APPEAL NO. 001584

On June 13, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issue of whether (employer) was a subscriber to workers' compensation insurance on November 1, 1999, by deciding that the employer was a subscriber to workers' compensation insurance on November 1, 1999. The appellant, (carrier), requests that the hearing officer's decision be reversed and that a decision be rendered in its favor, or, in the alternative, that the case be remanded to the hearing officer for consideration of documents attached to its appeal. The respondent (claimant) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed as reformed herein.

Medical records reflect that the claimant sustained an injury to his right hand, wrist, and forearm while working for the employer on _____. On or about November 16, 1999, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) with the Texas Workers' Compensation Commission (Commission) disputing compensability of the claimant's injury stating that it did not provide coverage for the employer on the alleged accident date; that the policy was canceled on July 21, 1999; and that an Insurance Carrier Notice of Coverage/Cancellation/Non-Renewal of Coverage form (TWCC-20) was filed with the Commission.

(F Group) includes, among other companies, (TIE) and the carrier.

TWCC-20s in evidence reflect the following with regard to the employer's workers' compensation insurance policies:

1. TIE's policy number _____ (Policy N) was for the period of June 10, 1997, to June 10, 1998, and for the period of June 10, 1998, to June 10, 1999.

2. Carrier's policy number A_____ (Policy A) was for the period of June 10, 1999, to June 10, 2000.

3. On June 21, 1999, carrier's Policy A was rewritten to new policy number _____ (Policy B) for the period of June 10, 1999, to June 10, 2000 (an F Group letter states that the change from Policy A to Policy B was at employer's request for a change in payment option).

4. On August 30, 1999, carrier hand-delivered to the Commission a TWCC-20 dated August 26, 1999, in which carrier gave notice to the Commission that Policy B was canceled on July

21, 1999, for nonpayment of premiums, and that carrier notified employer of the cancellation on July 7, 1999.

The Commission certified that a search of Commission records failed to disclose any Commission coverage forms for the period of August 30, 1999, to December 31, 2000, for the employer.

In evidence is a letter dated July 7, 1999 (July 7 letter) that has F Group's letterhead and is addressed to the employer. The July 7 letter references a claim number and the Policy N number (which was issued by TIE for the period of June 10, 1997, to June 10, 1999) and contains TIE's name as the entity writing the letter. The letter states that the employer had not been heard from regarding reimbursement of a specific deductible amount which was paid to cover the employer's portion of the loss on the referenced claim; that the employer's insurance will be canceled on July 21, 1999; and that, if payment is received before the cancellation date, the employer's policy will be continued. There is no indication on the July 7 letter that it was sent by certified mail or that it was personally delivered to the employer.

The claimant testified that the employer paid him while he was off work until March or April of 2000 and that the employer offered to pay for his medical treatment.

MH, the carrier's claims representative, testified that he does not know what notification of cancellation of insurance was sent to the employer on July 7, 1999, but that the July 7 letter would be the notification letter. MH said that he has no personal knowledge of whether the July 7 letter was sent to the employer by certified mail or personal delivery. MH said that it is likely that the claim number on the July 7 letter relates to an old claim.

MZ, the employer's controller, testified that the employer's workers' compensation coverage expired in July or August of 1999; that the employer did not obtain another workers' compensation insurance policy after its coverage lapsed; that the reason the employer let its workers' compensation insurance expire was because the employer did not have funds to pay for it; that the employer intended to let the workers' compensation policy be canceled for nonpayment; that he does not exactly recall the July 7 letter; that the July 7 letter is vaguely familiar to him; that he has no personal knowledge of how the July 7 letter was sent to the employer; that in July or August of 1999 the employer received written notification that its workers' compensation insurance policy had been canceled; that he cannot state that the written notification was not sent by certified mail; that he cannot recall if the cancellation notice was sent by certified mail or by regular mail; that he cannot recall if the cancellation notice was personally delivered to the employer; that if the cancellation notice was sent by certified mail, he could find it in his files; that he was not certain when he first saw the TWCC-20 dated August 26, 1999; that he understood that the workers' compensation policy that was canceled was the one that was in effect at the time of cancellation; and that the reason the employer paid the claimant while he was off work was because the employer did not have workers' compensation insurance.

Section 406.008 provides:

CANCELLATION OR NON-RENEWAL OF COVERAGE BY INSURANCE COMPANY; NOTICE.

(a) An insurance company that cancels a policy of workers' compensation insurance or that does not renew the policy by the anniversary date of the policy shall deliver notice of the cancellation or non-renewal 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 non-renewal takes effect; or

(2) the 10th day before the date on which the cancellation or non-renewal takes effect if the insurance company cancels or does not renew because of:

* * * *

(C) failure to pay a premium when due;

* * * *

(b) The notice required under this section shall be filed with the commission.

(c) Failure 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 110.1 (Rule 110.1) contains requirements for notifying the Commission of insurance coverage.

The carrier contends that the hearing officer erred as a matter of law in making the following findings of fact and conclusion of law:

FINDINGS OF FACT

2. The carrier did not send a notification of cancellation of workers' compensation coverage to the employer by certified mail or hand delivery as of 11/1/99.

3. The evidence does not establish that the carrier properly notified the employer of the cancellation of its workers' compensation policy as of _____ as required under Section 406.408 [sic] of the Act. Therefore, its coverage was extended through 11/1/99, rendering employer a subscriber under the Act.

CONCLUSION OF LAW

4. Employer was a subscriber to workers' compensation insurance on _____.

The hearing officer's reference to Section 406.408 in Finding of Fact No. 3 is clearly a typographical error (the hearing officer referred to Section 406.008 in her Statement of the Evidence) and we reform that finding to substitute Section 406.008 for Section 406.408.

At the beginning of the CCH, the parties agreed that the issue was whether the employer was a subscriber to workers' compensation insurance on _____, and the hearing officer stated that the claimant had the burden of proof on that issue. On appeal, the carrier contends that it was the claimant's burden to show that the notice of cancellation for Policy B was not sent by certified mail, that the claimant failed to establish that the notice of cancellation was not sent by certified mail, and that the hearing officer erroneously shifted the burden to the carrier to show that Policy B had been properly canceled.

In Texas Workers' Compensation Commission Appeal No. 981597, decided August 19, 1998, the Appeals Panel affirmed a hearing officer's decision that a workers' compensation insurance policy was extended under Section 406.008(c) because the carrier failed to send notice of cancellation or non-renewal by certified mail as required by Section 406.008(a), stating that "we note that the claimant had the burden of proof to show her injury, in the course and scope of employment, was compensable and, therefore had the burden to show the employer was covered by a policy of workers' compensation insurance and she was an employee under the 1989 Act. However, the carrier had the burden to prove it sent a cancellation letter as prescribed by Section 406.008(a)." *See also* Texas Workers' Compensation Commission Appeal No. 950377, decided April 25, 1995, and Texas Workers' Compensation Commission Appeal No. 951912, decided December 20, 1995, which affirmed hearing officers' decisions that workers' compensation insurance coverage was extended because the insurance carrier failed to comply with the Section 406.008 notice provision.

In the instant case, it was stipulated that the carrier wrote a new policy for the employer under Policy B to cover the period from June 10, 1999, to June 10, 2000. The carrier contested compensability of the claimant's _____, injury based on its cancellation of Policy B on July 21, 1999. In accordance with our decision in Appeal No.

981597, *supra*, the carrier had the burden to prove that it gave notice of cancellation as required by Section 406.008(a). The hearing officer states in her decision that "the carrier did not establish that a notice of cancellation of [Policy B] . . . . was sent to the employer by certified mail or hand delivery in accordance with Section 406.008 before the date of injury of 11/1/99." The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). We conclude that the appealed findings and conclusion are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The carrier attached to its appeal a copy of a "green card" for receipt of certified mail showing that an article for Policy B was received by the employer on July 30, 1999, and a cancellation notice for Policy B dated July 27, 1999. These documents were not offered at the CCH nor were they made a part of the CCH record. The carrier requests that we consider the documents attached to its appeal.

As a general rule, the Appeals Panel considers only the record developed at the CCH, the request for review, and the response thereto and does not consider new evidence on appeal. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993; Section 410.203. We decline to consider the documents that were not made a part of the CCH record.

The carrier contends that we should consider the documents attached to its appeal because we considered a TWCC-20 that was attached to a carrier's appeal in Texas Workers' Compensation Commission Appeal No. 950966, decided July 21, 1995. We disagree with the carrier's reading of Appeal No. 950966. In Appeal No. 950966 we stated that it would have been better practice for the hearing officer to have left open the record to allow the parties to search Commission files to determine if the Commission or the employer had a TWCC-20 and then we noted that the carrier had attached a TWCC-20 to its appeal; however, we then stated that we generally do not consider evidence not admitted at the CCH. Appeal No. 950966 was not decided based on the TWCC-20 attached to the carrier's appeal; instead, it was decided based on our assumption that there was no gap in coverage between policies.

The carrier appears to assert that the hearing officer erred in not leaving the record open to allow the parties to search their files to determine whether the notice of cancellation was sent to the employer by certified mail. Since there was no request for a continuance or for the record to be left open, we find no merit in this assertion.

The carrier requests that we remand the case to the hearing officer for consideration of the documents attached to its appeal. The carrier has not shown that the documents attached to its appeal meet the requirements for newly discovered evidence. Appeal No. 93536, *supra*. We decline to remand.

Stipulations 1.A through 1.H were made by the parties. There is no indication in the CCH record that the parties stipulated to 1.I (the effective date of the cancellation of Policy

B was July 21, 1999), or to 1.J (the carrier notified the employer of the cancellation on July 7, 1999). We do not know why the hearing officer listed 1.I and 1.J as stipulations when no such stipulations appear in the record. Accordingly, what the hearing officer has listed as stipulations 1.I and 1.J are stricken from the hearing officer's decision as not having been stipulations of the parties and the hearing officer's decision is reformed to reflect that those two listed stipulations have been stricken from the decision.

As reformed herein, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge