APPEAL NO. 990802

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 17, 1999. The record closed on February 23, 1999. With respect to the issues before her, the hearing officer determined that the June 12, 1997, functional capacity evaluation (FCE) did not cause damage or harm to the physical structure of the respondent's (claimant) body; that the appellant (carrier) waived the right to contest the claimant's alleged back injury because it failed to do so within 60 days of the date it received written notice of the alleged injury; that an injury caused by treatment for a compensable injury is itself compensable and is handled as part of the original claim as opposed to being considered and handled as a new injury or claim; that the claimant was not required to notify the employer of an injury arising out of treatment under Section 409.001; and that the claimant is not required to independently file a claim with the Texas Workers' Compensation Commission (Commission) regarding an injury arising out of treatment for a compensable injury. In its appeal, the carrier asserts error in the hearing officer's determination that the alleged back injury had become compensable as a matter of law because of its failure to timely contest the alleged injury. The carrier did not appeal the determinations that an injury arising from treatment of a compensable injury is treated as part of the original injury and claim and that, as such, the claimant was not required to provide notice of the alleged injury from treatment to the employer within 30 days of the date of injury or to file a claim with the Commission within a year of the date of injury. The claimant did not respond to the carrier's appeal and also did not appeal the hearing officer's determination that he did not sustain a back injury during the FCE.

DECISION

Affirmed.

Because only the carrier waiver issue is before us on appeal, our factual recitation will be limited to those facts most germane to that issue. The parties stipulated that the claimant sustained a compensable right knee injury on _____. Dr. H performed arthroscopic surgery on the claimant's right knee on January 9, 1997. On March 11, 1997, the claimant began treating with Dr. Y, a chiropractor. In a progress report of June 3, 1997, Dr. Y notes that the claimant "will continue his therapy and will have a [FCE] performed to obtain the status of this patient's progress." On June 12, 1997, the claimant underwent the FCE. The claimant alleged that he injured his low back during the lifting portion of that examination.

On February 16, 1998, Dr. L, a chiropractor, examined the claimant at the request of the carrier. In a Report of Medical Evaluation (TWCC-69) dated February 26, 1998, Dr. L certified that the claimant reached maximum medical improvement (MMI) on February 16, 1998, with an impairment rating (IR) of two percent. In his accompanying narrative report, Dr. L states:

> According to [claimant], at some point [Dr. Y] referred him for a [FCE]; however, he reports during the course of testing, he sustained a lower back injury which he subsequently reported to the treating chiropractor.

In an unappealed finding the hearing officer determined that the carrier received Dr. L's report and narrative on February 27, 1998.

On July 7, 1998, Dr. P, a chiropractor, examined the claimant as the Commission-selected designated doctor. In a TWCC-69 dated July 7, 1998, Dr. P certified that the claimant reached MMI on that date with a 15% IR, which was comprised of six percent for the right knee and 10% for loss of lumbar range of motion. On July 22, 1998, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Commission disputing Dr. P's IR, noting that it "disputes extension of claimant's knee injury to his spine . . . ."

Mr. H, an adjuster with the carrier assigned to the claimant's claim, testified that he believed that he first received written notice of the alleged low back injury when he received the designated doctor's report. Mr. H stated that when he received Dr. L's report, he had no knowledge that the FCE had been performed, although he acknowledged that he had received Dr. Y's report around that time which recommended an FCE. Mr. H insisted that he did not learn that the FCE had been performed until the benefit review conference prior to the hearing. Mr. H maintained that Dr. L's report was insufficient to give notice of the alleged back injury because it did not contain specifics as to where, when or how the injury occurred.

Initially, we consider the carrier's argument that the hearing officer erred in finding that it had waived its right to contest compensability of the alleged low back injury under Section 409.021(c) by not contesting within 60 days of February 27, 1998, the date it received its first written notice of the alleged back injury in the form of Dr. L's report. The carrier asserts that Dr. L's report is insufficient to serve as its first written notice of the back injury under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) because it "does not indicate *when* the injury occurred, *how* the injury occurred, *where* the injury occurred, who claimant's employer was, or other facts showing compensability." (Emphasis in original.) We find no merit in this assertion. Dr. L's served as a carrier required medical examination doctor. His report was completed at the carrier's request as part of the handling of the _____, compensable injury. Specifically, he was retained to examine the claimant to determine if he had reached MMI and, if so, to assess an IR. Thus, as the hearing officer found, the carrier "already knew the pertinent background facts, specifically that [Dr. L] was evaluating the Claimant relative solely to his _____ work-related injury." In addition, to the extent that the carrier is asserting that Dr. L's report was insufficient to serve as notice under Rule 124.1 of the back injury because it did not contain proof of causation, its argument misses the mark. In Texas Workers' Compensation Commission Appeal No. 972672, decided February 6, 1998, we noted that "[a] document need not prove causation in order to provide notice sufficient to trigger the duty to contest. On the contrary, it is the allegation of those facts that serves as notice." That is, the claimant need not present a carrier with evidence sufficient to satisfy his burden of proof to

trigger the carrier's obligation to contest. In fact, it would seem that the existence of medical evidence contrary to the position advanced by the claimant would cause a carrier to contest rather than excusing its failure to do so. Dr. L's report was sufficient to serve as notice in this instance, because it contained a statement that the claimant was asserting that he had injured his low back during an FCE that was performed as a result of the compensable injury. Because we affirm the determination that Dr. L's report was sufficient to serve as the first written notice of the alleged back injury, we likewise affirm her determination that the carrier waived its right to contest that back injury because its TWCC-21 was not filed until July 22, 1998, well beyond 60 days of February 27, 1998, the date it received Dr. L's report.

The carrier also asserts that the hearing officer erred in finding that the back injury had become compensable as a matter of law, citing Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). The carrier's reliance on Williamson is misplaced. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is no damage or harm to the physical structure of the body, as opposed to cases where, as here, there is an injury, a lumbar strain, which was determined by the hearing officer not to have been caused by the FCE. *See* Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999, and Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, and the cases cited therein. In this instance, the hearing officer found that FCE did not cause damage or harm to the physical structure of the claimant's body, she did not find that there was no damage or harm to the physical structure of the body. As such, Williamson is inapplicable and the hearing officer correctly determined that the claimant's back injury has become compensable as a matter of law because of the carrier's failure to timely contest the same.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge