

APPEAL NO. 050931
FILED JUNE 15, 2005

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 8, 2005. With regard to the three disputed issues before her, the hearing officer determined that respondent 1 (carrier) did not provide workers' compensation coverage for the appellant, (subclaimant/employer) on _____; that the carrier did not waive its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and that respondent 2 (claimant) did not sustain a compensable injury.

The subclaimant/employer appealed the carrier coverage and carrier waiver issues, contending that the carrier had not complied with Section 406.008 and requests reversal of the hearing officer's decision on the disputed issues. The carrier responded, urging affirmance. The file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

The claimant was employed by the subclaimant/employer childcare facility. The hearing officer, in an unappealed determination found that on _____, the claimant was injured while in the course and scope of her employment. The crux of the issue before us is whether the subclaimant/employer had workers' compensation insurance coverage with the carrier on the date of injury.

As the hearing officer commented, it was undisputed that on or about June 5, 2002, the subclaimant/employer received notice from the carrier that the workers' compensation policy would expire on August 4, 2002. That letter, dated June 5, 2002, contains the following sentence in bold type: "**Please note: this is only a notice of your upcoming expiration, not a cancellation.**" The letter goes on to state "We have notified your agent of the upcoming expiration date and will be working with him/her to obtain the necessary information to provide you with your renewal quotation." Also as the hearing officer notes it is "undisputed that the employer [subclaimant] did not send the premium to continue coverage until August 23, 2002." The claimant's date of injury was _____, and when the subclaimant/employer reported the claimant's injury to the carrier on or about August 21, 2002, the carrier advised there was no coverage. The subclaimant/employer's president wrote the carrier, by letter dated August 23, 2002, acknowledging a "miscommunication" and "unintentional mistake" in failing to pay the premium, enclosing a check for the premium and asking consideration for accepting the belated premium payment.

Also in evidence is an Insurance Carrier's Notice of Coverage/Cancellation/Non-Renewal of Coverage (TWCC-20) showing the effective dates of coverage (to "8-04-

2002”), listing the type of transaction as “carrier 30 day cancellation/non Renewal.” The date of notice is largely illegible but the parties at the CCH and on appeal indicate the notice is dated June 6, 2002, and received by the Texas Workers’ Compensation Commission (Commission) on June 6, 2002. Block 16, the date the carrier notified the employer of cancellation is left blank. It is unclear whether this notice was sent with the June 5, 2002, letter or was sent at some other time under separate cover. The subclaimant/employer denies receipt of the notice and there is no evidence to the contrary. The carrier contends that the subclaimant/employer is not credible in her testimony that she received the June 5, 2002, letter but not the TWCC-20 form. In the subclaimant/employer’s interrogatories to the carrier asking the carrier to state the date and method that the cancellation notice was provided to the employer, the answer stated “Notice of non-renewal was provided.”

Section 406.008 provides in pertinent part as follows:

§ 406.008. CANCELLATION OR NONRENEWAL 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 nonrenewal by certified mail or in person to the employer and the [C]ommission not later than:

- (1) the 30th day before the date on which the cancellation or nonrenewal takes effect; or
- (2) the 10th day before the date on which the cancellation or nonrenewal 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 [C]ommission.
- (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 [C]ommission.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 110.1 (Rule 110.1) contains requirements for notifying the Commission of insurance coverage and implements Section 406.008.

Although the hearing officer commented that the evidence was insufficient, and failed to establish that the carrier cancelled the policy during the coverage period, “[t]he evidence was sufficient to establish that the Commission received proper notice pursuant to Section 406.008.” How or in what manner that occurred is not explained. The hearing officer appears to base her decision on the fact that “the policy expired on August 4, 2002 after non-payment to continue coverage” without addressing the specific requirements of Section 406.008.

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 nonrenewal 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 the hearing officers’ decisions that workers’ compensation insurance coverage was extended because the insurance carrier failed to comply with the notice provision of Section 406.008. The carrier has the burden of proving compliance with Section 406.008. Appeal No. 981597, *supra*; Texas Workers’ Compensation Commission Appeal No. 022213, decided October 7, 2002.

In the instant case there is no evidence that the carrier gave notice of nonrenewal of coverage by certified mail or in person to either the employer (subclaimant) or the Commission at any time much less than the required time frames in Section 406.008(a)(1) and (2). The carrier had the burden of showing that the required notice of nonrenewal was sent to the employer and the Commission by certified mail or in person. The carrier failed to do so. In fact, as the subclaimant/employer contends, the only notice which the employer agrees that it received, the June 5, 2002, letter, specifically stated in bold print that it was not a cancellation notice.

We hold that the carrier failed to comply with the requirements of Section 406.008 and therefore as a matter of law failed to establish either cancellation or nonrenewal of coverage. We reverse the hearing officer’s determination that the carrier did not provide workers’ compensation coverage for the employer on _____, and render a new decision that because the carrier failed to establish that it gave notice as required by Section 406.008(a) the policy was extended pursuant to Section 406.008(c) and the employer did have workers’ compensation coverage with the carrier on _____.

CARRIER WAIVER

The carrier was advised of the claimed _____, injury by means of a Employer's First Report of injury or Illness (TWCC-1) dated August 23, 2002. The claimant filed her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on September 3, 2002. In evidence is a letter dated September 3, 2002, from the carrier acknowledging receipt of the claimant's TWCC-41. The carrier's first Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) is dated June 8, 2004, where it disputed both an injury in the course and scope of employment and coverage. Before that time the carrier relied solely on the grounds that there was no coverage and therefore "there is no duty for the Carrier to act." The carrier cites Appeals Panel decisions and case law for the proposition that where there is no coverage there is no duty to act.

Section 409.021 provides, in pertinent part, that for injuries occurring prior to September 1, 2003, an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Commission and the employee in writing of its refusal to pay benefits. In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Supreme Court held that the failure of a carrier to comply with the pay or dispute provision resulted in the carrier waiving its right to contest compensability. The evidence establishes that the carrier received notice of the claimed injury in August or early September 2002 and did not dispute compensability until June of 2004. The hearing officer's determination that the carrier did not waive its right to contest compensability of the claimed injury is apparently predicated on the determination that the carrier did not have workers' compensation coverage for the employer. Having reversed that determination we also reverse the hearing officer's determination that the carrier did not waive its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. We render a new decision that the carrier did waive the right to contest compensability of the claimed injury by not timely contesting the injury.

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

**MR. RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge