APPEAL NO. 990432

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 February 10, 1999. The issues at the CCH involved a claim for injury by the appellant, who is the claimant. At issue was the date of the claimed injury, whether a compensable injury occurred, whether the respondent (carrier) was relieved from liability for the failure of claimant to give timely notice of injury to his employer, whether there was good cause for any untimely notice, whether carrier waived a dispute to compensability because it did not dispute within 60 days of notification, and whether claimant had disability from a compensable injury.

The hearing officer held that there was no compensable injury, no disability, and that the date of the claimed injury was _____. He further held that, while carrier had not timely filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) to contest compensability, this did not affect a waiver as there was no injury. He found that claimant timely notified his employer of the alleged injury and carrier was not relieved from any liability that might otherwise have been found. The hearing officer did find that claimant's headaches, while not a compensable injury, caused an inability to obtain and retain employment equivalent to the pre-injury wage.

Claimant has appealed. He argues that the determination that his headaches are not connected to his work-related accident is against the great weight and preponderance of the evidence. He argues that the failure of the carrier to file a timely TWCC-21 compels a finding in his favor on compensable injury. The claimant argues that, because claimant was wrong in his date of injury and the carrier responded to this date, there is a waiver when the date was corrected. The claimant also appeals the finding of fact that is in his favor regarding his inability to work. The carrier argues that there can be no waiver of the nonexistent injury, citing current case law, and further that the rest of the decision was sufficiently supported. The carrier appeals the finding that it did not timely file a dispute to compensability, and it attaches a copy of a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) not submitted at the CCH. The carrier argues that the hearing officer should have adopted the observation made in the benefit review conference (BRC) report as to timely filing of this form. There is no response to this cross-appeal.

DECISION

Affirmed as modified.

Claimant was employed as a service technician by (employer). Claimant started working for the employer on March 1, 1998. He claimed his severe headaches resulted from an incident at work on _____. Claimant said he was taking sheetrock inventory in a storage trailer. He said he lost his balance and the sheetrock fell over the top of him, knocking him back into some shelving. Claimant contended he hit his head and the

sheetrock fell on top of his right leg and right foot. Claimant said he reported the incident to the office secretary and then to his supervisor, Mr. M, who was the general manager.

Claimant said that Mr. M told him he did not know how to file a workers' compensation claim, so one was not filed. Claimant said his right leg and ankle were sore, and he generally ached all over. About three weeks later, claimant developed headaches.

Claimant did not seek medical attention after the accident because he had no health insurance (as a probationary employee) and could not otherwise afford a doctor. Claimant said he discussed his problems with Mr. M about six times over the course of the ensuing weeks, and Mr. M ultimately told him he had to work full time or take a leave of absence. Claimant said he would take a leave of absence if he could get workers' compensation. He said his work had suffered because of his severe headaches. When his health insurance "kicked in" after his period of probation was up, he went to a doctor, Dr. H, beginning July 8, 1998.

Claimant said he did not tell Dr. H about the sheetrock incident because he wasn't "for sure" if the headaches were caused by that incident. Dr. H at first thought that the headaches might be caused by exposure to formaldehyde, but this was ruled out as a cause. He said Dr. H ordered an EKG of his brain, but there were no tumors or clots detected. Claimant was referred to Dr. C, with whom he discussed the sheetrock incident. Claimant said that Dr. C told him this could be the cause of his headaches. When claimant reported this to Mr. M, Mr. M told him he did not recall the incident. This conversation took place around August 7, 1998, and it was at that point that he was given a two-week leave of absence. After this date, he missed a lot of work, and was fired on September 3, 1998. The evidence indicated that claimant's gross pay went down beginning in early August, 1998.

Claimant was also referred to Dr. W when Dr. C could not find out what was wrong with him. Claimant agreed that he had headaches as a child from ages four through around 12 or 13, and he then "outgrew" them. He said those were allergic headaches, and that the ones he had after the sheetrock accident were different. He said Dr. W told him his headaches were caused by nerve damage at the back of his head due to the fall. Claimant was treated with nerve blocks. He said that these injections helped. He agreed that he had not discussed his history of childhood headaches with Dr. W.

On the issue of disability, claimant described some part-time or limited-scope jobs he had after he was fired by the employer. He said he worked since January 18, 1999, for another person, against doctor's orders, for fewer hours and less money than he made for the employer. He said his headaches still limited how much work he could do. Claimant agreed that he was receiving temporary income benefits (TIBS) at the time of the CCH but had not told the carrier that he went back to work.

Claimant agreed he got the date of the accident wrong when he gave a recorded statement to the adjuster, and he later refreshed his recollection about the date when he

talked to the office secretary. An unsworn, signed statement from her verifies that claimant reported the incident on _____, as he testified.

Claimant said he had a bad memory loss as a result of his accident. He said that Dr. W told him he could have a concussion. He stated that he had not been in any fights or automobile accidents that would account for the delayed onset of his headaches.

The adjuster testified about filing of a notice disputing compensability. She said she first received notice on August 10, 1998, through an Employer's First Report of Injury or Illness (TWCC-1), contending that claimant had a blood clot in his head. She contacted claimant, who told her the accident happened on an unrecalled date in April. She filed a TWCC-21 disputing the claim. When she received a copy of claimant's claim with a new date of _____, she did not file another TWCC-21 because she had already raised pertinent defenses on her first TWCC-21. (An objection was made to this testimony, with claimant arguing that the four corners of the TWCC-21 were the only matters that could be considered in evaluating its sufficiency or timeliness). The copy of the TWCC-21 in evidence (tendered by both parties) is date-stamped on December 15, 1998, by the Texas Workers' Compensation Commission.

Dr. C wrote a report on July 29, 1998, that states that claimant has been having his headaches for three to four months, but after his fall at work. Dr. C documented that claimant reported a history of juvenile migraines, ending in the 11th grade. Dr. C also noted that claimant's sister had headaches. Dr. C made no assessment of causation, but noted that migraine treatment would be appropriate.

Dr. S reviewed claimant's medical records for the carrier. Dr. S opined that, in all likelihood, claimant was suffering from common migraine headache, and that the trauma he described would not be likely to produce these headaches or occipital neuralgia.

Dr. W's report of September 4, 1998, indicates that claimant's objective tests (brain scan, CT scan, and MRI of his head) were all within normal limits. His impression was intractable headache, possibly secondary to bilateral occipital neuralgia. Dr. W wrote on October 12, 1998, that it was "likely" that claimant injured his occipital nerve from traumatic compression when he fell. He also noted that claimant denied ever having headaches or similar problems prior to the accident.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole.

The development of headaches in this instance several weeks after an asserted trauma was, under these facts, a matter beyond common experience, and medical evidence was required to establish the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. *See* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. In reviewing the evidence, we find sufficient evidence to support the hearing officer's determination that no injury resulting from the _____, incident occurred, and that there is no compensable injury or disability.

Because the hearing officer found that there was no injury which occurred on the date in question, he found that there was no waiver by not filing a dispute, in accordance with Continental Casualty Company v. Williamson , 971 S.W.2d 108 (Tex. App.- Tyler 1998, no pet. h.). We cannot agree with the carrier that this case stands for the gross proposition that waiver never arises unless a claimant can "establish" an injury; this would essentially read Section 409.021(c) out of existence. A carrier that fails to react timely to a notice of injury where an accident has occurred does so at its peril. What we believe the Williamson case stands for is that, where there is factually no injury (no damage or harm), the nonexistent injury cannot be "waived" into existence. Here, the hearing officer believed there had been an incident, but no injury at all resulted whether from the incident or not. We do not believe, in this particular case, that the interpretation of the Williamson case was error.

Although the timely dispute issue is somewhat moot by the decision in chief, and our affirmance thereof, we would note that the TWCC-21 attached to the appeal is clearly date-stamped within 60 days after the date of the injury. There is no explanation in the appeal as to why this critical document was not tendered as an exhibit at the CCH, rather than the December 15, 1998, date-stamped copy that was both a carrier and a claimant exhibit. Because the timely stamped copy is not in the record, and no due diligence to obtain it before the CCH has even been asserted, we are not going to reverse and remand or render on this matter due to the mootness of the issue at this stage. The BRC report is not evidentiary on any matters stated therein and the hearing officer did not err by not considering it as such. Texas Workers' Compensation Commission Appeal No. 94063, decided February 22, 1994. If this decision is appealed further to court, it will be within the discretion of the judicial tribunal to admit, or not admit, this document.

To respond to one last matter raised in claimant's appeal, we would note that under the facts here, where claimant first communicates a wrong date of injury and later corrects it, but there is no contention that more than one incident occurred or that there is more than one injury, we cannot agree that the carrier had to file an additional TWCC-21 with the amended date of injury when it had already disputed compensability.

Finally, TIBS are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101 (a). Section 401.011(16) defines

"disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." We agree that the date that such diminution of wages began was August 2, 1998. Consequently, we reform the date of the appropriate finding of fact to reflect this date, rather than September 3, 1998.

For the reasons set forth above, we affirm the decision as reformed and the order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge