COMMONWEALTH OF PENNSYLVANIA

BNZ MATERIALS, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF LABOR AND INDUSTRY,	:	
STATE WORKERS' INSURANCE FUND	:	DOCKET NO. 2295

FINDINGS OF FACT

A. THE PARTIES

1. Plaintiff, BNZ Materials, Inc. ("BNZ") is a corporation doing business in the Commonwealth of Pennsylvania, with its principal offices in Littleton, Colorado. BNZ manufacturers refractory products including insulating firebrick that is utilized in steel and other industries. At all relevant times it was an employer within the Commonwealth of Pennsylvania with employees covered by the Pennsylvania Workers' Compensation Act. (Complaint and Answer, para. 1; Ex. P-1, pp 15-17)

2. Defendant is the State Workers' Insurance Fund, Department of Labor and Industry, Commonwealth of Pennsylvania ("SWIF"). SWIF issues policies of insurance that insure employers for obligations imposed by the Pennsylvania Workers' Compensation Act. (Complaint and Answer, para. 2; N.T. 14-16)

B. THE OFFER and ACCEPTANCE

3. BNZ obtained workers' compensation insurance through SWIF for its Pennsylvania employees from at least 1992 through April of 1995. (N.T. 87; Joint Exhibit ("JE") B; Ex. P-36)

4. For the year prior to January 23, 1994, BNZ was the insured under a SWIF policy which was written on a guaranteed cost basis. The policy had a renewal date of January 23, 1994. (N.T. 87, 199)

5. Under a guaranteed cost plan, an insured pays a certain premium for a policy year irrespective of the losses that were incurred during that year. (N.T. 29)

6. Under a retrospective Option V rating plan ("Option V"), premiums are adjusted based on the loss experience after the policy year. This type of plan could save an insured money, or it could cost more in premiums depending upon the insured's actual loss experience. (N.T. 72, 172-174)

7. In November, 1993, Lorraine Lorenzetti, an underwriting technician for SWIF responsible for policies that exceeded $20,000 in premium, pulled the BNZ file to conduct an analysis to determine whether BNZ should remain in the guaranteed cost plan, be changed to a retrospective rating plan, or be given the option to choose between the two types of policies. (N.T. 56, 61)

8. Ms. Lorenzetti instructed Joseph Cogliette, a technician for SWIF, to prepare a letter to send to BNZ giving BNZ the option of choosing between the guaranteed cost policy or the retrospective rated policy. (N.T. 119-121, 129, 197)

9. Mr. Cogliette did not send out the letter until February 2, 1994, eleven days after the inception of the new policy period. (N.T. 26, 48, 197; Ex. D-6)

10. Ms. Lorenzetti received supervisory approval to offer BNZ a retrospective Option V rating plan for its January 24, 1994 to January 23, 1995 policy. (N.T. 27)

11. The letter from SWIF to BNZ, dated February 2, 1994, stated that "The above referenced risk [Policy No. 03380198] has been placed on an Option V Retrospective Rating Plan." Attached to the letter was a copy of the factors that would be applied to the risk to adjust the premium payments. (Ex. D-6)

12. At the bottom of the letter dated February 2, 1994, is a typed post-script which stated:

> "If you elect to renew on a Retrospective Rating Option V Plan, the factors will be as follows. If you instead choose a Guaranteed Cost Plan, the standard schedule T premium discount will apply <u>at audit</u>. YOU MUST ADVISE OF YOUR SELECTION WITHIN TEN BUSINESS DAYS OF THE DATE OF THIS LETTER: failure to respond within this time will result in the policy's automatically reverting to a Guaranteed Cost basis." (Ex. D-6)

13. The letter dated February 2, 1994 from SWIF to BNZ was sent by First Class, United States Mail. (Ex. D-6)

14. Upon receipt of SWIF's letter, BNZ consulted its insurance broker in Colorado, Sedgwick James, about SWIF's offer of a retrospective Option V rating plan. (N.T. 13-17; Exs. P-1, P-11)

15. Sedgwick James told BNZ on February 14, 1994 that it had ten (10) business days from the date of the letter to respond and he recommended that BNZ accept the offer of an Option V plan. (N.T. 42; Exs. P-1, P-11)

16. Daryl Boehmer, vice president of finance and treasurer of BNZ, understood that SWIF had offered BNZ a choice of a guaranteed cost plan or a retrospective Option V rating plan and that a response to SWIF's offer was due by February 16, 1994. (N.T. 42-44; Ex. P-1, pp. 37-42)

17. Mr. Boehmer prepared a letter to Ms. Lorenzetti at SWIF dated February 14, 1994, informing her that BNZ "accepts the retrospective rating plan as described in your letter of 2/2/94." (N.T. 42; Exs. P-1, pp. 21-22, P-6)

18. Mr. Boehmer directed that this acceptance letter be sent to SWIF by certified mail, return receipt requested on February 14, 1994. (Exs. P-1, pp. 23-25, P-6)

19. BNZ has no certified mail receipt, no certified mailing number, and no signed delivery card for this letter. (N.T. 190-191; Exs. P-1, P-2; J.E. B, para. 15)

20. The letter from BNZ to SWIF contained a single wrong digit in SWIF's zip code. In all other respects the address was correct. BNZ used the address: Scranton, PA 18506-5100. SWIF's correct address is Scranton, PA 18505-5100. There is no zip code of 18506 in the United States.(N.T. 201-202; Exs. P-2, p. 35; D-2; J.E. B)

21. Mr. Boehmer has no recollection of ever seeing a signed mailing receipt for the acceptance letter, even though BNZ's office practice was to route the delivery card back to the sender. (Exs. P-1, p. 28, P-2, pp. 15-16)

22. Mr. Boehmer gave the letter to Donna Anglada to mail and instructed her to mail it certified mail, return receipt. Ms. Anglada was employed by BNZ in February, 1994 and was responsible for mailing Mr. Boehmer's correspondence. (Ex. P-1, pp. 25-27)

23. The office practice at BNZ was that envelopes containing letters that were to be mailed were placed in a mail tray in the Resource Room. On the afternoon of February 14, 1994, Mr. Boehmer saw his letter to SWIF in that tray. (Ex. P-1, p. 27)

24. Ms. Anglada was generally responsible for preparing the envelope and the return receipt for certified letters. (Ex. P-2, p. 39)

25. Ms. Anglada has no recollection of the specific letter prepared by Mr. Boehmer on February 14, 1994 and no recollection whether she actually mailed the letter or not. (Ex. P-2, p. 32)

C. SWIF FAILED TO RECEIVE BNZ'S LETTER

26. SWIF's office services division in Scranton maintains logs of all incoming mail to SWIF requiring a signature for acceptance, including certified mail requiring a return receipt. These logs do not reflect SWIF's receipt of a letter from BNZ or Darryl Boehmer requiring a signed receipt during the months of February or March 1994. (N.T. 232-233, 243; Exs. P-4, P-5)

27. Ms. Lorenzetti never received any letter from BNZ in 1994 accepting the Option V policy. (N.T. 49-52, 65-66)

28. The audited financial statements for BNZ for 1994 as prepared by Coopers and Lybrand included a receivable amount of $112,919.00. The receivable was for the expected retrospective premium refund that BNZ expected from SWIF. (N.T. 147-148; Ex. P-16)

29. SWIF placed BNZ's 1994 policy on a guaranteed cost plan on or about March 23, 1994. BNZ was mailed a policy at that time that contained a premium discount endorsement. A premium discount endorsement is used with guaranteed cost plans, but not with retrospective rating plans. (N.T. 65, 87, 198-199; Ex. P-36)

30. Ms. Lorenzetti's letter dated February 2, 1994 further advised that, if a retrospective Option V rating plan was elected, the first retrospective adjustment would be based on losses valued in the eighteenth month after inception. The policy inception date was January 23, 1994; eighteen months after that date would have been July 23, 1995. (N.T. 169, 201)

31. By letter dated April 10, 1995, BNZ's insurance broker, Sedgwick James advised BNZ of an estimated "retro return premium" from SWIF in the amount of $112,919.00. (N.T. 147, 170; Ex. P-16)

32. In August, 1996, BNZ requested that SWIF refund the premium that BNZ claimed was due and owing for the policy period January 23, 1994 to January 23, 1995. (N.T. 169-170)

33. SWIF refused to refund the premium for this policy period, maintaining that BNZ had been placed in a guaranteed cost plan and, therefore, was not entitled to a refund. (N.T. 65-66, 229-230; Exs. P-7, P-36)

34. The parties have stipulated that the amount of damages sustained by BNZ is $90,041.80 plus interest, if the policy were an Option V retrospective rated policy and not a guaranteed cost policy. (J.E. A, para. 12)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action. 72 P.S. §4651-4.

2. The Board of Claims has personal jurisdiction over the parties.

3. BNZ's claim is not barred by the statute of limitations set forth at 72 P.S. §4651-6.

4. It is the requisite of every contract that there be an offer and an acceptance.

5. Under the mailbox rule, a contract is made at the time and place that the letter of acceptance is properly put into the possession of the postal service.

6. If an acceptance letter is properly mailed, there is a presumption that it was received which cannot be rebutted by a mere denial.

7. "Proper mailing" means a letter must be correctly addressed, have sufficient postage, and be placed in a mailbox or post office.

8. BNZ's letter of acceptance was addressed using an incorrect zip code, therefore it was not properly mailed and there is no presumption of receipt.

9. Because BNZ chose to respond to SWIF's offer by certified mail, return receipt, rather than regular mail, it is held to a higher standard of proof and must produce the receipts in order to prove mailing.

10. Evidence of BNZ's office procedures regarding regular mail was insufficient to invoke a presumption of receipt where BNZ chose to use certified mail for its acceptance. In such a case, testimony of actual mailing at the post office or the white and green mailing receipts are required to prove proper mailing.

11. Even if BNZ were entitled to a presumption of receipt of its acceptance letter, SWIF successfully rebutted that presumption by denying receipt and supporting that denial with its mail room logs

showing no letter from BNZ arrived at SWIF's office during February or March, 1994.

12. SWIF demonstrated by a preponderance of the evidence that it never received BNZ's acceptance of its offer.

13. No contract was formed by BNZ and SWIF for a retrospective Option V insurance policy.

14. Because BNZ never communicated its acceptance of the contract for an Option V policy to SWIF, there can be no action for promissory estoppel.

15. No act by SWIF estops it from denying BNZ coverage under an Option V insurance policy.

16. As a matter of law, BNZ was enrolled in a guaranteed cost plan for the policy period January 23, 1994 to January 23, 1995.

17. BNZ's claim against SWIF is dismissed with prejudice.

OPINION

In the complaint in this action that was filed on December 2, 1996, the plaintiff, BNZ Materials, Inc. ("BNZ") demanded judgment against the State Workers' Insurance Fund ("SWIF") in the sum of $90,041.80 for breach of contract. On February 14, 1997, the defendant filed an answer and new matter and on March 24, 1997, plaintiff answered the new matter. The parties entered into a period of discovery. On April 22, 2000, SWIF moved for summary judgment and this motion was denied on November 2, 2000.

A panel hearing of the matter was held on September 5 and 6, 2001. The plaintiff filed its post-hearing brief and proposed findings of fact and conclusions of law on January 4, 2002. Defendant filed its brief and proposed findings on February 4, 2002. The Panel Report has been submitted and

reviewed.

This case involves a Workers' Compensation Policy, Policy No. 03380198, that was issued by SWIF to BNZ for the time period of January 23, 1994 to January 23, 1995. The central issue in the case is whether this policy was a guaranteed cost policy or an Option V retrospective rated ("Option V") policy. If the policy is found to be an Option V policy as plaintiff claims, then BNZ will be entitled to a premium refund from SWIF of $90,041.80.

The complaint contains two counts. The first is a breach of contract claim and the second alleges that SWIF is estopped by its actions from denying that BNZ was placed on an Option V plan.

The evidence presented at the hearing of this matter shows that the parties' dispute centers on whether BNZ's letter accepting SWIF's offer of the Option V policy was an effective acceptance and thereby created an enforceable contract for Option V coverage. Most facts are not in dispute and the question to be decided is which party will bear the risk of the non-delivery of the acceptance letter.

THE FACTS

A recitation of the facts begins with a letter sent by SWIF to BNZ dated February 2, 1994 offering to renew BNZ's insurance policy. (Ex. D-6) That letter, signed by SWIF underwriting technician Ms. Lorraine Lorenzetti, offered BNZ the option of electing to renew its insurance policy either on an Option V retrospective rating plan or a guaranteed cost plan. SWIF's letter stated that BNZ must advise SWIF within ten business days of its decision or SWIF would automatically issue the renewal as a guaranteed cost policy.

Under a guaranteed cost plan, an insured pays a set premium for the policy year irrespective

of the losses actually insured in that year. BNZ was covered by a guaranteed cost plan the prior year. Under a retrospective rating plan, premiums are adjusted after the policy year ends based on the actual losses experienced. This type of plan can save an insured money, or it can cost more in premiums, depending on the insured's actual loss experience. Whether a retrospective Option V policy will actually save money cannot be determined with certainty until after the policy period ends.

Upon receipt of SWIF's offer, BNZ consulted its insurance broker, Sedgwick James, who recommended that BNZ accept the Option V policy. This advice was communicated to Daryl Boehmer, BNZ's treasurer and vice president of finance. Mr. Boehmer then prepared a letter to SWIF on his computer accepting the Option V policy. (Ex. P-6) On the face of BNZ's file copy of that letter is an indication that the letter was to be sent certified mail, return receipt requested and the letter is dated February 14, 1994. The copy also indicates that the letter was properly addressed to SWIF except that the zip code used was typed incorrectly as 1850<u>6</u>-5100 instead of 1850<u>5</u>-5100 (emphasis added).

Mr. Boehmer testified that he directed Donna Anglada, BNZ's administrative assistant, to send the letter certified mail and that he later saw the letter's mailing envelope with the certified mail cards attached to it in BNZ's tray for outgoing office mail. (Ex. P-1, pp. 25-26). Ms. Anglada testified that her normal business procedure at BNZ was to prepare certified mail, to place it in the tray, and to mail the letters in the tray at the end of the day. However, Ms. Anglada had no specific recollection of preparing Mr. Boehmer's letter for mailing or mailing it at the post office. (Ex. P-2, pp. 31-32).

BNZ could not produce any certified mail receipts showing actual mailing or receipt of the letter. Donna Anglada testified that BNZ's business practice was to retain the "white form" that is filled out; (which states the costs of postage, the type of mail used, and "to whom it was being sent") with the

file copy of the document that is being mailed. (Ex. P-2, pp.14-15) However, she could not locate the "white form" showing the mailing of this letter in BNZ's files, and additionally could not recall if she filled out any postal receipts for this particular letter. (Ex. P-2, pp. 14-15, 32-33) Likewise, BNZ's internal procedure was to route the signed green delivery card back to the sender. (Ex. P-2, pp. 15-16) According to Ms. Anglada, Darryl Boehmer would have been the "sender" in this instance. (Ex. P-2, p.16) Mr. Boehmer testified that he did not have any signed mailing receipt for this letter in his files and he had no recollection of ever seeing one. (Ex. P-1, p.26)

SWIF denies it ever received a letter from BNZ accepting the Option V policy. Ms. Lorenzetti testified that she never received any response from BNZ. SWIF produced its incoming mail logs which showed no letter from BNZ was received at the SWIF office during the relevant time period. (N.T. 49-52, 65-66)

During 1994, the parties had no further communication. SWIF proceeded to treat the policy on its books as a guaranteed cost policy as it stated it would in its offer-letter and it charged BNZ's account accordingly. BNZ assumed it was covered by the Option V plan. The parties continued through the year, each operating under a different assumption regarding the policy that was in effect. They next communicated about the subject two years later when BNZ asked SWIF for the refund that it thought was due under the Option V policy. Only then did BNZ discover that SWIF was claiming that it never received Mr. Boehmer's acceptance letter. The issue to be decided is which party must bear the risk of the missing acceptance letter and the resulting $90,041.80 loss.

BREACH OF CONTRACT CLAIM

BNZ argues that under the facts presented it has shown that it properly mailed its acceptance of the Option V policy and therefore it is entitled under the mailbox rule to the presumption that SWIF received the letter. SWIF argues that it never received the letter and that the facts do not show the letter was properly mailed, therefore no legal presumption of receipt arises. Even if there is a presumption, SWIF asserts it has presented sufficient evidence of non-receipt for rebuttal.

"It is the requisite of every contract that there be an offer and acceptance." Farren v. McNulty, 121 A. 501, 502 (Pa. 1923). An offer can specify any mode or terms of acceptance. It can require that the acceptance be by telephone, telegraph or letter, and it can require that the acceptance shall be received instead of merely stated. Glenway Industries, Inc. v. Wheelabrator-Frye, Inc., 686 F.2d 415 (3rd Cir. 1982)(applying Pa. Law). When parties are negotiating at a distance from each other, the most common method of making an offer is to send it by mail, and most often the offeror has specified no particular mode of acceptance. Corbin on Contracts, ch.3, sec. 3.24. In such a case, or in any case where a mailed acceptance is reasonable, it is the rule that the offeree has the power to accept and close the contract by mailing the letter of acceptance within the time specified in the offer, or, if none is specified, then within a reasonable time. Corbin, supra. The so-called mailbox rule is that the contract is regarded as made at the time and place that the letter of acceptance is put into the possession of the postal service. McClintock v. South Penn Oil Co., 146 Pa. 144, 23 A. 211 (1892).

If the circumstances are such that the acceptance is operative upon starting it by mail or telegraph, the fact that it is delayed on the way or even that it is lost and never received does not affect the validity of the contract already made. Corbin, supra. This rule, however, assumes that the acceptance letter is properly stamped and addressed and that the loss or delay is not the fault of the offeree. If the

acceptance is improperly stamped or addressed, classical thinking concluded that the offeree lost the benefit of the mailbox rule and that the acceptance is effective only when and if it arrives and only if the offer is still open at that time. Corbin, supra.

In Pennsylvania, the mailbox rule follows the basic common law. It provides that where an acceptance letter has been properly addressed and mailed, that acceptance is presumed to be effective on the date of mailing. Once the presumption of receipt has been established, that presumption cannot be rebutted by a naked denial that the letter was received. The alleged recipient must offer some affirmative evidence of non-receipt in order to rebut it. See e.g., Department of Transportation v. Grasse, 606 A.2d 544 (1992); Department of Transportation v. Brayman Construction Corp.-Bracken Construction Co., 513 A.2d 562 (Pa. Cmwlth 1986).

In the case before us, there is no legal issue concerning SWIF's letter offer of a new insurance policy. While the offer-letter could have been more precisely drafted by SWIF, there is no doubt that BNZ understood the terms of the offer and clearly knew that in order to accept the Option V policy it had to tell SWIF. Also, the record supports the fact that BNZ understood that if it did not communicate its acceptance of the Option V policy to SWIF within ten business days, SWIF would automatically enroll BNZ in the guaranteed cost plan.

In order for BNZ to benefit from the presumption of delivery under the mailbox rule, it must prove that its February 14, 1994 acceptance letter was "properly mailed". Under Pennsylvania cases this means that the letter had adequate postage, was properly addressed, and was actually mailed. SWIF argues that the letter was not properly mailed and that there should be no presumption of mailing for at least four reasons: 1) that the letter was addressed with an incorrect zip code, 2) that BNZ has no white certified

post office receipt evidencing mailing, 3) that BNZ has no signed green certified mail receipt evidencing delivery, and 4) that no BNZ witness has testified that the letter was ever actually taken to the post office.

First, the controlling cases indicate there can be no presumption of proper mailing if a letter is incorrectly addressed. In Dow v. W.C.A.B. (Household Finance Co.), 768 A.2d 1221 (Pa. Cmwlth. 2001), the court ruled that the use of an incorrect address meant the letter was not "properly mailed" and there can be no presumption of receipt. The issue was whether the claimant had been notified by the employer that a position was open which was within the claimant's physical capabilities. The employer testified he sent the letter to claimant's counsel telling claimant to return to work at the new position. Claimant's counsel said she never received the letter and the issue was whether a presumption of delivery attached. The letter was addressed to the attorney at her former address, a building that had burned down and had not existed for more than one year before the letter was allegedly mailed. The court found the letter was not properly mailed because the address was incorrect.

Another case where the address was incorrect involved an incorrect zip code. In Effort Foundry, Inc. v. Commonwealth, Unemployment Compensation Board of Review, 415 A.2d 1263 (Pa.Cmwlth 1980), the Commonwealth Court found that because the respondent addressed its notice to the claimant at "Effort Foundry, Effort, Pa. 18353" instead of using the correct zip code "18330", the notice was deemed ineffective. Because of this seemingly minor mistake, claimant was not entitled to a presumption of delivery.

BNZ argues that its zip code mistake is *de minimus* and should not nullify the presumption. The Board finds that under the rule in Effort Foundry BNZ's single digit zip code error is significant because the courts interpret the "proper mailing" requirement quite strictly. When BNZ's address error is coupled with its lack of any certified mail receipts, and the absence of any testimony that the letter ever actually reached the post office, the Board finds that the totality of these circumstances dictates that there can be no presumption of delivery in this case.

BNZ made the choice to send the acceptance letter certified mail, return receipt requested rather than regular first class mail which was all the offer required. BNZ opted for certified mail because it understood the importance of the letter and the consequences of late or non-delivery. BNZ's decision to use a mode of delivery other than first class mail, put an additional burden on it to prove that the letter was actually mailed certified mail.

As noted earlier, BNZ's witnesses had no certified mail receipts, no witness had a recollection of seeing any white or green return receipt cards, and there was no testimony of an actual mailing of the letter. BNZ was only able to produce testimony about the office practice for mailing letters. Relying on language in Commonwealth, Department of Transportation v. Brayman Construction Corporation-Bracken Construction Company, supra., BNZ asserts that it is entitled to the presumption of delivery because it produced evidence that the letter was written and signed in the regular course of business, that it was placed in the basket which was the regular place for collecting mail, and that it was the custom and practice of BNZ to mail the letters in the basket daily.

The court in Brayman Construction addressed a situation in which the subcontractor denied it received a letter from the Department of Transportation regarding approval of a document and the

Department claimed that the mailbox rule operated to set up a presumption that the letter was sent regular mail and was received. The court found the mailbox rule applicable where there is some evidence that the item was mailed:

> "The [mailbox] rule applies only when there is evidence that the item was mailed. It is true that evidence of actual mailing is not required. Instead, 'when a letter has been written and signed in the usual course of business and placed in the regular place of mailing, evidence of the custom of the establishment as to the mailing of such letters is receivable as evidence that it was duly mailed.' Christie v. Open Pantry Marts, 237 Pa. Super. 243, 246, 352 A.2d 165, 166-67 (1975).

The Board finds that the case at bar is not controlled by this rule because Brayman Construction involved regular mail. In the case before us, BNZ did not choose to use regular mail which required only deposit in any mailbox. BNZ cannot rely only on evidence of general business practices because it chose to use that form of mail which requires special receipts and a trip to the post office. Evidence of actual mailing is required, because BNZ chose this special form of mailing. No such evidence was presented.

The Restatement (Second) of Contracts sec. 67 indicates that when an alternate mode of communication is used, the mailbox rule for acceptance is modified:

> "Where an acceptance is seasonably dispatched but the offeree uses a means of transmission not invited by the offer or fails to exercise reasonable diligence to insure safe transmission, it is treated as operative upon dispatch if received within the time in which a properly dispatched acceptance would normally have arrived." (Emphasis added)

This means that once BNZ chose to send its acceptance by certified mail, that acceptance was only

effective if and when SWIF actually received it. Choosing certified mail meant BNZ could not rely on any presumption of receipt but had to prove actual mailing and receipt to show a contract was formed for an Option V policy.

When special aspects of mailing are used, courts require special proof. In Darroch v. Unemployment Compensation Board of Review, 627 A.2d 1235 (Pa. Cmwlth. 1993), the court ruled that testimony of actual mailing was required to establish a presumption of receipt. The issue in Darroch was whether an appeal of a Bureau determination could be perfected by mailing the appeal letter to the Bureau even though the Bureau claimed it had not received the letter within the 15 day time period allowed for perfection. The Commonwealth Court decided that the appeal was not perfected because there was not sufficient evidence that the letter was put into the postal system in a timely way. The evidence presented by the plaintiff was that he prepared and signed the appeal letter on March 17, 1992 and placed it in an office mail basket for others to mail. His organization's customary mailing practice was that such mail would be taken to the post office and mailed. However, plaintiff produced no testimony establishing that actual mailing happened on the particular date at issue. The defendant had received the letter late and there was no postmark on the letter indicating when it was mailed. Accordingly, the court ruled that plaintiff could not rely on any presumption that the letter was mailed on that date because he had no proof. The Court held that there was "...no basis for finding that the appeal letter was mailed during the statutory period." Darroch, supra at 1237.

In the case now before this Board, no evidence was presented indicating that the acceptance letter was ever placed in the postal system, only that it was placed in an office mail basket to be mailed.

Applying the reasoning in Darroch where there was no postmark showing the date of mailing, BNZ has no receipts from the certified letter showing it ever actually made it to the post office, and therefore, can not get a presumption of receipt.

Even if the Board were to find that plaintiff is entitled to a presumption of receipt, plaintiff could still not prevail. SWIF has denied receipt of the letter and has gone beyond that denial and presented rebuttal evidence. Through its business records (mail room logs) and testimony, SWIF proved that it received no certified letter from BNZ at any time in February or March 1994. While the Board is sympathetic to plaintiff's situation, under the facts found and the applicable law, the Board finds that SWIF was entitled to treat the insurance in effect as a guaranteed cost policy. No contract for an Option V policy was formed.

ESTOPPEL CLAIM

BNZ argues that even if it cannot prove that it mailed its acceptance of SWIF's offer of an Option V policy, SWIF's subsequent actions should estop it from denying the Option V policy coverage for BNZ.

The doctrine of promissory estoppel also requires the elements of an offer and acceptance. "The doctrine of promissory estoppel was never intended to overcome the fundamental contract principle that there must be an offer and an acceptance before a contract can be created." Cayuga Construction Corp. v. Vanco Engineering Co., 423 F. Supp. 1182, 1185 (W.D. Pa. 1976). Here SWIF offered BNZ a retrospective Option V rating plan, but the offer required BNZ to advise SWIF of its acceptance within ten business days. (Ex. D-6). Because the Board finds that BNZ's acceptance was never delivered or

communicated to SWIF, the Board rules that BNZ has no actionable claim in promissory estoppel.

BNZ argues that SWIF should have taken several actions and that SWIF's failure to act entitles BNZ to a judgment under a theory of equitable estoppel. "Equitable estoppel can be applied to a Commonwealth agency when its acting in a proprietary capacity to preclude the agency from depriving a person of a reasonable expectation when the agency knew, or should have known, such person would rely upon the representation of the agency." Com., State Public School Bldg. Authority v. Nobel C. Quandel Co., 585 A.2d 1136, 1141 (Pa. Cmwlth. 1991)

BNZ claims SWIF should have notified BNZ when SWIF received no response to its February 2, 1994 offer-letter. The Board disagrees that SWIF had any such duty. BNZ states also that the policy reprint that SWIF forwarded to BNZ did not make clear that it was a guaranteed rate policy rather than an Option V policy and that SWIF was late in sending out the policy by not mailing it to BNZ until on or about March 23, 1994, a little over two (2) months after the inception of the policy period. While these facts are true, none of these complaints supports an equitable estoppel claim against SWIF.

The Board accepts BNZ's position that the policy reprint mailed to BNZ on or about March 23, 1994 did not state that it was a guaranteed cost policy. However, BNZ had a guaranteed cost policy the previous year and should have recognized or inquired if the renewal policy was not clear. The fact that the policy was not mailed until on or about March 23, 1994 did not really harm BNZ.

BNZ also argues that it carried the anticipated Option V premium refund on its books and that this demonstrates that BNZ thought it was under an Option V policy. Even though that was BNZ's mind set, for the reasons set forth throughout this opinion the Board finds that there was never a contract for such coverage and that SWIF took no action that estops it from denying such coverage.

For the above-stated reasons, BNZ's claims are denied and the action is dismissed with prejudice.

ORDER

AND NOW, this 17th day of October, 2002, after hearing, it is **ORDERED** and **DECREED** that judgment be entered in favor of Defendant, Commonwealth of Pennsylvania, Department of Labor & Industry, State Workers' Insurance Fund, and against Plaintiff, BNZ Materials, Inc. All claims are **DISMISSED WITH PREJUDICE.**

Each party shall bear its own costs and attorney's fees.

BOARD OF CLAIMS

_____
David C. Clipper
Chief Administrative Judge

_____
Louis G. O'Brien, P.E.
Engineer Member

_____
John R. McCarty
Citizen Member