APPEAL NO. 990224

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 5 and 6, 1998, a contested case hearing (CCH) was held. The two issues before the hearing officer were:

1. Did [Carrier R] or [Carrier E] provide workers' compensation insurance for [LJM] on _____?

2. Did the Claimant [respondent] have disability resulting from the injury sustained on _____, and if so, for what periods?

The hearing officer determined that Carrier R had provided workers' compensation coverage on _____, and that claimant had disability from July 1, 1998, through the date of the CCH.

Carrier R appeals, with the main thrust of its appeal directed at the determination that it, rather than Carrier E, provided workers' compensation coverage. Carrier R also contends that claimant's injury had "healed" and that claimant did not have disability. Carrier R requests that we reverse or remand the case for findings in its favor. Carrier E filed a lengthy, detailed response, generally urging that Carrier E never provided coverage for the employer and that the hearing officer's decision be affirmed. The file does not contain a response from claimant.

DECISION

Affirmed.

First, we will note that although this case is one of four cases, each of which have different claimants, different dates of injury and different injuries, each has as its common theme the issue of whether Carrier R or Carrier E provided workers' compensation coverage at the time the injuries occurred. The hearing officer provided a detailed Statement of the Evidence which the parties appear to have accepted as generally factually accurate. Where there is a dispute or conflict in the factual evidence, we accept the hearing officer's version in that the hearing officer has the responsibility to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is a very complex case involving insurance and corporation law. In an attempt to concisely address the arguments presented, we define some of the terms and background.

LJM is a staff leasing company and was the employer of the claimant in this case and of the claimants in the three companion cases. In December 1997 the owner of LJM sold 60% of the business to Ms. DM and Mr. WD, who, as the hearing officer states, were "the disputed equal owners of [SS]," another staff leasing company. (Apparently, one of the reasons for this sale was that SS would add LJM to its insurance policy with a common

modifier, thereby reducing the insurance premium.) Prior to the sale, LJM had insurance coverage with Carrier R. In acquiring a 60% interest in LJM, Mr. WD and Ms. DM, as owners of SS, would have an insurable interest in LJM and would, therefore, be allowed to provide workers' compensation coverage through their carrier, Carrier E. While the ownership of SS was in dispute, the hearing officer found, in an unappealed finding of fact, that Mr. WD and Ms. DM each owned 50% of SS.

Following the purchase of LJM[1], the owners of SS contacted their insurance agent ("soliciting agent"), Ms. PS, to request that LJM be added as an insured on the policy SS had with Carrier E. (There is some dispute regarding who Ms. PS was working for; her own company or another company.) On December 23, 1997, Ms. PS requested that Carrier E endorse SS's policy to include LJM as an insured. On that same date, Ms. PS began issuing "certificates of insurance" to LJM and other clients of SS, indicating that both LJM and SS were insured on Carrier E's policy with SS. LJM canceled its policy with Carrier R and began sending premium payments to SS, which apparently, at least for a period of time, kept the money. On April 2, 1998, Ms. PS purportedly renewed the policy with Carrier E. Apparently, some claims began coming in to (employer), which was a general agent for Carrier E. Subsequently, Carrier E canceled its policy with SS on May 8, 1998, due to alleged fraud on the part of Ms. DM and Mr. WD.

The hearing officer, in the Statement of the Evidence, discusses in some detail the unusual aspects of the sale of LJM shares to SS. We will simply accept the unappealed finding that on or about December 10, 1997, Ms. Dm and Mr. WD "purchased 30% of [LJM] and in so doing obtained an insurable interest in [LJM]." The reason for the sale was so that LJM could obtain "workers' compensation insurance at a discount of 79%." It is also undisputed that Ms. PS issued certificates of insurance on the same day that she sent a facsimile transmission to Carrier E (through (employer)) to add LJM as an insured. Carrier E did not respond to the request (testimony was that an underwriter for (employer) made a verbal request for additional information and, receiving none, took no further action). When asked why she did not wait for a response from Carrier E before submitting the certificates of insurance, the hearing officer notes, Ms. PS testified that it was common in the industry and "that was how she always did business." Ms. PS continued to issue certificates of insurance until May 1998.

The hearing officer, in her discussion, comments on the effect that a certificate of insurance has and notes it "does not constitute a contract." As the hearing officer notes, the certificate of insurance, on its face, states:

[1]The purchase agreement allowed the former owner, who had retained a 40% ownership, to repurchase the business.

> This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below. (Carrier R, Exhibit C.)

The hearing officer discusses Granite Construction Co. v. Bituminous Insurance Companies, 832 S.W.2d 427 (Tex. App.-Amarillo 1992, no writ), a non-workers' compensation case, and applies it to the present case. The hearing officer noted that the policies issued by Carrier E to SS "failed to reveal any mention of LJM" and commented:

> [Ms. PS's] request to add LJM to the policy SS had with [Carrier E] was simply an application for coverage. The Texas Appellate courts have held an application is a mere offer to make a contract of insurance, and must be accepted before a binding contract of insurance is made. American Casualty & Life Insurance Co. v. Parish, 355 S.W.2d 781, 784 (Tex. 1962) [sic, should be (Tex. Civ. Appl-Waco 1962, no writ)]. There is no contract unless and until the application for insurance is accepted by the insurance company. Inglish v. Prudential Ins. Co. of America, 298 [sic, should be 928] S.W.2d 702, 706 (Tex. 1996), no writ [sic, should be Tex. App.-Corpus Christi 1996, no writ].

Underwriters for (employer) and Carrier E testified that Carrier E never endorsed LJM as an added insured, although, as the hearing officer notes, there was evidence that work codes for both LJM and SS clients were included in the renewal policy (for April 2, 1998, through April 2, 1999, which was subsequently canceled). The hearing officer found that the work codes alone did not inform Carrier E of "LJM's inclusion in the policy and do not work to expand the coverage afforded by the policy."

The hearing officer, in finding that Carrier R remained liable for the coverage, relies largely on Sections 406.007 and 406.008 of the 1989 Act and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 110.1(f) (Rule 110.1(f)). Section 406.007(a), entitled TERMINATION OF COVERAGE BY EMPLOYER, NOTICE, provides that an "employer who terminates workers' compensation coverage . . . shall file a written notice with the commission [Texas Workers' Compensation Commission] by certified mail not later than the 10th day after the date on which the employer notified the insurance carrier to terminate the coverage." (Emphasis added.) That section goes on to state that the notice was to be provided Ato affected employees . . . .A Section 406.007(c) provides that termination of coverage takes effect 30 days after the date of filing notice with the Commission or the cancellation date of the policy, whichever is later. (There was no evidence that LJM filed its notice with the Commission.) Section 406.007(d) provides that coverage shall be extended until the date on which the termination of coverage takes effect and the employer is obligated for the payment of premiums for that period. In summary, this section states what is necessary for the employer, LJM, to do to cancel coverage. Section 406.008 similarly provides that a carrier "that cancels a policy of workers' compensation insurance or that does not renew the policy . . . shall deliver notice of the cancellation or nonrenewal by certified mail or in person to the employer and the commission not later than: (1) the 30th day before the date on which the cancellation or nonrenewal takes effect . . . ." (Emphasis added.) Subsection

(b) states that the "notice required under this section shall be filed with the commission" and subsection (c) states that the "[f]ailure of the insurance company to give notice as required by this section extends the policy until the date on which the required notice is provided to the employer and the commission."

Rule 110.1 implements the provisions of Sections 406.007 and 406.008, with Rule 110.1(f) providing that insurance coverage remains in effect until the end of the policy period, until the beginning of a new policy, or until the Commission and employer receive the Insurance Carrier's Notice of Coverage/Cancellation of Coverage (TWCC-20) and the later of "(3) the effective date of the cancellation if later than the date in paragraphs (1) or (2) of this subsection." In evidence is a TWCC-20 dated March 6, 1998, with a purported effective date of cancellation of January 9, 1998, with a date/time stamp as being received by the Commission on March 10, 1998. The hearing officer made the following findings:

FINDINGS OF FACT

18. The [Commission] form 20 which is titled "Insurance Carrier Notice of Coverage/Cancellation/Non-Renewal of Coverage" was filed by [Carrier R] and hand delivered to the commission on March 10, 1998.

19. [Carrier R] did not send the [Commission] form 20 to the employer as notice of the cancellation of the policy either by certified mail or by hand delivery.

1. Pursuant to Rule 110.1(f) the policy for workers' compensation coverage LJM had with [Carrier R] continued in effect until the end of the policy period, October 23, 1998.

Finding of Fact No. 18 was not appealed.

Carrier R appealed the hearing officer's decision, contending that LJM canceled its policy with Carrier R rather than Carrier R canceling its policy with LJM, and that Carrier R completed the TWCC-20 and filed it with "TWCC on March 18, 1998 [sic, March 10, 1998]." Also in evidence is another TWCC-20, dated April 16, 1998, from Carrier R, with no effective date of cancellation or nonrenewal, filed with the Commission on April 21, 1998. The claimant in this case was injured on _____. It does not appear that the employer ever gave notice to the Commission nor did it notify its affected employees of the attempted cancellation. In short, LJM had not effectively canceled its policy with Carrier R. Carrier R further contends that compliance with notice or cancellation of coverage was not an issue and, therefore, both "Claimant and [Carrier E] waived the defense that [Carrier R] did not comply with ' 406.008 or Rule 110.1(f)"; that Carrier R "had no opportunity to present evidence or raise defenses regarding the filing of form, TWCC-20"; and that the hearing officer improperly "recast the issues to include arguments not before her." We disagree. Carrier R's position at the benefit review conference was that coverage was canceled prior to the date of the accident. Further, the issue was whether Carrier E or Carrier R had coverage, which, to us, would fairly clearly indicate that cancellation and/or compliance with

the statute and Commission rules was very relevant and was reasonably included in the issue. Just because a party does not argue a clearly relevant and pertinent portion of the 1989 Act does not preclude the hearing officer from considering that portion of the statute. We believe that Sections 406.007 and 406.008 and Rule 110.1 have as their purpose to give full and complete disclosure to everyone concerned when a policy of workers' compensation insurance is canceled. Here, the claimant has a reasonable expectation that the employer had workers' compensation coverage and should not, either through inadvertence or otherwise, be deprived of that protection without being given the opportunity to seek employment with an employer that does afford workers' compensation coverage. In this case, both carriers argue they do not have coverage, yet the employer apparently paid the premium and the employee reasonably believed there was coverage. The employer, LJM here, was obligated to pay premiums to Carrier R until proper notice of cancellation had been given.

Carrier R further contends that Carrier E had coverage, arguing agency law that "soliciting agents can bind the carrier." Carrier R argues that Ms. PS either had actual authority or apparent authority to bind Carrier E by issuing the certificates of insurance. That argument is not supported by the testimony and evidence. All of the witnesses, with the possible exception of Ms. PS, indicated that only the insurance company or an authorized general agent could bind a carrier. It is undisputed that Ms. PS was a soliciting agent *(i.e.*, salesperson) without authority to bind Carrier E and that she improperly issued the certificates of insurance which, on their faces, stated they conferred no rights and did not amend, extend, or alter the coverage of the policies (which did not include LJM). To the extent that there is conflicting evidence on this point, the hearing officer makes abundantly clear that the certificates of insurance did not confer any coverage outside the actual policies issued by Carrier E, which never endorsed LJM as an added insured. (*See* hearing officer's Findings of Fact Nos. 11 and 14.) We are unwilling to say that is incorrect as a matter of law or not supported by the evidence. Carrier R also asserts that the hearing officer should have made a finding on whether Ms. PS had actual authority to bind Carrier E. Ms. PS testified that she was a soliciting agent and there is scant evidence to the contrary. We do not find error in the hearing officer's failure to make a specific finding on this point.

Carrier R also contends that Carrier E is the responsible carrier on a theory of estoppel and detrimental reliance, that (employer) and/or Carrier E should have earlier objected to Ms. PS's issuance of the certificates of insurance, that LJM paid premiums to SS, that Carrier E paid some benefits to the claimant, and that LJM detrimentally relied on the representations of Ms. PS and SS. Carrier R notes that the Appeals panel has discussed equitable estoppel, citing Service Farm Lloyds, Inc. v. Williams, 791 S.W.2d 542, 550 (Tex. App.-Dallas, 1990, writ denied), a homeowner's policy case where the court noted that the doctrines of waiver and estoppel cannot be used to create insurance coverage where none exists under the terms of the policy, but also noted that there is authority supporting an exception to that rule; that is, if the insurer assumes an insured's defense without declaring a reservation of rights or obtaining a nonwaiver agreement, and with knowledge of facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising them. *See* Texas

Workers' Compensation Commission Appeal No. 971606, decided September 24, 1997. Carrier R appears to contend that Carrier E, by paying some benefits, is estopped from denying coverage. We disagree. Williams was also mentioned in Houston General Insurance Co. v. Association Casualty Insurance Company, 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.), a workers' compensation case involving two carriers, which stated that there were no cases in which the Williams exception has been extended to workers' compensation cases and concluded that where two carriers are disputing coverage there is not an issue of compensability and no new coverage is created by waiver. Further, as Carrier E notes, the policies Carrier E issued to SS never provided coverage to LJM and there is no evidence that Carrier E paid benefits when it knew there was no coverage. Section 409.021 encourages a carrier to promptly commence the payment of benefits and specifically, in subsection (d), provides that the "initiation of payments by an insurance carrier does not affect the rights of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period."

On the substantive aspects regarding this claimant's injury and disability, the parties stipulated that claimant sustained a compensable thoracic, spinal injury on _____ (when he lost his footing and fell off a building). Claimant was treated at a hospital and was diagnosed as having compression fractures at T6 and T7. Claimant testified that he received income benefits from Carrier E's adjusting firm from April 7 to June 5, 1998. Claimant said that he returned to work at light duty in mid-June, worked two weeks light duty and then tried to work regular duty for two days, but was unable to do so. Claimant changed treating doctors' from the hospital doctor to Dr. B on July 1, 1998. Claimant saw Dr. B on July 1st and Dr. B took claimant off work. Various off-duty slips have continued claimant in an off-duty status. Claimant testified that he is unable to return to his preinjury construction work job. The hearing officer found claimant had disability beginning July 1, 1998, and continuing to the CCH. Carrier R (concurred in by Carrier E) contends that claimant's "compression fractures have healed," that claimant returned to work," and "has otherwise not been diagnosed with orthopedic problems." We have frequently noted that issues of injury and disability may be established by claimant's testimony alone, if believed, citing Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In this case, claimant attempted to go back to regular preinjury work, was unable to do so, and is supported by medical records of Dr. B in his assertion that he has disability, as defined in Section 401.011(16).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge