APPEAL NO. 991789

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was commenced on June 9, 1999, with the record closing on July 19, 1999. The issues at the CCH were whether respondent (carrier 1) or appellant (carrier 2) provided workers' compensation coverage for (employer) on _____; whether carrier 1 waived its right to contest compensability of the injury to respondent (claimant) on the basis of no coverage by not contesting compensability within 60 days of being notified of the injury; and whether carrier 2 waived the right to contest compensability of the claimant's injury based on no coverage by not contesting compensability within 60 days of being notified of the injury. The hearing officer also found good cause to add the issue of whether, if it was determined that carrier 2 was liable for benefits, carrier 2 should be ordered to reimburse carrier 1 for all or part of the payments that carrier 1 has made on the claim. No party objected to this issue being added or to the authority of the hearing officer to resolve this issue and we will not address this further. The hearing officer concluded that carrier 2 had workers' compensation coverage for the employer in effect on the date of the claimant's injury and waived the right to contest compensability of the claimant's injury. The hearing officer also concluded that carrier 1 did not have coverage in effect on the date of injury and did not waive its right to contest the claim based on no coverage. Finally, the hearing officer concluded that carrier 1 was entitled to reimbursement from carrier 2 for benefits it had paid the claimant regarding his compensable injury of _____. Carrier 2 appeals, arguing that the hearing officer erred in finding the workers' compensation coverage by carrier 1 was canceled by virtue of the employer's obtaining coverage through carrier 2. Carrier 2 also argues that the hearing officer erred in finding carrier 2 waived the right to contest compensability of the claimant's injury and that carrier 1 is entitled to reimbursement from carrier 2. Carrier 1 responds, questioning the timeliness of carrier 2's appeal and arguing that the decision of the hearing officer should be affirmed.

DECISION

Finding a timely appeal, sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

We first address the issue of timeliness of the appeal, since this is jurisdictional. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was received by the carrier 2's Austin representative on July 29, 1999. Carrier 2 recites that it received the decision on May 25, 1994. Carrier 2 mailed its request for review to the Commission postmarked August 13, 1999, and the Commission received it on August 17, 1999. Thus, since carrier 2 mailed its request for review to the Commission within 15 days and it was received within 20 days of receipt of the hearing officer's decision, carrier 2's request for review is timely. *See* Section 410.202(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 143.3(c) (Rule 143.3(c)).

Most of the facts of the case are not in dispute. The parties stipulated that on _____, the claimant sustained a compensable injury while in the course and scope of his employment. It was undisputed that carrier 1 issued a policy of workers' compensation insurance to the claimant's employer to be effective from February 13, 1993, to February 13, 1994. It was also undisputed that on July 6, 1993, carrier 1 prepared an Insurance Carrier's Notice of Coverage/Cancellation of Coverage (TWCC-20) for nonpayment of premiums and that the cancellation was to be effective beginning August 8, 1993. Finally, it was undisputed that the carrier 2 issued a policy of workers' compensation insurance for the employer to be effective from August 15, 1993, to August 15, 1994.

There is some dispute concerning carrier 1's TWCC-20. Carrier 1 contends it was sent to the employer but there no evidence of its receipt by the employer in the record. The parties are not in disagreement that the TWCC-20 was received by the Texas Department of Insurance (TDI) on July 7, 1993. There is no record that the TWCC-20 was sent to the Commission.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. [Carrier 1] issued a new policy of workers' compensation insurance for the [employer], to be effective from February 13, 1993 to February 13, 1994. Notice of this coverage was filed with the TDI on February 18, 1993.

3. On July 6, 1993, [carrier 1] prepared a [TWCC-20] regarding its workers' compensation insurance policy for [employer] because of [employer's] failure to pay premiums. The cancellation was to be effective beginning August 8, 1993 to [sic] 12:01 a.m.

4. The evidence does not establish that [carrier 1's] [TWCC-20], as referred to in Finding of Fact #3 above, was mailed to or received by [employer] or the [Commission]. The TDI received it on July 7, 1993.

5. [Carrier 2], which is a wholly owned subsidiary of AIG, issued a policy of workers' compensation insurance coverage for [employer] that was in effect from August 15, 1993 to August 15, 1994.

6. [Carrier 1] received written notice of the Claimant's injury on August 27, 1993 via the TWCC-1 [Employer's First Report of Injury or Illness] form done on August 26, 1993.

7. [Carrier 2], through AIG, received written notice of this claim from [carrier 1] on July 21, 1994.

8. The evidence does not establish when either [carrier 2] or [carrier 1]

filed TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim] forms in this case. According to the Benefit Review Officer, as of April 22, 1999, [Commission] files and computer records reflected that [carrier 2] had not yet filed a controversion in this case.

9. [Carrier 1] has paid out $25,293.10 in indemnity benefits and $61,685.46 in medical benefits in this case.

CONCLUSIONS OF LAW

3. The evidence does not establish that [carrier 1] properly notified [employer] of the cancellation of its workers' compensation insurance policy in July 1993 as required by the Act. Therefore, its coverage was extended until [employer] obtained replacement coverage from [carrier 2] on August 15, 1993.

4. [Carrier 2], and not [carrier 1], provided workers' compensation insurance coverage to [employer] on _____.

5. [Carrier 1] did not waive the right to controvert the Claimant's injury on the basis of no coverage since it had no workers' compensation insurance coverage for [employer] on _____.

6. [Carrier 2] has waived the right to contest the compensability of the Claimant's injury since it failed to do so within 60 days after it received written notice of the injury.

7. [Carrier 1] is entitled to reimbursement from [carrier 2] for the indemnity and medical benefits it has paid to or for the Claimant regarding his compensable _____, injury.

Carrier 2 argues that the hearing officer erred in determining that the carrier 1's coverage of the employer terminated when the employer provided replacement coverage with carrier 2. Carrier 2 argues that under Section 406.008, carrier 1's coverage was extended beyond this time due to its failure to file notice of cancellation with the employer and with the Commission. Carrier 2 argues that the provisions of Rule 110.1(f), which provides that failure to provide insurance coverage will remain in effect "until the end of the policy period, the beginning date of a new policy, or until the commission and employer receive the TWCC-20," is not applicable because the effective date of this rule is September 15, 1993.

While we can agree with carrier 2 that retroactive application of Rule 110.1(f) would not be proper, we cannot agree that the only proper reading of Section 406.008 would be to extend carrier 1's coverage beyond the time that carrier 2's coverage went into effect. To say that Section 406.008 can only be read in this way would mean that by promulgating

Rule 110.1(f) the Commissioners promulgated a rule which was in contradiction to the statute. We find no basis to support such a view and believe that the purpose of Rule 110.1(f) was clearly to clarify, not to contradict, Section 406.008. If Rule 110.1(f) is not in conflict with the language of Section 406.008, we perceive no error in the hearing officer's reading Section 406.008 as not extending carrier 1's coverage of the employer after carrier 2's coverage went into effect.

Carrier 2 also argues that the hearing officer erred in finding that it had waived the right to contest the compensability of the claimant's injury. Section 409.021(c) provides that if a carrier does not contest the compensability of an injury on or before the 60th day after the date on which it is notified of the injury, the carrier waives its right to contest compensability. In the present case, there was conflicting evidence concerning whether or when carrier 2 received notice of the claimant's injury. This conflict of evidence created a question of fact.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we do not find error in the hearing officer's finding that carrier 2 received notice of the claimant's injury on July 21, 1994. We also note that compensability does actually appear to be at issue in the present case. In fact, both carriers stipulated that the claimant suffered a compensable injury.

Carrier 2 argues that we should apply equitable estoppel to bar carrier 1 from obtaining reimbursement. Carrier 2 points to the passage of time from the claimant's injury to the time of the CCH. Carrier 1 argues that much of the delay was not its fault and, in fact, carrier 2 was responsible for a large amount of it. Carrier 1 argues that it sought reimbursement upon learning that carrier 2 had coverage and this took place within months of the claimant's injury. We note that equitable relief is an extraordinary relief and the burden is clearly on the party seeking such relief to prove that it is justified. The record is not entirely clear as to why the issue of coverage has taken so long to resolve. We would

note that carrier 2's request for this relief is somewhat at odds with what it argues are the limits of the authority of the Appeals Panel under Rodriguez v. Service Lloyd's Insurance Company, 997 S.W.2d 248 (Tex. 1999). In any case, we do not believe that equitable relief is justified under the circumstances of this case and do not believe, as carrier 2 argues, that our decision in Texas Workers' Compensation Commission Appeal No. 950042, decided February 23, 1995, dictates we grant such relief in the present case. *See* Texas Workers' Compensation Commission Appeal No. 951489, decided October 17, 1995. We also note the case we reviewed in Appeal No. 950042, *supra*, was appealed to the Tyler Court of Appeals, which issued a decision in Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, n.w.h.).

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge