APPEAL NO. 991551

Following a contested case hearing (CCH) held on June 25, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant/cross-respondent (claimant) did not sustain an injury to her low back area while in the course and scope of her employment on or about injury 2; that the respondent/cross-appellant (carrier) is relieved from liability because claimant failed to timely notify the employer of the claimed injury; that claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission); that although the carrier did not contest the compensability of the claimed injury within 60 days of being notified of the injury, the carrier did not waive the right to do so because claimant did not establish that she sustained an injury; and that claimant did not have disability resulting from the claimed injury of injury 2. Claimant requests our review of the adverse injury in the course and scope, timely notice, and disability determinations, asserting evidentiary insufficiency but not specifically challenging particular factual findings. Claimant's appeal of the injury determination also takes issue with the hearing officer's determination that the carrier's untimely controversion did not waive into a new injury because there was no new injury. The carrier requests review of the factual finding that its Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) does not dispute the compensability of the claimed injury and so much of the legal conclusion on the waiver issue as states that it failed to contest the compensability of the claimed injury within 60 days of being notified of the injury. The carrier filed a response to claimant's request for review; however, the file does not contain a response to the carrier's request for review.

DECISION

Affirmed.

The parties stipulated that the date of the alleged injury is injury 2, and that on that date, claimant had a preexisting herniated disc injury to the L4-5 level of her lumbar spine.

Claimant testified that on Injury 1, while employed by (bank B), she sustained a back injury, lost time, and settled that case on March 21, 1994, for $20,000.00 and five years of open medical treatment which will expire March 4, 1999; that on April 6, 1993, while employed by (bank A), she sustained a back injury and lost time from work; and that on injury 2, while employed by (employer), she sustained an aggravation injury to her back when she lifted a heavy bag of coins while working as a teller at a drive-thru window. Claimant said she mentioned this accident to coworker Ms. F when it happened and reported it to supervisor Ms. T the next day. Claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) is dated "10-14-98" and reflects receipt by the Commission's McAllen field office on "10-14-98." Claimant stated that when she filed the TWCC-41 stating the date of injury as "injury 2," she was told that a more specific date was required, and because she recalled that the injury occurred around the middle of the month, she crossed through the "injury 2" and wrote the date of injury as

"injury 2." Elsewhere on that form claimant wrote "not sure on day" and "I'm not really sure." Claimant indicated that she was treated by both Dr. W and Dr. C for her injury 1 injury as well as her claimed new injury of injury 2.

Ms. F, who conceded that the employer had terminated her employment over a $600.00 out-of-balance drawer, testified that she had worked with claimant for about six months; that "around" injury 2, claimant got some coins and strained her back; that she counseled claimant to report the matter to Ms. T; and that the next day claimant said that she had talked to Ms. T but that her report was not written down. Ms. T testified that to the best of her knowledge, claimant, whom she acknowledged to have been a good employee, did not hurt her back at work in Injury 2 and that she did not complain to her of a back injury or report such an injury. Ms. T stated that the employer first received notice of the claimed injury in November or December 1998. Ms. M, the employer's human resources director, testified that neither claimant nor anyone else at the bank gave notice at any time between October 1 and December 1, 1997, that claimant sustained a job-related injury in Injury 2.

The carrier's undated TWCC-21 reflects that the carrier's first written notice of injury, provided by Ms. M, was received by the carrier on "11-3-98." The copy introduced by the claimant bears two Commission Austin Central Office date stamps, one showing receipt on "Oct. 04, 1998," and the other, on "Nov. 04, 1998." Presumably, the October 4th date was stamped in error. Clearly, the carrier's filing of the TWCC-21 the day after it received its first written notification of the claim was timely under Section 409.021. The TWCC-21 states the following as the reasons for disputing the claim:

> Failure to [sic] Employer 30 days or less after injury -
>
> Injured woker's [sic] claim for compensation filed after 1 yr time constraint (limit)
>
> Injured worker has been treating for a pre-existing injury to the same area of the body before and after the alleged accident date. Previous injury - injury 1 injured worker refused surgery, surgery now being requested. Provider relates need for surgery to injury 1 injury.

Claimant further testified that after her injury 2, injury, Dr. W took her off work and that Dr. C, who, apparently, sometime later became her treating doctor, kept her off work and has not yet released her.

The medical record claimant relies on as establishing that on injury 2, she sustained an aggravation injury of her preexisting back injury is a Injury 3, lumbar spine report from Dr. S obtained by Dr. W which concludes that compared to 1992 and 1994 studies, the MRI revealed dessication of disc material at the L4-5 and L5-S1 levels. The report also noted the revealing of minute, stable subligamentous bulging at L5-S1 and a minute, stable subligamentous contained disc fragment. Also in evidence are Dr. W's reports of "10-28-97" and "11-18-97," both referencing a date of injury of "injury 1." In the former, Dr. W

states that claimant continued to have pain after her last visit on May 29, 1997, and that she reports that the pain is a little more severe and quite severe since October 24, 1997. In the latter, Dr. W notes that claimant works as a bank cashier, stands most of the time, and "is working trying to protect her back." Neither report mentions an incident concerning lifting a bag of coins at work and a reinjury.

Dr. C's letter of December 22, 1998, states that although his reports indicate that claimant sustained an initial injury in injury 1, it is his impression that she reinjured her back in Injury 2 while at work for the employer "with her not knowing specifically what date this injury occurred." Dr. C further states that he is "strongly convinced" that claimant's back pain "is definitely a reinjury" which occurred last year and that he is going to change the "injury 1" date in his reports.

Claimant had the burden to prove that she sustained the claimed injury (*see* Section 401.011(26) for definition of injury), that she timely reported the claimed injury (*see* Sections 409.001 and 409.002), that she timely filed her claim (*see* Sections 409.003 and 409.004), and that she had disability (*see* Section 401.011(16) for definition of disability). The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.).

We are satisfied that the evidence sufficiently supports the challenged determinations that claimant did not sustain an injury to her low back area while in the course and scope of her employment on or about injury 2; that the carrier is relieved from liability under Section 409.002 because claimant failed to timely notify the employer pursuant to Section 409.001; that claimant timely filed a claim for compensation with the Commission; and that claimant did not have disability from the claimed injury 2, injury. The hearing officer's discussion of the evidence indicates that she found claimant's evidence lacking in credibility and unpersuasive. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

As for the waiver issue, Section 409.021(c) provides, in part, that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the

date on which the carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) provides that the TWCC-21 is to be filed on or before the 60th day after written notice of injury is received by the carrier. The carrier had the burden to show, if raised by claimant, that it timely filed its contest of compensability and, if raised by claimant, that its (timely) filing was sufficient to constitute a contest of the compensability of the claimed injury.

The disputed issue was framed as follows in the benefit review conference (BRC) report: "Did Carrier waive the right to contest the compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury." At the BRC, it was claimant's position that the carrier waived its right to contest an injury in the course and scope because it is not disputed on the TWCC-21; that it is now too late for the carrier to dispute injury in the course and scope; and that the only thing the carrier timely disputed was failure to report the injury to the employer within 30 days and failure to file the claim with the Commission within one year. The carrier's position was stated to be that it disputed the claimed injury by stating on the TWCC-21: "Insured worker has been treating for a pre-existing injury to the same area of the body before and after the alleged accident date." It thus is apparent that claimant was not contending that the carrier's TWCC-21 was untimely filed pursuant to Section 409.021(c) but rather that its verbiage in the TWCC-21 was insufficient to constitute a contest of the compensability of the claimed new back injury pursuant to Rule 124.6(a)(9).

Relative to the waiver issue the hearing officer made the following findings and conclusion:

FINDINGS OF FACT

28. On 10-4-98 [sic], [Commission] received a TWCC-21 filed by Carrier, referencing the injury 2 date of alleged injury and indicating in box #43 that it was refusing to pay temporary income benefits (TIBS) because Claimant failed to timely report an injury to Employer, [sic] Claimant failed to timely file a claim for compensation and stating that Claimant has been receiving medical treatment for a pre-existing injury, for which surgery was then being requested.

29. Carrier's TWCC-21 does not dispute compensability of the claimed injury.

CONCLUSION OF LAW

5. Although Carrier did not contest compensability of the claimed injury within 60 days of being notified of the injury, Carrier did not waive the right to do so because Claimant did not establish that she sustained an injury.

The carrier does not dispute Finding of Fact No. 28 but does challenge Finding of Fact No. 29 as well as the first phrase in Conclusion of Law No. 5. The carrier urges on appeal, as it did below, that "read as a whole," the TWCC-21 does comport with the requirement of Rule 124.6(a)(9) which requires "a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits" and provides that a statement that simply states a conclusion such as "liability is in question," "compensability in dispute," "no medical evidence received to support disability," or "under investigation" is insufficient grounds for the information required by this rule. In Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992, the Appeals Panel stated that while Article 8308-5.21(c), now Section 409.021(c), and Rule 124.6(a)(9) "require specificity and not generalities in setting forth the grounds upon which the controversion is based, we believe the respondent has sufficiently complied," and that "a fair reading of the grounds listed, when considered together, encompass a controversion or dispute on the basic issue that an injury was not suffered in the course and scope of employment." *And see* Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993, and cases cited therein. The carrier's TWCC-21 clearly raises the defenses of untimely notice of an injury and untimely filing of a claim. As to the remainder, while another fact finder may have drawn different inferences from the remaining language in the TWCC-21 and considered the references to receiving treatment after the claimed injury to the same area of the body previously injured and previously declining surgery but now desiring surgery as contesting the compensability of the claimed new injury, such does not afford us a basis to disturb the finding which we do not view as being so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, *supra*.

Finally, we turn to claimant's contention that the hearing officer erred in concluding (Conclusion of Law No. 5) that the carrier did not waive the right to contest compensability because claimant did not establish that she sustained an injury. In support of this conclusion, the hearing officer found in Findings of Fact Nos. 21 and 22, respectively, that claimant "did not sustain damage or harm to her low back area on injury 2" and that she "did not sustain a low back injury while at work on injury 2." In her discussion of the evidence, the hearing officer states as follows:

> Carrier's TWCC-21 was found to be deficient for disputing compensability of the claimed injury; however, in order for waiver to be found, Claimant must first establish that an injury was sustained. Absent an injury having been sustained, Carrier's deficiency will not "waive" an injury into existence.

Though not citing it, the hearing officer's discussion is plainly referring to the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.- Tyler 1998, no pet. h.). In Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998, where the carrier was determined to have failed to timely contest the compensability of a claimed knee injury, the hearing officer stated that in that case there was no slip-and-fall injury on the claimed date and that no compensable injury was created

as a matter of law citing Williamson. The following discussion from Appeal No. 981770 is applicable here.

> In that case [Williamson], the court stated that the issue before it was whether an employer's failure to contest compensability, when there was no injury, creates a compensable injury as a matter of law. The hearing officer found that the self-insured did not waive the right to contest the injury itself and that the self-insured's failure to timely contest compensability where there is no injury does not create a compensable injury as a matter of law.

In the case we now consider, given the specificity of Findings of Fact Nos. 21 and 22 and the hearing officer's discussion making clear she believed no injury was sustained at all on October 17, 1997, we find no error in the hearing officer's applying Williamson and determining that the carrier did not waive into a new back injury. *See* Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998, where the Appeals Panel reversed and rendered a new decision that the carrier had not waived into a reflex sympathetic dystrophy (RSD) injury under Williamson when the hearing officer had found that the claimant did not have RSD.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENTING OPINION:

I respectfully dissent in the present case in regard to the majority's affirming the hearing officer on the issue of waiver of compensability. I think affirming the hearing officer mistakenly absolves her of error for overreading the Tyler Court of Appeals decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) (herein after Williamson). Even though the hearing officer does not mention Williamson in her decision, I agree with the majority that she clearly seeks to apply Williamson to the present case. However, it appears clear that her reading of Williamson is that it requires the claimant to first prove a compensable injury before the carrier has an

obligation to dispute Section 409.021(c). Such a reading renders Section 409.021 meaningless in that a carrier could only waive the truth of what has already been established to be true. In fact, I suspect the carrier might well have appealed the hearing officer's factual finding that the carrier's dispute was insufficient to avoid having to defend such circular reasoning.

It appears to me that it is clear in the present case that the claimant had damage or harm to the physical structure of her low back, but the essential question in regard to injury was whether such damage or harm was a result of an incident at work on injury 2. Thus the present case dealt not with a situation where there was no damage or harm to the physical structure of the claimant's body but with the causality of such damage or harm. We stated as follows in Texas Workers' Compensation Commission Appeal No. 991509, decided August 31, 1999:

> 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 employment. *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 incident at work did not cause the damage or harm to the physical structure of the neck, she did not find that the claimant did not have damage or harm to the physical structure of his neck. To the contrary, she found that the claimant had a "2-3mm cervical disc herniation at C5-6." As such, the carrier was not relieved of its duty to contest compensability of the neck injury under Williamson and that injury became compensable as a matter of law pursuant to Section 409.021(c).

In the present case, the parties stipulated that the claimant had a preexisting herniated disc injury to the L4-5 level of her lumbar spine. The hearing officer did not find, and indeed in light of this stipulation and the evidence in the case could not have reasonably found, that the claimant had no damage or harm to the physical structure of her body. While I do not take issue with the authority of the hearing officer as the finder of fact to find that this harm was not caused by the claimant's asserted injury on injury 2, (which is how I read her Findings of Fact Nos. 21 and 22 quoted by the majority), I do have difficulty comprehending how her resolution of the issue of causality of the damage or harm to the claimant's body relieved the carrier of its duty to timely dispute a compensable injury pursuant to Section 409.021(c), Williamson notwithstanding. The reading the hearing officer has given the doctrine expressed in the Williamson case would in my mind effectively render Section 409.021(c) a nullity, a result I do not believe was intended by the Williamson court and I am certain was not intended by the Texas Legislature.

I would reverse the decision of the hearing officer and remand the case to her to make findings of fact and conclusions of law applying a legally correct interpretation of

Williamson, limiting it application to instances where there is no damage or harm to the physical structure of the body.

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Gary L. Kilgore
Appeals Judge