

APPEAL NO. 981597

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 May 6, 1998. With regard to the issues at the CCH, she determined that the appellant (carrier) provided workers' compensation insurance coverage for the employees of (employer) on _____; that the respondent (claimant) sustained a compensable injury on _____; and that the claimant had disability from _____, to the date of the CCH, "with the exception of a 20-hour period in February 1998." The carrier appeals and seeks a reversal of the decision. It argues that it did not provide workers' compensation coverage to the employer on _____, and that the claimant did not sustain a compensable injury on _____, and did not have disability. The claimant responds and seeks an affirmance of the decision.

DECISION

We affirm.

The record contains the carrier's October 10, 1997, cancellation letter, addressed to the employer. The letter bore the words "VIA CERTIFIED MAIL" and included the United States Postal Service's certified mail article number. The record does not contain a domestic return receipt or "green card." The letter stated the following:

This letter is to inform you that your workers' compensation insurance policy written through the [carrier] will expire on 12/09/1997.

The [carrier] has notified your agent and will be working with him/her to obtain information in order to provide you with a renewal quotation. If a quotation is given and you wish to accept the coverage, it is imperative that your premium be received by the [carrier] prior to 12/09/1997. If the monies are not received by that date, you may have a lapse in coverage for your employees.

The employer's representative, Ms. M, testified at the CCH that the employer received the carrier's October 10, 1997, letter in late October 1997. She said she thought the letter was sent regular mail because she did not remember signing a green card. She said she did not remember seeing the envelope the letter was sent in. Ms. M testified that the employer did not contact the carrier or the employer's insurance agent, Mr. O, until after the claimant's _____, injury. She stated that the employer was then notified its policy of workers' compensation insurance with the carrier expired on December 9, 1997, and, consequently, the claimant's claim would not be covered. She said the employer then secured a new policy of insurance with the carrier which was effective on December 29, 1997. Ms. M testified that the reason the employer did not respond to the carrier's cancellation letter was because it assumed Mr. O would handle the renewal.

The carrier sought to introduce the April 21, 1998, affidavit of the supervisor of its policy and technical services department, Mr. S, and an attachment thereto. The attachment consisted of an October 17, 1997, "firm book." The firm book reflected the United States Postal Service's October 14, 1997, date stamp, which Mr. S swore represented certified mailing of the articles listed in the book, including the October 10, 1997, cancellation letter. The claimant objected to the admission of the affidavit and its attachment on the ground they were not exchanged with her within 15 days after the March 19, 1998, benefit review conference (BRC). The carrier responded that they were exchanged with the claimant and showed that she received them on April 24, 1998. It argued they were exchanged as they became available to the carrier. The hearing officer sustained the objection and did not admit the affidavit. She stated on the record that the carrier did not timely exchange the documents because they were not exchanged as they became available. She reasoned that while Mr. S's affidavit was not available until he swore to it on April 21, 1998, the firm book was available on October 14, 1997, when the post office stamped it. The carrier argues on appeal that the hearing officer abused her discretion in sustaining the objection. It states the affidavit was exchanged as the document became available and, therefore, good cause for failing to timely exchange it was not required. The carrier also argues that the exclusion of the affidavit and its attachment probably did cause the rendition of an improper decision because it proves conclusively that the October 10, 1997, letter was sent by certified mail.

Parties must exchange witness statements with each other. Section 410.160(3); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(C) (Rule 142.13(c)(1)(C)). The exchange of such information must be made not later than 15 days after the BRC and thereafter, "as it becomes available." Rule 142.13(c). The hearing officer is authorized to accept documents and rule on the admissibility of evidence at a CCH. Section 410.163(a)(4); Rule 142.2(8). Our standard of review for regarding the efficacy of the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. If the hearing officer abused her discretion, it is not reversible error unless the party raising the point of error shows that the exclusion of the documents was reasonably calculated to and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 941533, decided December 30, 1994.

The hearing officer did not abuse her discretion in sustaining the claimant's objection to the admission of Mr. S's affidavit and its attachment, and in not admitting them into evidence. The exchange was made 37 days after the BRC. Therefore, the carrier needed to show that they were exchanged as they became available or, in the alternative, that it had good cause for failing to timely exchange them. Rule 142.13(c). The carrier tendered the affidavit and the firm book as a single exhibit and did move to admit the affidavit by itself. The carrier did not seek to show it had good cause for failing to timely exchange the documents. The record supports the hearing officer's determination that the documents were not timely exchanged and, therefore, we reject the carrier's argument regarding their admissibility.

"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 commission [Texas Workers' Compensation]" Section 406.008(a). "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." Section 406.008(c). There is no dispute in the case under review that the carrier provided timely, adequate notice to the Commission under Section 406.008(a).

The hearing officer makes findings of fact that the employer received the carrier's letter and that "[t]he preponderance of credible evidence fails to establish that the [carrier] sent the letter . . . by certified mail." She rendered conclusions of law that the carrier "failed to send notice of cancellation or nonrenewal to the [employer] by certified mail as required by § 406.008(a) . . ." and "provided workers' compensation insurance for the [employer] on _____ because the workers' compensation insurance policy that was to expire on December 9, 1997 was extended pursuant to § 406.008(c)"

The claimant argued at the CCH that Mr. O usually communicated with the employer on the carrier's behalf and that since he did not initiate the cancellation, it was invalid. The hearing officer also makes several findings of fact regarding whether Mr. O sent a letter of cancellation to the employer. It is not clear why she made those findings since there is no basis in the 1989 Act or the Commission's rules to support the claimant's argument. Accordingly, we disregard and strike Findings of Fact Nos. 3, 10 and 11.

The carrier argues on appeal that the determination that it did not send the October 10, 1997, letter by certified mail is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The hearing officer offers no explanation as to what evidence supports her findings of fact that the carrier's letter was not sent by certified mail. 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).

The contested case 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. Section 410.165(a). 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).

We reverse the decision and order of the hearing officer only when her determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas

Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The evidence in the record was contradictory as to whether the carrier mailed the cancellation letter by certified mail. The hearing officer did not err in placing more weight on Ms. M's representations than on the certified mail denotation on the face of the letter. The determinations that the carrier did not send the employer the October 10, 1997, cancellation letter by certified mail and that carrier's policy covering the employer's employees is extended to include _____, are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, we affirm those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951).

We agree with the hearing officer's assessment that "the big question in this case was whether the [carrier] provided workers' compensation insurance to the [employer] on the date of the injury." We resolve the big question in favor of the claimant. Nevertheless, we must address the issues of whether the claimant sustained an injury in the course and scope of her employment and whether she had disability. An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992.

The claimant testified that on _____, she injured her left foot, ankle and leg when she slipped and fell on concrete steps. The medical reports in the record confirm that she was unable to obtain and retain employment at her preinjury wage from _____, to the date of the CCH, with the exception of a 20-hour period in February 1998 when she attempted to return to light-duty work. The hearing officer's determinations regarding whether the claimant sustained an injury in the course and scope

of her employment and had disability are supported by the record and, therefore, we affirm those determinations also.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge