

APPEAL NO. 990662

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 2, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury to his cervical, thoracic, and lumbar areas, left knee, and right hip, in addition to the compensable right shoulder and right leg injuries of _____; whether the appellant (carrier) waived the right to contest the compensability of the claimed cervical, thoracic and lumbar areas, left knee and right hip injuries by not contesting compensability within 60 days of being notified of the injuries; and what was the impairment rating (IR). The parties agreed that the IR issue was not ripe for adjudication at the outset of the CCH, the hearing officer remanded the issue to the benefit review officer, and the issue not appealed will not be further discussed. The parties also stipulated that the carrier timely contested compensability of the claimed thoracic and lumbar injuries and these issues will not be further discussed. The hearing officer found that the claimant sustained an injury to the cervical area on _____; that he did not sustain an injury to his left knee and right hip on _____; that the carrier received notification of the cervical injury and left knee injury on July 15, 1998 (sic); and that the carrier contested compensability of the cervical injury on July 8, 1998, the left knee injury on January 5, 1998, and the right hip on July 8, 1998. The hearing officer concluded that claimant did not sustain an injury to the left knee and right hip, did sustain an injury to the cervical spine on _____, and that the carrier waived its right to contest compensability of the left knee and cervical spine. The carrier appeals, urging that the hearing officer's conclusion that it did not timely contest the cervical and left knee injury is in contradiction to the hearing officer's own findings of fact, that the evidence does not support that a cervical injury was sustained, and that since there was no left knee injury, the carrier could not waive its right to contest compensability. The claimant responds, urging that there was a clerical-type error in the date stated in the hearing officer's finding of fact that can be cured short of reversal, that there was sufficient evidence to support the remaining findings and conclusions of the hearing officer, and that the finding of no injury to the left knee does not necessarily mean that the claimant did not suffer damage or harm to the structure of the knee and thus the hearing officer could be and is supported in holding that the carrier waived its right to contest compensability.

DECISION

Affirmed in part, modified in part, and reversed and rendered in part.

The evidence in this case is set out in some detail in the Decision and Order of the hearing officer and will be briefly summarized here. Not in dispute was the fact that the claimant sustained injuries in a fall from a ladder on _____. He was taken to an emergency room and medical records of that date and later, including a physical therapy report of July 2, 1996, show complaints relating to the right shoulder, right upper leg, left knee, neck, and "multiple musculoskeletal complaints." A cervical strain was assessed in a report dated June 18, 1996. X-rays were taken of various body areas and those of the hip and left knee showed "osseous structures to be intact" and "no fractures or

dislocations." (A later medical report dated May 18, 1998, states that "the patient states that his left knee began hurting him about one year and six months post injury") In any event, it appears the claimant was off work for three days and returned to light duty for some three months at which time he returned to full duties as a maintenance man for the employer. He continued to have shoulder problems which ultimately resulted in rotator cuff surgery in February 1997, and a subsequent second shoulder surgery. During his testimony, the claimant stated that the doctors only treated his shoulder for two years although he had pain from the other injuries. In June 1998, the claimant saw a Dr. B for a consultation who assessed, among other things, "bilateral knee contusion with traumatic bursitis."

Although not entirely clear from the various date stamps, there was evidence that the emergency room medical reports and the July 2, 1996, medical report showing complaints of pain in the shoulder, cervical, and knee area, were received by the carrier or its agent on July 15, 1996, and July 19, 1998. Subsequently, there were a number of other medical records and reports that showed varying dates of receipt by the carrier. The carrier disputed the left knee on January 5, 1998, and the cervical injury on July 8, 1998, and asserted that it did not have notice of the claimed cervical or left knee injury during 1996.

Initially, we agree there is error in the hearing officer's finding of fact but conclude it is typographical or clerical in nature. In her Finding of Fact No. 5, she indicates that the carrier was on notice of the cervical and left knee injury on July 15, 1998. Clearly, from the evidence we have reviewed and from the discussion section of the Decision and Order, the date was intended to be reflected as 1996, and we so reform the finding to so state. Finding of Fact No. 5 is modified to state "The Carrier received notification of the cervical injury and left knee injury on July 15, 1996."

The hearing officer also found that the claimant sustained a cervical injury and we conclude from our review of the record that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). A cervical strain was assessed in June 1996 and the claimant testified as to being treated for his neck problems and that he had ongoing pain in the cervical area. While the evidence may give rise to different inferences other than those found most reasonable by the hearing officer, it is not a sound basis to disturb her factual findings. Texas Workers' Compensation Commission Appeal No. 94466, decided July 25, 1994. Accordingly, we affirm that determination.

Although there was a degree of conflict in the evidence concerning when the carrier was on notice of a claimed injury to the cervical area and left knee, resolving that conflict was 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). It appears clear from the receipt stamps that the carrier did receive early medical records that sufficiently put it on notice of asserted injury to body areas, including the cervical and left knee area, to trigger the 60-day dispute of compensability provisions. Section 409.021(c); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) and 124.6 (Rules 124.1(a)(3))

and 124.6). We conclude there is a minimally sufficient evidentiary basis to uphold the determinations that the carrier received notification of the assertion of a cervical and left knee injury on July 15, 1996, and that it did not contest the asserted cervical injury until July 8, 1998, and the left knee injury until January 5, 1998, and that the carrier waived the right to contest compensability of the cervical spine. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). There was no showing of newly discovered evidence with respect to the cervical injury that would support a 1998 dispute.

Insofar as it results in the carrier's liability for a left knee injury through waiver, we reverse that part of the hearing officer's conclusion of law and decision that provides that the carrier waived its right to contest compensability of the left knee and render a new decision that the carrier did not waive its right to contest compensability. As we read the hearing officer's decision, she was not satisfied that any injury occurred to the claimant's left knee and this is supported by the lack of any diagnosis of any knee injury surrounding the 1996 incident and the negative x-rays. Under the circumstances of this case, where there is sufficient evidence, and we hold there is from our review of the record, that the claimant did not sustain an injury to his left knee on _____, as found by the hearing officer, the issue of a compensable injury to be disputed was not actually reached and did not create a compensable injury through waiver. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) the Court of Appeals held that "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." The hearing officer found as fact that the claimant did not sustain an injury to his left knee in the incident of _____, and that determination is not against the great weight and preponderance of the evidence. The Appeals Panel has followed the Williamson decision in several cases following its promulgation and finds that it is controlling here. Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998; Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998. See also Texas Workers' Compensation Commission Appeal No. 982500, decided December 10, 1998. Compare Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998, where an injury was found and the issue was actually compensability.

For the foregoing reasons, we reform and modify Finding of Fact No. 5 to reflect the date of 1996; reverse, insofar as it results in the carrier's liability for a left knee injury through waiver, the conclusion and decision of the hearing officer that the carrier waived its right to contest compensability of the left knee and render a new conclusion and decision that the carrier did not waive its right to contest compensability of the left knee, and affirm the remainder of the decision.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

CONCURRING OPINION:

Because I cannot read the decision in chief as stating that the hearing officer held that there was no injury to the left knee, I do not agree that the Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) case applies here. In my opinion, the crux of the carrier's dispute in its Payment of Compensation or Notice of Refused/Disputed Claim was that the claimant's left knee was not injured on _____; as I read the discussion in the decision, the hearing officer accepts that the left knee injury exists, but that it did not happen on _____. As we noted in Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998, the Appeals Panel would decline to extend the Williamson case to those situations where it is the causal connection to the course and scope of employment, not the existence of an injury as such, that is in dispute.

Therefore, if I agreed that the hearing officer was correct in her other findings, I would vote to affirm. However, I concur in reversal because the great weight and preponderance of the evidence indicates to me that the carrier first received written notice of injury to the left knee (as opposed to mere pain, with injury being ruled out in a medical record dated six days later) in late December 1997, and promptly reacted. Therefore, the carrier timely disputed compensability. I would reverse and render on this basis rather than the rationale articulated by the majority.

Susan M. Kelley
Appeals Judge