

APPEAL NO. 92279

A contested case hearing was held at (city), Texas, on May 6, 1992, (hearing officer) presiding as hearing officer. On the single issue of whether the respondent timely filed its notice of disputed claim, he determined that notice was filed timely with the Texas Workers' Compensation Commission. Appellant urges there was no evidence or, alternatively, insufficient evidence upon which to base one of the hearing officer's findings of fact and two of his conclusions of law and complains that the hearing officer erred in failing to take judicial or official notice of two matters, failing to admit two items of evidence and failing to grant a continuance.

DECISION

Determining there is sufficient evidence of record to support the findings, conclusions and decision of the hearing officer, we affirm.

As indicated, the only issue in this case is timely notification of respondent's disputing of the appellant's claim. Under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.21(a) (Vernon Supp. 1992) (1989 Act), if a carrier "does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." The focus of the parties in this case centers around whether a form, Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), was filed with the Commission on June 28, 1991 by the respondent. If so, the dispute of the claim would be timely.

The evidence of record offered by the appellant indicates that the Commission's claims file in this case does not contain the June 28, 1991 form disputing the claim. To establish that the form was filed with the Commission, the respondent presented the testimony of (LA), a claims adjuster who testified that she handled this claim. LA stated that she first became aware of the claim on June 21, 1991, the date the adjuster service handling the matter for the respondent received written notice of a claim. (The hearing officer found as fact that the notice of the appellant's workers' compensation injury claim was made on (date of injury)). It was her responsibility to timely investigate the claim so that if it was disputed for any reason the adjuster service's (city) office could be notified in time to file a notice of dispute within seven days. She specifically recalls attempting to get an interview of the claimant (appellant here) but the law firm representing him would not allow it. She recalled that her investigation resulted in the conclusion that the claim should not be allowed and that she drafted a dispute notice. It was subsequently typed by someone else and faxed to the (city) office. She described this as standard procedure. Also in the record are two transcripts of interviews by LA involving this claim indicating they were conducted on June 24, and 26, 1991.

(DF), the (city) representative of the adjuster service testified that he is responsible for filing the TWCC-21 with the Commission. He stated that it was standard procedure for

the adjuster service field office to prepare the TWCC-21 and fax it to his office in (city). His office would then make two copies of the form and hand carry it to the (city) Central Office of the Texas Workers' Compensation Commission for filing. In accordance with existing procedure in June 1991, his office would file one copy in the "field office bin" at the Commission and file the other with the clerk at the cashier's cage who would date stamp the copy and return it to them for their file. He believes that procedure was followed in this case because his office has a copy of the TWCC-21 filed concerning the appellant's claim and which has been date stamped "Received, Jun 28, 1991, Texas Workers' Compensation Commission, (city), Texas." DF identified one of the respondent's exhibits as being a true copy of the TWCC-21 with attachments that is on file in his office. He also identified the file stamp as being the stamp used by the (city) central office in June 1991.

An affidavit of (DC), Reprographics Supervisor with the Texas Workers' Compensation Commission, provides that she is familiar with the cashier's cage and with the stamp used to file documents. She identified the stamp on the respondent's TWCC-21 exhibit as the file-mark stamp for documents filed at the cashier's cage in June, 1991. The affidavit goes on to set forth that:

I am responsible for the cashier room which is open for business from 8:00 am to 5:00 pm (including the lunch hour). The cashier room has keyless locked doors that uses a security code to access that room. Only the staff of the cashier room and their supervisors have access to the code, and only the cashier on duty has access to use the stamp. Although I am responsible for the physical location of the Adjuster's and Insurance Carrier Board Representatives Room, I am not responsible for stamping, distribution, pick-up or delivery of mail, articles or documents sent there and I have neither knowledge of nor control over how documents are handled that are left in the Adjuster's and Insurance Carrier Board Representatives room.

However, I do know that Insurance Carrier Board Representatives and Adjusters do not have access to TWCC cashier room file-mark stamps. Insurance Carrier Board Representatives and Adjusters are not allowed to file-mark any documents delivered to the Texas Workers' Compensations Commission cashier room window.

The Finding of Fact and the Conclusions of Law with which the appellant takes exception are:

FINDINGS OF FACT

6.The Carrier filed TWCC-21, Notice of Disputed Claim regarding the (appellant's) claim with the (city) Central Office of the Texas Workers' Compensation Commission on June 28, 1991 and this notice did comply with Rule 124.6(a)(9).

CONCLUSIONS OF LAW

2. The Carrier, (County) through its servicing contractor, [adjuster service], filed notice of disputed claim with the Texas Workers' Compensation Commission before the 60th day after the date on which the Carrier was notified of the claim.

3. The Carrier did not waive the right to contest compensability.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). He resolves conflicts and inconsistencies in the evidence and makes findings of fact. Texas Workers' Compensation Commission Appeal No. 92260 (Docket No. redacted) decided August 3, 1992. Clearly, the evidence indicated that the June 28, 1991 notice of dispute filed by the respondent did not become a part of the appellant's claims file. Whether it was lost, misplaced, erroneously destroyed or filed elsewhere is not resolved by the evidence. However, there was sufficient evidence from which the hearing officer could find that the form was appropriately and timely filed with the Commission. See *generally* Texas Workers' Compensation Commission Appeal No. 92122 (Docket No. redacted) decided May 4, 1992. And, there was no evidence to suggest or support any fraud, abuse or other improper conduct on the part of any party. While it is indeed unfortunate that the particular TWCC-21 did not reach the claims file or become a part of the claims record at the commission, there is no evidence or other indication that prejudice or harm regarding any substantive issues has resulted other than the circumstance that waiver does not apply.

The appellant's remaining assertions of error lack merit. The hearing officer appropriately refused to take judicial or official notice of the complete file in this case but allowed the parties to present evidence from the files. Indeed, the appellant presented considerable evidence from the claims file that the TWCC-21 in question did not get into the claims file. The evidence which the hearing officer rejected was from the claims file and was primarily cumulative in showing that the TWCC-21 was not a part of the file. See Texas Workers' Compensation Commission Appeal No. 91131 (Docket No. redacted) decided February 12, 1992. A request for a continuance was also appropriately denied, under the circumstances, particularly since the hearing officer agreed to leave the record open for 24 hours to allow for some added evidence from the appellant. There is nothing to indicate that the appellant took advantage of this opportunity by the hearing officer. The appellant should not be heard to complain at this time. In sum, we do not find any abuse of discretion in the denial of a continuance. See Texas Workers' Compensation Commission Appeal No. 91076 (Docket No. redacted) decided December 31, 1991.

Determining the evidence sufficient to support the findings, conclusions, and decision of the hearing officer, the case is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge