APPEAL NO. 021298
FILED JULY 11, 2002

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 held on April 15, 2002. The hearing officer resolved the disputed issues by determining that the respondent (claimant) sustained a compensable injury on _____, and had disability from _____ through November 23, 2001. The appellant (carrier) contends that these determinations are not supported by the evidence or are against the great weight and preponderance of the evidence. Also, the carrier argues that the hearing officer erred in excluding two of the carrier's exhibits offered at the hearing. The appeal file contains no response from the claimant.

DECISION

We affirm the hearing officer's decision.

To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the exclusion of evidence, an appellant must first show that the exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Although the carrier argued at the hearing that the document had been exchanged by sending a copy to the claimant via certified mail, the claimant denied having received the document, an employment record dated well in advance of the benefit review conference (BRC) and CCH. The carrier offered the certified mail slip, which had a mailing date handwritten on it, but did not have a postmark. There was no proof offered of a counterpart mailing by regular mail.

The hearing officer disallowed the slip as evidence to establish that the document had been mailed, and excluded the document for lack of timely exchange. We find no abuse of discretion in the hearing officer's application of the exchange of evidence rules or that the evidence presented to her at the hearing was insufficient to establish that the document had been mailed. We note that although the carrier attaches to its appeal the returned green card indicating the mailing was "unclaimed," this does not necessarily equate to affirmative refusal of the mailing. This card was not available at the hearing but we decline to remand for this reason alone. As noted above, the documents could have been promptly exchanged, even at the BRC itself.

With regard to the exclusion of a peer review report, the carrier alleges in its appeal that the hearing officer based her decision to exclude Carrier's Exhibit No. 3. on the fact that it was not exchanged timely and was not exchanged at all. The hearing officer noted that although the report itself was created after the exchange deadline and purportedly exchanged thereafter, the carrier did not exercise due diligence in obtaining

a peer review report; although the carrier obtained a medical release from the claimant in February, and could then provide information to the doctor preparing the peer review, it did not. The hearing officer did not abuse her discretion by applying the due diligence test to the untimely exchanged peer review and deciding to exclude it. Moreover, there is nothing in the report itself which could be deemed conclusive on the issues in the CCH such that exclusion could be deemed reversible error.

Whether the claimant sustained a compensable injury and had disability are factual questions for the hearing officer to resolve. 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 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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 great weight and preponderance 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 find no grounds to reverse the decision of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN EMPLOYERS' INSURANCE COMPANY** and the name and address of its registered agent for service of process is

C. J. FIELDS
5910 NORTH CENTRAL EXPRESSWAY, SUITE 500
DALLAS, TEXAS 75206.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Roy L. Warren
Appeals Judge