

APPEAL NO. 991178

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 April 26, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) did not sustain his burden of proving a causal relationship between his compensable injury and the deep vein thrombosis (DVT) of the right leg, but that the appellant (carrier) had waived its right to contest compensability of the DVT because it failed to do so within 60 days of the date it received its first written notice of the claimed injury. In its appeal, the carrier asserts error in the hearing officer's resolution of the waiver issue. In addition, the carrier contends that the hearing officer erred in not granting its motion for continuance and in denying its motion to add an issue of whether the carrier had a duty to contest compensability of the claimed DVT injury, citing Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). The appeals file does not contain a response to the carrier's appeal from the claimant. In addition, the claimant did not appeal the determination that he did not establish a causal connection between his compensable injury and the DVT; therefore, that determination has become final under Section 410.169.

DECISION

Affirmed.

Because only the carrier waiver issue and two procedural issues are before us on appeal, our factual recitation will be limited to the facts most germane to those issues. It is undisputed that the claimant sustained a compensable injury on _____, in the course and scope of his employment as a hoist operator. He testified that in April 1996, he developed a knot on the inside of his right leg but that he did not seek medical attention for it until he developed other complications, including chest pain. On April 16, 1996, the claimant went to the emergency room and was admitted to the hospital. His right leg problem was diagnosed as DVT. In May 1996, the claimant returned to the emergency room with similar problems that caused his hospitalization in April 1996. He was again admitted to the hospital and the DVT diagnosis was confirmed. The claimant testified that he treated with Dr. R for his right leg and with Dr. GB for his shoulder injuries.

Dr. GB referred the claimant to Dr. G for an impairment evaluation. In a Report of Medical Evaluation (TWCC-69) dated January 23, 1998, Dr. G certified that the claimant reached maximum medical improvement (MMI) on December 17, 1997, with an impairment rating (IR) of seven percent. The claimant disputed Dr. G's rating because it did not take into account the DVT in his right leg. The Texas Workers' Compensation Commission (Commission) selected Dr. LB as the designated doctor. In a TWCC-69 of April 17, 1998, Dr. LB certified that the claimant reached MMI on December 17, 1997, with an IR of 10%, which was comprised of four percent for the right shoulder, four percent for the left shoulder, and two percent for transient edema in the right lower extremity. In the narrative report accompanying his TWCC-69, Dr. LB states:

The claimant reports that he developed thrombophlebitis to the right lower extremity as a result of the trauma from the fall. This was confirmed by a

bilateral Doppler duplex ultrasound on 9/16/97. [Dr. R] treated this with medical management and surgery was not needed. [Claimant] reports he still has mild swelling of the right lower extremity.

Dr. LB's TWCC-69 and the accompanying narrative report are date-stamped as having been received by the carrier on April 24, 1998.

The carrier completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability of the DVT on October 8, 1998, which was filed with the Commission on October 14, 1998. The carrier asserts that it received its first written notice of the DVT injury when it received Dr. R's September 29, 1998, "To Whom it May Concern" letter, which states:

[Claimant] has been under my care since April 1996. Since that time, he has undergone extensive cardiac testing. His primary problem at present is swelling of the right leg. Approximately two years ago while working, he fell about 12 feet off a roof. He got tangled in some cables and was severely injured. He did not have a specific injury to the right leg, but because of his prolonged convalescence developed a DVT and possibly a pulmonary embolism. At that time, he was treated with heparin and Coumadin for six months. Since then, he has had significant edema in the right leg that has not resolved. He recently had a sonogram done which showed no new clots. He has been wearing compression stockings to reduce the swelling which has helped some.

The carrier called Dr. V, who conducted a records review on its behalf, as a witness at the hearing. Dr. V primarily testified that there was no causal connection between the claimant's compensable injury and the DVT; however, in response to questioning from the hearing officer, Dr. V testified that thrombophlebitis is a blanket diagnosis that includes both phlebitis, an inflammation of the veins, and thrombosis which is the development of blood clots in the deep veins of the legs.

Initially, we will consider the carrier's assertion that the hearing officer erred in determining that it had waived the right to contest the DVT by not raising its contest within 60 days of the date it received written notice of that condition. Section 409.021(c) provides that a carrier waives its right to contest compensability of a claimed injury if it does not do so on or before the 60th day after it is notified on the injury. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)) provides in relevant part that written notice under Section 409.021(c) consists of the carrier's earliest receipt of "any other notification, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." The hearing officer determined that the carrier first received written notice of the DVT on April 24, 1998, when it received the designated doctor's report. In its appeal, the carrier asserts that the designated doctor's report "was simply not sufficient to put carrier on notice of an allegation of the [DVT] as part of the compensable injury." In so stating, the carrier argues that the designated doctor "did not diagnose deep vein thrombosis, nor make any mention of it being work related." As noted above, the designated doctor stated in his narrative that the "claimant reports that he developed

thrombophlebitis to the right lower extremity as a result of the trauma from the fall." In addition, the designated doctor assigned a rating for the transient edema associated with that condition. The hearing officer stated in his discussion "it is very clear to this Hearing Officer that Carrier had received written notice as of April 24, 1998, that Claimant was claiming he developed thrombophlebitis to his right lower extremity as a result of Claimant's injury of _____" and that "this was the first time . . . that Carrier received written notice" of the claimed injury. The question of when the carrier received notice triggering its obligation to contest the DVT was a question of fact for the hearing officer to resolve. We find no merit in the carrier's assertion that the designated doctor's report was insufficient to serve as notice in this instance. The TWCC-69, clearly identifies the injured employee, the employer and the date of injury. As noted above, the accompanying narrative report unequivocally states that the claimant is asserting the causal connection between his compensable injury and the DVT and the designated doctor assigned a rating for the condition. Those factors provide support for the hearing officer's determination that the designated doctor's report also included an assertion of the facts showing compensability of the DVT such that it triggered the carrier's obligation to contest it within 60 days or waive its right to do so. The carrier did not file its contest in this instance until October 14, 1998, well beyond 60 days of April 24, 1998. Accordingly, the hearing officer properly determined that the carrier had waived its right to contest compensability of the DVT.

The carrier asserts that the hearing officer erred in refusing to add the issue of whether under Williamson, *supra*, it had a duty to contest compensability of the DVT. The carrier asserts that the DVT could not become compensable as a matter of law because the claimant did not establish the causal connection between his compensable injury and the DVT. 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, which was determined by the hearing officer not to have been causally related to the compensable injury. 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, while the hearing officer found that the compensable injury did not cause the DVT, he did not find that the claimant did not have DVT or that there was no damage or harm to the physical structure of the claimant's right lower extremity. As such, contrary to the carrier's assertion it was not relieved of its duty to contest compensability of the DVT under Williamson and, as such, no error resulted from the hearing officer's denial of the request to add that issue.

The carrier also argues that the hearing officer erred in not granting its request for a continuance. It requested a continuance because it had sought records from the Commission concerning a prior compensable injury to the claimant's right leg but the Commission was allegedly unable to provide those records before the hearing because they were not readily available because they had been transferred to microfiche. At the hearing, the carrier's attorney could not provide any documentation as to when the carrier had filed the request to obtain the confidential claims information, except to make the representation that it was after the March 4, 1999, benefit review conference (BRC). In opposing the request, the ombudsman noted that the March 4th BRC was the second BRC held in this case and that the other BRC was held in February 1999; thus, she argued that

the carrier had had ample opportunity to conduct discovery. In denying the motion, the hearing officer noted that the Dispute Resolution Information System-Contact Data did not reflect that a request for the information had, in fact, been filed. Thus, the hearing officer stated that the carrier failed to demonstrate that it made a timely request for the information and that it likewise did not demonstrate that it exercised due diligence in conducting discovery. We reject the assertion that the hearing officer abused his discretion in so finding where, as here, the carrier presented no evidence to support its assertion that a timely request was made for the information and that it was the Commission's delay in responding to the request, rather than the carrier's delay in requesting the information which necessitated the continuance request. In addition, we are hard-pressed to see how the carrier was harmed by the denial of the continuance request in that it prevailed on the substantive issue of whether the compensable injury caused the DVT. Thus, although the records of the prior injury may well have been relevant to that issue, they have no apparent relevance to the waiver issue, which is the subject of this appeal. We perceive no error.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge