March 25, 2013

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Letter Decision on Remand

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RE: HF No. 44, 2010/11 – Deborah Lacy v. Weston Investments, Inc., d/b/a Interbake Foods LLC and Zurich American Insurance Company

Dear Counsel:

This letter Decision is written upon the Remand Order of the Honorable Judge Mark Barnett of the Fifth Judicial Circuit dated July 30, 2012. Judge Barnett ruled that the two year statute of limitations contained in SDCL §62-7-35 applied instead of the three year statute of limitations from SDCL § 62-7-35.1. A hearing on this case was held on November 28, 2012 in Sioux Falls, South Dakota. Attorney Kerry Cook Huber represented Claimant, Deborah Lacy. Attorney Kristi Geisler Holm represented Employer and Insurer, Weston Investment and Zurich American Ins. Co. Witnesses testifying at hearing were Linda Hall, Sophie Sherman, Mary Pool, Jo Hackett, Cindy Sieber, and Bonnie Ackerman. All evidence from hearing, briefs and submissions and the record have been taken into consideration.

Claimant has not met the two-year statute of limitations as set out in SDCL §62-7-35 and this Petition for Hearing is Dismissed.

**FACTS**

1. While working for Employer, Claimant allegedly suffered a work-related injury on September 9, 2003.
2. Employer and Insurer filed a first report of injury. The claim was given a South Dakota workers' compensation claim number.
3. Employer and Insurer at that time accepted the claim as compensable.
4. Claimant received workers' compensation benefits, including costs of medical treatment, until May 19, 2005.

5. On May 19, 2005, Sophie Sherman, a claims examiner for Insurer, sent a denial of benefits letter to Claimant. Carbon-copies of the letter were also sent on that day to the Employer, the Insurer's defense attorney, and the Department of Labor.
6. The denial of benefits letter was deposited in a mail receptacle that was to be taken to the U.S. Postal Office in Kansas City, Missouri.
7. The May 19, 2005 denial of benefits letter was received in a timely manner by the Claimant, the Employer, and the defense attorney.
8. There is insufficient evidence to rule that the Department of Labor and Regulation did not receive the denial of benefits letter.
9. The last payment of any workers' compensation benefits to or on behalf of Claimant was on October 13, 2005 for medical expenses related to an earlier date of service.
10. Claimant was discharged by Employer on May 25, 2005. Claimant met with Employer (Jo Hackett with Human Resources) and Employer's Health Manager (Linda Hall, RN) where she was informed that she was no longer employed by Employer.
11. Claimant stopped sending medical bills to Claimant after that date.
12. In April 2006, Claimant contacted Employer and requested a denial letter or a copy of a denial letter. On April 24, 2006, Employer mailed Claimant a copy of a letter dated May 19, 2005 which denied any workers' compensation benefits to Claimant.
13. The Department of Labor is unable to locate in the Department files, the denial letter sent to the Department by Employer and Insurer in May 2005 regarding Claimant's reported work injury.
14. On September 13, 2010, over eight years after receiving a denial of benefits, Claimant filed a Petition for Hearing the Department of Labor and Regulation.

## ANALYSIS & DECISION

SDCL § 62-7-35 reads:

> The right to compensation under this title shall be forever barred unless a written petition for hearing pursuant to § 62-7-12 is filed by the claimant with the department within two years after the self-insurer or insurer notifies the claimant and the department, in writing, that it intends to deny coverage in whole or in part under this title. If the denial is in part, the bar shall only apply to such part.

SDCL § 62-7-35.

A claimant is limited to a two-year period in which to file a petition for hearing, following the written denial of benefits from employer and insurer. *Weber v. Reihsen Mercantile Corp.*,92 N.W.2d 154, 155 (S.D. 1958). It is undisputed that Claimant received the denial of benefits letter from Employer and Insurer shortly after it was mailed on May 19, 2005. The question remains whether the Department of Labor received the denial of benefits letter from Employer and Insurer.

Presumption of Delivery

"It is well established that proof of mailing by depositing a letter in a proper mail receptacle, properly addressed and stamped, raises a presumption of delivery to the person addressed; however,

it is only a rebuttable presumption. See *Ebert v. Fort Pierre Moose Lodge #1813*, 312 N.W.2d 119 (S.D. 1981); *Bank of Ipswich v. Harding County, Etc., Ins. Co.*, 55 S.D. 261, 225 N.W. 721 (1929)." *Cox v. Brookings Intern. Life Ins. Co.*, 331 N.W.2d 299, 301 (S.D. 1983).

In a case like this, where there is a large office, a single piece of mail may be handled numerous times by many people before it is placed in a Post Office receptacle. Proof of an office practice and procedure followed in the regular course of business, which shows that the notice has been duly addressed and mailed, raises this same presumption. 58 Am. Jur. 2d Notice §38. See also *Ebert v. Fort Pierre Moose Lodge No. 1813*, 312 N.W.2d 119, 125-126 (S.D. 1981) (holding that the testimony by office personnel as to the regular course of business for mailing notices established a presumption of mailing and delivery). Personal knowledge of the particular mailing is not required, just personal knowledge of the office procedure. *Id.,* see also *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985) (holding that personal knowledge is required only to establish regular office procedure, not the particular mailing).

Employer and Insurer's witnesses testified in a credible manner how the mail is handled from the time when it leaves Ms. Sherman's desk to when it is delivered to the truck that delivers it to the U.S. Postal Service. The other recipients who were "carbon copied" on the letter testified that the letter was delivered to them in a timely manner. Employer and Insurer have shown personal knowledge of the office procedure for mailing letters of denial. The testimony has established the presumption of mailing and therefore, delivery as well.

In the *Cox* case, in a special concurrence, Justice Henderson wrote, "The presumption of receipt of a letter duly mailed is ordinarily indulged in only when there is an absence of evidence to the contrary. *Roshek Realty Company v. Roshek Brothers Company*, 249 Iowa 349, 87 N.W.2d 8 (1957); 29 Am.Jur.2d, Evidence §194 (1967)." *Cox* at 304 (quoting *Ebert*, 312 N.W.2d 119, 126 (S.D. 1981)). The presumption is "indulged in" in this case, because Claimant is unable to produce specific evidence that the letter was not properly mailed.

The presumption of delivery is rebuttable, in that after Employer and Insurer met their burden of proving the letter was properly mailed, the burden switches to Claimant to prove that it was not mailed properly. The Department cannot say whether they received the letter or not. Just because the letter was not found in the paper or electronic files for Claimant, does not mean that letter was not received and misfiled by the Department. According to testimony from the Department, mistakes in filing are found on a regular basis. The same day of the hearing, in her regular course of business, Ms. Ackerman discovered and testified to a number of recent mailroom errors that occurred within the state system. Mistakes can and do occur. Delivery is presumed.

The presumption is that the letter from Sophie Sherman on behalf of Insurer was mailed to the Department of Labor on May 16, 2005 and was delivered to the Department a few days thereafter. Therefore, Claimant, who had also received the same letter just after May 16, 2005, was given notice that she had two years in which to file a petition for hearing with the Department of Labor.

Claimant filed a Petition for Hearing with the Department of Labor past the statute of limitations provided for in SDCL §62-7-35. The Petition for Hearing is hereby Dismissed.

The Parties may consider this Letter Decision to be the Order of the Department.

Sincerely,

Catherine Duenwald
Administrative Law Judge
Division of Labor & Management
Department of Labor & Regulation