

APPEAL NO. 991506

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 14, 1999, a contested case hearing (CCH) was held. With respect to the issues before him the hearing officer determined that the respondent (carrier herein) waived its right to contest the compensability of an injury to the appellant's (claimant herein) shoulders and neck by not contesting compensability within 60 days of being notified of these injuries; that the claimant's compensable injury did not extend to an injury to the claimant's shoulders and neck; and that the claimant did not have disability because she did not have a compensable injury. The claimant files a request for review challenging the hearing officer's resolution of the extent of injury and disability issues. The claimant also raises an issue concerning the identity of the carrier and contends the hearing officer erred in excluding certain evidence. The carrier replies that the findings and the decision of the hearing officer were sufficiently supported by the evidence. The carrier argues that the identity of the carrier was a matter to which the parties stipulated at the CCH and that the hearing officer properly excluded evidence for failure to timely exchange it. Finally, the carrier contends that the exclusion of this evidence, even if error, was harmless error.

DECISION

Reversed and remanded.

Before discussing the facts of the case we will briefly discuss the question of the carrier's identity. At the CCH the parties stipulated that on the date of the injury, the claimant's employer had workers' compensation insurance with the carrier. The claimant asserts in her request for review that another insurance company (or at least an insurance company with another name) is actually the carrier. In its response to the claimant's request for review, the carrier points to the stipulation and represents that it was the workers' compensation carrier for the claimant's employer on the date of her injury. We find no reason to set aside the stipulation of the parties concerning the identity of the carrier, particularly in light of absence of any evidence contrary to the stipulation.

Most of the essential facts of the case were not in dispute. The hearing officer summarizes the evidence in his decision and we adopt his rendition of the evidence. We will only touch on the evidence directly germane to the appeal. This includes the fact that it was undisputed that the claimant suffered a compensable injury on _____. The claimant testified that she reported complaints to the employer's health department of pain to her hands and wrists as well as to both her shoulders. The claimant testified that her initial medical treatments concentrated on her hands and she did not initially receive treatment for her neck and shoulders. The claimant testified that on December 21, 1998, she saw Dr. D, D.C., for complaints to her shoulders and neck. The claimant sought to introduce medical records from Dr. D to relate her shoulder and neck problems to her compensable injury but this exhibit was excluded for untimely exchange. The claimant testified that she was off work at the direction of Dr. D from December 21, 1998, to January 21, 1999. The claimant

testified she was employed from January 22, 1999, through March 24, 1999, but at a lower wage than her preinjury wage. The claimant testified that from March 25, 1999, through the date of the CCH she had been off work due to her compensable injury.

The findings of fact and conclusions of law of the hearing officer include the following:

FINDINGS OF FACT

2. The medical evidence presented does not contain a diagnosis of injury to the physical structures of the Claimant's neck and shoulders.
3. The TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim] submitted by the Carrier is undated and contains the notation that the Carrier's first written notice of injury was received on March 18, 1997.
4. Carrier did not present sufficient evidence to establish that it contested compensability within 60 days of March 18, 1997.
5. Due to the claimed injury, Claimant was unable to obtain and retain employment at wages equivalent to her pre-injury wage beginning December 21, 1998, and continuing through the date of this hearing.

CONCLUSIONS OF LAW

3. Claimant did not sustain an injury to her shoulders and neck.
4. Carrier did not contest compensability of the claimed injury to the shoulders and neck within 60 days of being notified of the injury.
5. Carrier's waiver of the right to contest compensability does not result in the existence of a compensable injury where the evidence presented does not support the existence of a compensable injury.
6. Claimant did not have disability as Claimant does not have a compensable injury.

We do not find error in the hearing officer's exclusion of evidence not timely exchanged. Section 410.161 provides that absent a finding of good cause evidence not exchanged pursuant to Sections 410.158-410.160 will be excluded. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) provides specific times for the exchange of documents which were not meant in the present case. The claimant presented no evidence compelling a finding of good cause for timely exchange by the hearing officer.

Where we do find error in the present case is in the hearing officer's application of Section 409.021. Section 409.021 provides as follows, in relevant part:

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:
 - (A) the right to request a benefit review conference; and
 - (B) the means to obtain additional information from the commission.
- (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.
- (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.
- (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

In the present case, the hearing officer found facts establishing that the carrier failed to meet the requirements of Section 410.161. These factual findings have not been appealed and have become final pursuant to Section 410.169. The hearing officer concluded that the carrier's waiver was without effect because the claimant did not have a compensable injury. Though not directly stated, the hearing officer apparently relies on the decision of the Tyler Court of Appeals in Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) (hereinafter Williamson). The Williamson case dealt with a situation in which there was a factual finding of no injury whatsoever. The Court of Appeals held under those circumstances that Section 410.021 would not operate to create an injury when none existed. That is quite distinct from the present situation where it is undisputed that the claimant suffered a compensable injury. The Appeals Panel has held that where the hearing officer found that the claimant did not suffer from a

condition that the claimant argued was part of her compensable injury, namely fibromyalgia, compensability of the condition would not be created under Williamson. Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998. However, that is not the circumstance in the present case either. The hearing officer did not find that the claimant does not suffer from any physical damage or harm to her shoulders and neck, but did find that the claimant did not establish a causal relationship between her injury and her problems with her shoulders and neck.

The Appeals Panel addressed this type of situation in Texas Workers' Compensation Commission Appeal No. 991178, decided July 15, 1999, where we stated as follows:

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 [deep vein thrombosis]. 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.

In the present case, we find that the hearing officer's factual findings do not support his conclusions of law. He has made no factual findings as to whether or not the claimant has physical harm or damage to her neck and shoulders. His Conclusion of Law No. 3 does not resolve this issue as it is not a factual finding nor is it supported by a factual finding. Finding of Fact No. 2 is not sufficient to support Conclusion of Law No. 3. Finding of Fact No. 2 on its face appears to require medical evidence to establish injury. Generally, corroboration of an injury is not required and may be found based upon a claimant's testimony alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). It is thus unclear whether or not the hearing officer applied the correct legal standard. Under these circumstances, we reverse the decision of the hearing officer and remand the case for him to make findings of fact and conclusions of law that are internally consistent and which are sufficient to support a decision in this case.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order

by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge