it [denied] Gomez the opportunity for judicial review of the commission's decision." ***Id***. We recognized, however, that strict compliance with procedural requirements is "necessary to 'maintain a simple, orderly, and uniform way of conducting legal business in our courts.'" ***Id***. Accordingly, and because

[4] ***Wright v. LIRC***, 210 Wis.2d 289, 565 N.W.2d 221 (Ct. App. 1997), is distinguishable from the instant case. In ***Wright***, the discussion of "fair play" arose from the petitioner's argument that "due process and principles of fundamental fairness [entitled] him to an opportunity to present evidence on permanent disability." ***Id***. at 291, 565 N.W.2d at 222. There, the ALJ's ruling had been limited to the cause of the claimed injury, temporary disability and medical expenses. *See* ***id***. at 297-98, 565 N.W.2d at 224. On review, the commission looked beyond the available record and nevertheless considered issues of permanency, thereby offending "traditional notions of fair play by denying the parties notice as to what issues would be tried and a hearing on such issues." ***Id***. at 296, 565 N.W.2d at 224. The due process/fair play discussion of ***Wright*** did not arise from any failure, as here, on the petitioner's part to comply with procedural requirements.

the November 10, 1997, mailing of the ALJ's order was found to be both delivered and received, we conclude that Kramer's March 30 petition was not timely filed.

¶18 Section 102.18(3), STATS., provides that the commission shall dismiss a petition which is not timely filed unless the petition shows probable good cause that the reason for the untimely filing was beyond the petitioner's control. Here, the commission concluded that Kramer failed to show probable good cause that his untimely filing was beyond his control. He provided no reason for his failure to check his post office box, focusing instead on the fact that he never "received" the order, as he mistakenly defines that term. Because Kramer failed to show good probable cause that his untimely filing was beyond his control, we conclude that his petition for review of the ALJ's order was properly dismissed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.