APPEAL NO. 000604

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 March 7, 2000. The hearing officer determined that the respondent (claimant) while having a cervical injury, did not sustain a compensable injury to her cervical area in addition to her compensable left wrist, left arm, and left shoulder injuries; that appellant (carrier) waived the right to contest the compensability of the cervical injury by not contesting compensability within 60 days of being notified of the claimed cervical injury; and that claimant had disability from March 17, 1998, and continuing through the date of the CCH. The carrier appeals certain of the hearing officer=s determinations, and contends that it had timely disputed compensability of the claimed injury, and, even if it had not timely disputed, the hearing officer had found the cervical injury was not compensable and Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) held that the failure to contest compensability cannot create an injury, citing several Appeals Panel decisions. Carrier also appeals the hearing officer=s decision on the issue of disability, contending that since there is no compensable cervical injury claimant cannot have disability due to the cervical injury. (Claimant=s testimony was that her inability to obtain and retain employment was due to both her compensable injury and the cervical injury.) The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant had been employed in an office capacity and on _____, was walking across a concrete floor when she slipped and fell to the floor, injuring her left wrist (a comminuted fracture), left hip and left shoulder. Claimant was taken to the hospital and received treatment for these injuries. The parties stipulated claimant sustained a compensable injury on _____, and carrier has accepted liability for these injuries. As the hearing officer noted, the question before us "is whether [claimant] also injured her cervical spine in the fall."

Claimant=s treating doctor is Dr. H, who in progress notes from March 18 through December 23, 1998, initially focused on the wrist injury and in August 1998 began mentioning the left shoulder. Claimant continued having shoulder problems which appeared to get worse and manipulation under anesthesia was performed, apparently in January 1999. In a report dated July 26, 1999, Dr. H commented that claimant "first started making [cervical] complaints to the [physical] therapist in late ›98, early ›99 . . . ."

In a note dated June 25, 1999, Dr. H comments on claimant=s continued "intermittent problems with her neck and pain in her left upper extremity . . . that is resistant to treatment and the physical findings in her left upper extremity" and states claimant needs an MRI of her

cervical spine. In a letter dated June 29, 1999, addressed to Dr. H, carrier=s adjuster writes that carrier is in receipt of Dr. H=s "letter of June 25, 1999," concerning claimant and that:

> The letter is our first indication that a claim for the cervical region is being made on this file.

The letter goes on to ask for medical rationale to support the need for the cervical MRI and other information regarding Dr. H=s June 25, 1999, note. In another note dated July 1, 1999, Dr. H states:

> [Claimant] has been having increased symptoms in her left shoulder and neck and upper extremity when she tries to increase her activity level. There has not been a history of an additional fall. Her only increase in pain has been associated with routine day to day activities such as lifting a small dog, lifting a grandchild, etc. There is no evidence at this time that her symptoms relate to anything other than the original fall back in _____.

Dr. H responds to carrier=s June 29, 1999, letter by letter dated July 26, 1999, acknowledging that claimant had past problems with cervical spondylosis and "pre-existing cervical problems." However, Dr. H, at that time, was ambivalent of whether claimant=s cervical problems were work related. An MRI was apparently performed and in a September 8, 1999, note, Dr. H states that the MRI was "very impressive" and showed "disc herniation at C5-6 centrally and on the left with cord compression and nerve root encroachment." Claimant argues that a 1996 cervical MRI was "unimpressive" and normal. (Neither MRI is in evidence.) However, in response to a questionnaire from carrier about the MRI, and whether claimant=s current symptoms are work related, Dr. H wrote "I doubt that this is work related." Dr. Mc did a record review for carrier and in a report dated September 17, 1999, was of the opinion that claimant=s cervical injury was not as a result of claimant=s _____ fall.

The hearing officer, in his Statement of the Evidence, commented:

> Medical records in evidence do not clearly link the cervical spine problems to the compensable injury. Apparently, Claimant made no complaint of neck problems for at least eight months after the accident. She had a prior neck condition, and the origin of her current neck problems is not proven.
>
> On June 29, 1999, the adjustor for the Carrier responded to a letter from [Dr. H], acknowledging that a claim was being made for "the cervical region". A TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim], denying the extension of the injury to the cervical spine, was not filed until September 21, 1999, more than 60 days after receipt of notice of the claimed injury.

The hearing officer made the following findings:

FINDINGS OF FACT

2. Claimant has an injury to her cervical spine.

3. Claimant did not injure her cervical spine when she fell at work on _____.

4. The Carrier received written notice of a claimed cervical injury not later than June 29, 1999.

5. The Carrier disputed the cervical injury on September 21, 1999, more than 60 days after June 29, 1999.

6. Due to the injury to her left wrist, arm, shoulder and cervical spine, beginning March 17, 1998 and continuing through the date of this hearing, Claimant has been unable to obtain and retain employment at wages equivalent to her per-injury wage.

Carrier, in its appeal, only appeals Findings of Fact Nos. 2, 4, 5 and 6 (and the conclusions on which those findings are based) expressly accepting Finding of Fact No. 3.

Regarding the timely contest of compensability, carrier cites Section 409.021(c) (waiver of right to contest if not done within 60 days of notice) and Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 124.1(a)(3) (Rule 124.1(a)(3)), which provides that the insurance carrier may be given written notice by any document which "fairly informs the insurance carrier" of facts showing compensability. Carrier argues and cites Appeals Panel decisions that Dr. H=s June 25, 1999, letter was inadequate to give such notice and that carrier=s June 29, 1999, letter was only to obtain further information. Claimant, and the hearing officer, emphasized that carrier in the June 29, 1999, letter said "The letter [apparently Dr. H=s June 25th letter] is our first indication that a claim for the cervical region is being made on this file." The hearing officer found that carrier was "acknowledging that a claim was being made for >the cervical region.=" We hold that finding to be supported by the evidence and not in error as a matter of law.

Next, carrier cites a number of Appeals Panel decisions involving interpretation of the Williamson, *supra*, case. We have addressed this issue a number of times, including in Texas Workers= Compensation Commission Appeal No. 992780, decided January 26, 2000, where we quoted the Williamson court as saying:

> We hold, therefore, 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.

We have interpreted Williamson to mean that a carrier=s failure to timely dispute does not create an injury only when there is no injury. If the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when a TWCC-21 has not been timely and properly filed. *See* Texas Workers= Compensation Commission Appeal No. 992584, decided January 3, 2000, and Texas Workers= Compensation Commission Appeal No. 981640, decided September 2, 1998. In this case, the parties stipulated to compensable left wrist, left shoulder and left hip injuries and the hearing officer found a cervical injury but went on to say it was not caused by the compensable _____, fall. The hearing officer found a cervical injury and that finding is not against the great weight and preponderance of the evidence. Consequently, Williamson does not come into play. Carrier, in its appeal, would have us expand the holding of Williamson to apply to those cases where there is an injury, but the claimant fails to prove the injury was work related. This we decline to do because we do not believe it to be the correct interpretation of Williamson and because to so hold would effectively eliminate from the 1989 Act the requirement to timely dispute.

Regarding the issue of disability, as defined in Section 401.011(16), claimant testified that she was taken off work after her fall and, at some time upon request of the employer, returned to work a few hours a day, part time, in modified duty, until she was unable to meet even the part-time, light-duty requirements. When, for how long and at what rate of pay claimant worked was not developed. Carrier=s appeal on disability is predicated on its contention that there is no compensable cervical injury and that "Carrier cannot waive their right to contest compensability of the cervical spine" citing Williamson. While claimant testified that the disability was due to a combination of all her injuries, claimant acknowledged she returned to work part time at light duty but it is not at all clear whether the inability to obtain and retain employment at the preinjury wage was due to the cervical injury, a continuation of the accepted left shoulder injury or some combination thereof. Claimant testified that the disability was due to a combination of all her injuries. Carrier=s argument is that the disability was due solely to the cervical injury which it contends was not compensable. In any event, the evidence is in conflict and the hearing officer=s decision on this issue is sufficiently supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer=s determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge