APPEAL NO. 990592

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 January 15, 1999. The issues at the CCH were whether the claimed injury was caused by respondent's (claimant) willful intention and attempt to injure himself, thereby relieving the appellant (carrier) of liability; whether the carrier timely contested compensability on the basis of willful intention and attempt of claimant to injure himself; whether the injury, if compensable, extends to the claimant's neck and low back; and whether the carrier timely contested compensability of the extension to the neck and low back. The hearing officer determined that the claimant injured his right ankle; that the injury was not caused by his willful intention and attempt to injure himself; that the carrier received its first written notice of the claimed ankle injury in _____, and did not contest compensability on the basis of willful intention and attempt of claimant to injure himself until August 1998, thus not timely contesting compensability on that basis; that the compensable injury did not extend to the neck and low back; and that the carrier timely contested compensability of the extension of the injury to the neck and low back. Not on appeal and not further discussed are the determinations that the injury did not extend to the neck and low back and that the carrier timely contested compensability of the extent of injury. Carrier asserts on appeal that there was not sufficient evidence that the claimant sustained a "legitimate injury" in the course and scope of his employment on _____. Carrier asserts also that the hearing officer erred in determining the carrier did not timely contest compensability of claimant's right ankle injury on the basis of willful intention to injure himself because it was not required to raise intentional injury as a defense to the claimed injury within 60 days since "it is not a defense to a compensable injury in the course and scope of employment" and that "defense only arises in the event there is, in fact, an injury in the course and scope of employment." Carrier posits that the defenses in Section 406.032 are not required to be raised within 60 days and that this "is merely a defense that involves coverage." No response has been filed to the appeal.

DECISION

Affirmed.

Succinctly, the claimant testified that he injured his right ankle on _____, when he fell or jumped off a loading dock as he was operating a pallet jack that went out of control. It was not clear whether anyone witnessed the incident; however, other employees apparently gathered around quickly. The claimant testified that his right foot was bleeding, was in pain and was not straight which caused him to kick it to straighten it out. In any event, an ambulance was called and he was taken to an emergency room. Subsequently, and over a period of time, various diagnoses were rendered (and disputed among the various doctors), including sprained ankle, possible minute avulsion fracture, and "subtalar dislocation with reduction by patient." There were also x-rays of the right ankle which showed degenerative disease with some marginal spurring of the ankle joint, and medical evidence that the claimant had a preexisting injury to his ankle. The claimant uses crutches

when he walks although there was evidence questioning the necessity of crutches. Given the mechanics of the injury as stated by the claimant, there was medical evidence and opinion that he sustained an injury in the incident on _____, with the opinion expressed by a carrier doctor that the claimant may have sustained some sprain of the right ankle "with some temporary aggravation of the pre-existing degenerative disease."

While there was conflict in the medical evidence and some conflict, inconsistency, and credibility issues in the claimant's testimony, the hearing officer determined that a right ankle injury was sustained by the claimant from the incident on _____. The hearing officer, although expressing doubt about the credibility of the claimant, indicated that to hold that the claimant's ankle injury was caused by his willful intention and attempt to injure himself would require "an inordinate amount of speculation" and that the "evidence does not preponderate that the injury was intentional." Resolving conflicts and inconsistencies in the evidence and testimony and arriving at factual determinations is the responsibility of the hearing officer. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Section 410.165(a). That different inferences could be reached from the evidence is not a sufficient basis to set aside the findings of the hearing officer. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not, from our review of the record and evidence that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a proper legal basis or reason to disturb his findings or his decision based on those findings. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The evidence established that an on-the-job incident occurred on _____, when the claimant fell or jumped from a dock, that the claimant was taken to an emergency room and treated, and that he has been variously diagnosed with a right ankle injury. Although there was medical evidence showing a prior ankle injury, that evidence, considered with all the medical evidence, did not compel a finding that such preexisting injury was the sole cause of the claimant's right ankle condition following the incident, and thus not a new injury at all. Further, although the claimant acknowledged that he kicked his ankle to straighten it out or relocate it after the fall, evidence that could support a different inference and result, this does not constitute the great weight and preponderance of the evidence rendering this factual determination clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 91130, decided February 13, 1992. We affirm the hearing officer's findings that the claimant sustained a right ankle injury on _____, and that the injury to his right ankle was not caused by his willful intention and attempt to injure himself. Texas Workers' Compensation Commission Appeal No. 990167, decided March 12, 1999 (Unpublished).

Carrier asserts error in the hearing officer's determination that it did not timely contest compensability on the basis of willful intention and attempt of claimant to injure himself. Carrier does not dispute that it did not contest compensability on this basis within 60 days, rather it urges that it was not required to raise this as a defense within 60 days as

it is not a defense to a compensable injury as covered by Section 409.021. We do not find merit to this claim of error. In pertinent part, Section 409.021 provides that if a carrier does not contest the compensability of an injury on or before the 60th day after notification, it waives the right to contest compensability and that the carrier may reopen the issue of compensability if there is a finding of newly discovered evidence. Newly discovered evidence has not been asserted or raised by the evidence. Rather, the carrier urges that the defenses listed in Section 406.032 do not go to compensability and do not have to be raised within the 60-day provision of Section 409.021. Section 406.032 generally provides that "[a]n insurance carrier is not liable for compensation" if the injury occurred while the claimant was intoxicated, was caused by the claimant's wilful attempt to injure himself or another person, arose out of an act of a third person for personal reasons, arose out of off-duty recreational, etc., activity not expected or required by the employer, arose out of acts of God, or that horseplay was a producing cause. Although no authority is cited and we have not specifically or directly determined this issue regarding the specific defenses now raised, we conclude that the position advanced does not find support in the statute, rules, or our previous decisions concerning defenses to compensability. In this regard, in Texas Workers' Compensation Commission Appeal No. 981896, decided September 28, 1998 (Unpublished), we upheld a hearing officer's determination that the carrier did not contest compensability on the grounds that the injury was caused by the claimant's willful intent to injure himself, but had disputed on course and scope, and intoxication.

We have previously held that a defense to liability for compensation is lost if not timely and expressly asserted or raised within the 60-day provision of Section 409.021(c). Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994. In that case the claimant failed to meet the statutory requirements to file a claim within one year of the injury and the carrier did not dispute compensability within 60 days of notice of the injury. The hearing officer held that the carrier was not liable because the claimant did not timely file the claim. The Appeals Panel reversed the holding that the failure of the claimant to timely file the claim extinguished the claim and relieved the carrier of liability where the carrier did not contest compensability within 60 days. Similarly, the Appeals Panel upheld a hearing officer who found the carrier liable because of its failure to timely dispute within 60 days of notice of injury where the claimant both failed to give timely notice of injury and failed to timely file her claim. Assertions that there was no jurisdiction where the claim was not filed within one year and thus resulted in no liability, although not disputed timely by the carrier, have been rejected. Texas Workers' Compensation Commission Appeal No. 982888, decided January 26, 1999. We cannot arrive at a reasoned position to conclude that those exceptions to liability set forth in Section 406.032 are other than defenses to the compensability of a claim that need to be timely raised or result in waiver of compensability by the carrier.

Carrier, citing Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), urges that even if a carrier waives the right to contest compensability, it does not preclude a finding of no injury. Of course, in the case before us, the hearing officer found an injury to the claimant's ankle from the _____, incident

and we have affirmed that finding. Thus, Williamson does not apply to the facts of this case. We note here the limited application of that case to situations where no injury (damage or harm to the physical structure of the body) at all is found and is sufficiently supported by the evidence. Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999; Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999. In such a situation, a compensable injury cannot be created where no injury in fact exists. *See* the dissenting opinion of Appeals Judge Potts in Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994, the Appeals Panel decision in the Williamson case.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge