

APPEAL NO. 990155

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 4, 1999, a hearing was held. She (hearing officer) determined that the appellant's (claimant) neck and thoracic injuries do not result from the compensable injury of _____, that the respondent (carrier) did not timely dispute compensability of these injuries, but that it did not need to dispute compensability. Finally, she found that claimant had no disability. Claimant asserts that she did injure her cervical and thoracic spine at work and also took exception to several findings of fact addressing disability. Carrier asserts that those findings of fact related to when it received notice of the neck and thoracic spine and to the elapsed time before it disputed are against the great weight of the evidence.

DECISION

We reverse and remand.

Claimant worked for (employer) on _____, the day she compensably injured her low back. (Neither party appealed a finding of fact that the low back was compensably injured—the hearing was conducted under the premise of a compensable low back injury with the central issue being whether the mid back (thoracic) and neck were also compensably injured.) Claimant testified that injury occurred when she reached above her head to obtain a box of copy paper and turned with it—she felt "a sharp pain" in her leg and something "pulled" in "my back." When she reached down for another box she said she could "hardly raise back up."

The first issue follows precisely the language of the benefit review conference report. "Are the Claimant's neck and thoracic injuries a result of the compensable injury of _____?" (Emphasis added.) The hearing officer found that claimant "did not strain her neck or thoracic spine when she lifted the box on _____," and similarly, that claimant "did not injure her cervical and thoracic spine when she sustained an injury to her lumbar spine on _____" and added that therefore the "Carrier had no obligation to dispute the alleged injuries to these body parts." The case of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, n.h.w.) was cited at the hearing. That case held, "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." This holding was made after the same court had previously pointed to the distinctions between the word "injury" and the words "compensable injury," with injury defined as "damage or harm to the physical structure of the body"; compensable injury was defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle."

Because both of the findings concerning injury are made in language addressing compensability, and the rest of the decision does not clarify this question, a finding of fact on remand should address whether the hearing officer found that there is, or is not,

damage or harm to the physical structure of the body in regard to the neck and thoracic spine. If that finding of fact is positive, then the hearing officer may repeat her findings of fact in regard to the allegation of lifting a box on _____, or she may reconsider her prior findings of fact. See Williamson, *supra*, in which a finding of fact was made that an incident was staged to indicate injury.

Briefly stated, the evidence showed medical reports indicating treatment for various injuries, including the neck, but claimant, herself, did not assert an injury to the mid back until filing her Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on August 17, 1998, after signing it on August 12, 1998. In addition, claimant was in a car accident on (date of car accident), at which time, the hearing officer found, she "injured her cervical and thoracic spine." The parties stipulated that the carrier disputed compensability of the neck on August 27, 1998, and compensability of the thoracic spine on October 15, 1998.

Findings of fact that address notice to the carrier and carrier's untimely controversion must be addressed also on remand because they only determine when carrier was "fairly informed" not when carrier received "written notice of the injury." See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) which also measures the 60-day time limit from the time written notice was received.

Whether or not the carrier "had no obligation to dispute," as found in Finding of Fact No. 11, cannot be determined in this case until the hearing officer finds whether or not claimant has damage or harm to the physical structure of her neck or thoracic spine. Just as in regard to the findings of fact addressed, the hearing officer's Statement of Evidence does not make it clear that she addressed whether an injury occurred, as opposed to a compensable injury. The statement, "the Claimant's problems with her cervical and thoracic spine were not caused by lifting the box on _____, even though she apparently received medical treatment for those body parts prior to her involvement in the automobile accident [Emphasis added.]," also uses language addressing compensability. See Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998, which affirmed a finding of compensability and, in addition, a finding of waiver of dispute of compensability; it said, "[we] do not read the Williamson case to extend to situations w(h)ere there is some injury or condition support(ed) by the evidence and the pertinent issue is whether it relates to the employment, a compensability matter." Appeal No. 981847 is now cited after reviewing all Appeals Panel cases cited by carrier that addressed Williamson, plus others not cited.

We note that several findings of fact relate to various aspects of disability and only observe at this time that disability is generally a matter to be determined by the hearing officer and that questions as to disability are not waived by a carrier when there is a determination that the ability to dispute compensability has been waived.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge