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In the Matter of the Compensation of  
**ASHLEY A. REHFELD, Claimant**  
WCB Case No. 09-04302  
ORDER ON REVIEW  
Dodge & Uren LLC, Claimant Attorneys  
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Sedgwick CMS (Sedgwick), the statutory assigned claim processing agent for the noncomplying employer, requests review of Administrative Law Judge (ALJ) Rissberger's order that: (1) found, pursuant to our initial order, that claimant's hearing request regarding its denial of her right wrist injury claim was timely filed; and (2) set aside its denial. On review, the issues are timeliness of hearing request, subjectivity and course and scope of employment. We affirm.

FINDINGS OF FACT

The employer publishes a magazine intended for outdoor activity enthusiasts. In July 2008, the employer provided claimant with a key to its office and assigned her a desk, a telephone line, and an e-mail address. (Ex. A20-3; 2Tr. 27, 50-51).

Claimant worked for the employer as an intern, several hours each week. Her work activities initially involved graphic design, then later included selling advertising. (2Tr. 26).

On August 17, 2008, the employer directed a "photo shoot," a regular monthly activity, shooting photographs for advertising. On this occasion, the employer shot photos of models performing stunts on skate boards while wearing clothing provided by an advertiser. Claimant was performing as a model, wearing such clothing, when she fell and broke her right wrist. (2Tr. 30, 58).

Claimant sought treatment and filed an injury claim.

A Workers' Compensation Division Order declared the employer to be noncomplying and referred the claim to Sedgwick for processing. Sedgwick denied the claim, asserting that claimant's condition did not arise out of her employment. Claimant requested a hearing.

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After a hearing, the ALJ dismissed the request for hearing as untimely filed. Claimant requested Board review.

On July 6, 2010, we found that claimant's request for hearing was timely, reinstated the request, and remanded to the ALJ for further proceedings on the merits of the claim. *Ashley A. Rehfeld*, 62 Van Natta 1722 (2010).

### CONCLUSIONS OF LAW AND OPINION

To begin, Sedgwick renews its argument that claimant's request for hearing was untimely.

In doing so, Sedgwick relies on *Christopher J. Snyder*, 62 Van Natta 1514 (2010), where we held (in part) that the claimant had not established good cause for an untimely filed request for hearing, when the denial was mailed to an incorrect address and the claimant had not provided the employer with a correct mailing address. The court has affirmed our decision in *Snyder* on different grounds. *Snyder v. Interstate Distributor Co.*, 246 Or App 130 (2011). The court explained that, because the claimant did not respond to the denial within 60 days -- despite having had actual notice of the denial within 60 days -- his subsequent request for hearing was untimely.

Here, unlike *Snyder*, the timeliness issue turns on whether the denial was properly mailed under ORS 656.319(1), so that the 60-day time limitation for filing the request for hearing commenced running. *Cf. Snyder*, 246 Or App at 134 n 2 (noting that the claimant did not contend that "because the [denial] was sent to the wrong address, it was ineffective and for that reason did not trigger the 60-day period for requesting a hearing under ORS 656.319(1)."). Because we have determined that the denial was improperly mailed, the statutory time limitation for requesting a hearing was never triggered. *Rehfeld*, 62 Van Natta at 1725-26; *cf. Tracie L. Salustro*, 52 Van Natta 1420,1421 (2000) (hearing request properly dismissed, where the denial was properly mailed and the claimant did not timely request a hearing). Thus, *Snyder* is distinguishable.

We turn to the merits of the claim. The ALJ found an employment relationship, reasoning that the employer had the right to direct and control claimant's work and that she received remuneration for her work.<sup>1</sup> Further finding that claimant's injury arose out of and in the course of her employment, the ALJ set aside Sedgwick's denial. We reach the same result, reasoning as follows.

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<sup>1</sup> Sedgwick moves to strike claimant's "clothing as remuneration" argument, asserting that it conflicts with claimant's position at hearing. We need not address this matter, because the "clothing as remuneration" argument is not part of our reasoning.

Sedgwick argues that there was no employment relationship between the employer and claimant, because claimant was not paid and she did not expect to be paid.

Claimant has the burden of establishing the existence of an employment relationship between herself and the employer. *Hopkins v. Kobos Co.*, 186 Or App 273, 277 (2003). Pursuant to ORS 656.005(30), a “worker” is a person who engages to furnish services for remuneration, subject to the direction and control of an employer. The statute has two components: (1) “an agreement between the claimant and the employer that the employer will provide remuneration for the claimant’s services,” and (2) “the employer’s right to direct and control the services the claimant provides.” *Dep’t of Consumer & Bus. Servs. v. Clements*, 240 Or App 226, 232 (2010); *Hopkins*, 186 Or App at 276-77; *Janeé Mendoza*, 63 Van Natta 383, 383-84 (2011). A contract for hire that satisfies the “engagement” requirement of ORS 656.005(30) may be based on either an express or implied contract. *Oremus v. Oregonian Publ’g Co.*, 11 Or App 444, 446 (1972).

In *Montez v. Roloff Farms*, 175 Or App 532 (2001), the court explained that an “implied in fact” contract

“is no different in legal effect from an express contract. The only difference between them is the means by which the parties manifest their agreement. In an express contract, the parties manifest their agreement by their words, whether written or spoken. In an implied-in-fact contract, the parties’ agreement is inferred, in whole or in part, from their conduct. Other than questions of proof, the two types of contracts have the same legal effect.”  
*Id.* at 536.

An implied-in-fact employment contract may be based on the parties’ course of conduct. The conduct that is relevant to infer assent is not limited to the parties’ actions at the commencement of the alleged relationship, but includes consideration of their actions over an extended period in determining assent to an agreement. *Hix v. SAIF*, 34 Or App 819, 821-825 (1978) (examining the parties’ conduct over the course of an entire summer to determine whether there was sufficient evidence of either an express or implied contract).

Sedgwick argues that this case is like *Hix*, where the sixteen-year-old claimant performed services in furtherance of his father’s business interest in hauling lime by truck. Although the claimant received \$140 from the plant owner

for his help, he was never promised wages. The court found that the claimant was not a worker with an expectation for remuneration, because such an expectation was “more a reasonable hope based on the mutual goodwill between the parties than any kind of implicit contractual relationship.” *Id.* at 898.

*Hix* is distinguishable, because here the parties understood that claimant *would* be paid a commission for advertising sales and she had performed services for the employer to that end before her injury. (*See* 2Tr. 25, 38, 48-50). Moreover, because the employer exercised control over claimant’s work activities and treated her as its employee (as explained below), we find that there was an employment contract between them (based on their oral agreement about commission sales and their subsequent conduct). *See DCBS v. Clements*, 240 Or App 226 (2010) (the claimant was a subject worker, even though he was injured on a pre-employment “trial run,” and there had been no prior discussion of compensation); *Steve V. Ede*, 61 Van Natta 1549, 1552 (2009) (the parties had an employment contract, where the claimant performed work for the employer on the day of his injury and the employer directed his activities).

Sedgwick also argues that there can be no implied employment contract, because claimant testified that she was never paid for her work as an intern and her status as an intern did not change before her injury. (*See* Tr. 25-26, 35). According to Sedgwick, claimant’s testimony in this regard means that there was no “bargained for” contract. *Cf. Liberty Northwest. Ins. Corp. v. Church*, 106 Or App 477, 481 (1991) (although the claimant may not have known it, he was a subject worker employed by the employer who paid him, directed his activities, and exercised its power to control his daily work activities, albeit through an agent). We disagree, because we look to the parties’ conduct to evaluate whether a contract existed.

Claimant worked for the employer largely as an unpaid intern before her injury. However, the record establishes that she had begun selling advertisements for the employer before her injury (although she did not complete those sales). (2Tr. 33-34). The record also establishes that claimant expected to be remunerated for completed sales work. (2Tr. 25, 38, 48; Ex. A20-4). Sedgwick does not challenge that expectation. Instead, Sedgwick argues that claimant was not entitled to the promised commission for advertising sales, because she did not complete any such sales. However, we are not persuaded that *completed* work activities are a necessary prerequisite for finding an existing employment contract. *Cf. Stanley V. Burch*, 63 Van Natta 1732, 1734 (2011) (the claimant was not a subject worker when he was injured during “pre-employment” testing while laid off and

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receiving unemployment benefits); *Danell Sweisberger*, 44 Van Natta 913 (1992) (the claimant was a volunteer, not a “worker,” because she did not expect to be paid).

Finally, the parties’ conduct also supports an employment relationship in that the employer assigned claimant work space and equipment and directed her work activities, including her activity at the time of her injury. Moreover, when claimant started working for the employer, she announced that she wanted to take two and one-half months off at some point to travel, but the employer responded that she could only take the month of December, because it was the slow month. (Ex. A20-3). Thus, the employer treated claimant as an employee and she worked for the employer with the expectation of being paid when she eventually completed sales.

Accordingly, we find that there was an employment contract between claimant and the employer and that she was a “worker” when she was injured during the August 17, 2008 photo shoot. Because we also agree with the ALJ that claimant was performing activities for the employer, under the employer’s direction and control and within the course of her employment when she was injured, we adopt the ALJ’s reasoning in this regard. Accordingly, we conclude that claimant was a subject worker and her injury claim is compensable.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review is \$3,200, payable by Sedgwick, on behalf of the noncomplying employer. In reaching this conclusion, we have particularly considered the time devoted to the subjectivity and course and scope issues (as represented by claimant’s respondent’s brief), the complexity of the issues, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by Sedgwick, on behalf of the noncomplying employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated April 1, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,200, to be paid by Sedgwick, on behalf of the noncomplying employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by Sedgwick, on behalf of the noncomplying employer.

Entered at Salem, Oregon on December 15, 2011