

IN THE COURT OF APPEALS OF IOWA

No. 8-683 / 08-0346
Filed October 15, 2008

LINDA JORDAN,
Petitioner-Appellant,

vs.

SECOND INJURY FUND OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick Grady, Judge.

Linda Jordan appeals from the district court order affirming the workers' compensation commissioner's finding that her claim against the Second Injury Fund was time barred. **AFFIRMED.**

Thomas M. Wertz and Matthew D. Dake of Wertz Law Firm, P.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, and Anne E. Updegraff, Assistant Attorney General, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

MAHAN, P.J.

Linda Jordan appeals from the district court order affirming the workers' compensation commissioner's finding that her claim against the Second Injury Fund was time barred. She contends the commissioner erred in not requiring the Fund to prove a date certain of when the last check was placed in the mail and that the commissioner misapplied the law by requiring her to produce evidence of when the check was mailed. She argues the commissioner's finding that her claim was untimely is not supported by substantial evidence.

I. Background facts and proceedings. On April 1, 2004, Jordan filed a claim for benefits naming her former employer, Rockwell International, and the Second Injury Fund (the Fund). Rockwell submitted sworn answers to interrogatories in which it stated that the last benefits payment was made by check issued on March 29, 2001. Rockwell also averred that it was Rockwell's policy to mail checks no later than the Friday of the week a check is issued; therefore, the last check was mailed to Jordan on Friday, March 30, 2001. The payment was mailed to Jordan's Cedar Rapids address. The Fund alleged a statute of limitations defense. Jordan dismissed her claim against Rockwell.

A hearing was held before a deputy workers' compensation commissioner. Jordan testified at the hearing that: (1) she received a letter from Rockwell indicating her final payment would be March 28, 2001; (2) she contacted a Rockwell representative because the payment was late; and (3) she received the March 29, 2001 check on April 5, 2001, and deposited it on April 6, 2001. Jordan testified she had received the letter from Rockwell in an envelope bearing a postmark of March 7, 2001, but which was dated February 26, 2001.

The deputy commissioner noted that it was the Fund's burden to prove the claimant was not entitled to benefits because she had not filed in a timely manner. The deputy noted Rockwell's interrogatory answer as to its mailing policy. The deputy also found "suspect" Jordan's offer of Rockwell's termination of benefits letter to support a proposition that Rockwell did not timely mail items. The deputy concluded that the greater weight of evidence was that the check was mailed before April 1, 2001. The deputy ruled Jordan's April 1, 2004 claim was barred by the applicable statute of limitations.

Jordan appealed to the workers' compensation commissioner. The commissioner conducted a de novo review and concluded the Fund had met its burden of proving the statute of limitations defense. The commissioner found that the written testimony of Rockwell established that the last benefit check was mailed before April 1, 2001. This ruling was affirmed by the district court in its ruling on Jordan's petition for judicial review.

Jordan now appeals contending, in essence, the Fund should be required to establish a date certain for the mailing of the last benefits check in order to bar her claim for recovery.

II. Applicable law. Iowa Code section 85.26(1) (2003) provides that proceedings for workers' compensation benefits "shall not be maintained in any contested case unless the proceeding is commenced . . . if weekly compensation benefits are paid . . ., *within three years from the date of the last payment of weekly compensation benefits.*" (Emphasis added.) Our supreme court has concluded this three-year statute of limitations runs from the date of the last

payment of weekly compensation benefits and is not extended by the discovery rule. See *Bergen v. Iowa Veterans Home*, 577 N.W.2d 629, 630 (Iowa 1998).

Payments of benefits are “made” when they are mailed to the claimant, not when they are received. *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109, 112 (Iowa 1995). The court has held: “weekly benefit payments should be considered paid when placed in the United States mail addressed to the claimant.” *Robbenolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 236 (Iowa 1996).

We review decisions of the workers’ compensation commissioner under Iowa Code chapter 17A. See Iowa Code § 86.26 (2005). Our review of the commissioner’s decision is for errors at law, not de novo. *Second Injury Fund v. Braden*, 459 N.W.2d 467, 468 (Iowa 1990). We broadly and liberally construe the commissioner’s findings to uphold, rather than defeat the decision. *Second Injury Fund v. Hodgins*, 461 N.W.2d 454, 455 (Iowa 1990). We must examine whether the commissioner’s conclusions are supported by substantial evidence in the record made before the agency when the record is viewed as a whole. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion. *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 105 (Iowa 1989). An agency’s decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence. *Shank*, 516 N.W.2d at 812.

III. Merits. The commissioner concluded that Rockwell’s interrogatory answer was sufficient to establish that Jordan’s last benefits check was mailed

“before April 1, 2001.” Jordan does not argue that the check was not mailed at all: there is no doubt she received it. She argues, however, that there is no evidence of when the check was mailed and that a date certain is required to bar her recovery. She contends the Fund should not have been allowed to rely on Rockwell’s typical mailing practices to establish the date of mailing.

The Fund responds that there are two acceptable methods to satisfy the burden of proof of mailing. One method requires that evidence be introduced (1) of the contents and the execution of the paper; (2) that it was enclosed in an appropriate wrapper for transmission through the mail; (3) of the correct address of the person to receive it; (4) that the wrapper was properly addressed; (5) that postage was prepaid; and (6) that the article was deposited in the mail. See *Public Finance Co. v. Van Blaricome*, 324 N.W.2d 716, 718-19 (Iowa 1982) (noting earlier stated six-prong test). The other method was recognized in *Van Blaricome*, which found that evidence of office custom is sufficient, absent proof to the contrary, to raise a presumption of mailing. *Id.* at 720-21. The Fund contends the commissioner properly allowed the presumption of mailing to establish that Jordan’s last benefits check was mailed before April 1, 2001. Jordan argues that the common law “proof of mailing” rule should not be applied to defeat her workers’ compensation claim.

Our supreme court has refused to apply the common law presumption of mailing and its ancillary rules of proof where it would be “directly contrary to the rule of evidence adopted by the legislature.” *Lange v. Iowa Dep’t of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006) (noting that statute at issue requires “competent evidence that the . . . tax return . . . was deposited in the United

States mail” on or before the due date). But such a statutory evidentiary requirement is not involved here. We can find no reason to reject the common law presumption in the circumstances presented here.

Jordan was required by section 85.26 to bring her action within three years from the date of the last payment of weekly benefits. We agree that the evidence presented before the agency was sufficient to raise a presumption that Jordan’s last benefits check was mailed before April 1, 2001. Jordan has provided no authority that the Fund was required to prove a date certain. The deputy made a specific finding that Jordan’s attempt to establish that Rockwell’s mailing was not timely was “suspect.” The deputy found “little credibility in the evidence that the March 7 postmarked envelope belongs to the February 26, 2001 notice letter.” We are required to give such credibility findings considerable deference. Thus, the presumption afforded the Fund was not defeated.

We conclude substantial evidence supports the agency’s finding that the employer sent the final payment to Jordan before April 1, 2001. Accordingly, there was substantial evidence in the record to establish that Jordan’s April 1, 2004 claim was barred by the three-year statute of limitations found in Iowa Code section 85.26. We affirm.

AFFIRMED.