APPEAL NO. 001160

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 April 21, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and is not entitled to benefits as a result of the alleged injury. On a carrier waiver issue, the hearing officer further held that there was no waiver for the failure to dispute the injury, as there was no injury.

The claimant appealed and argued that a collision with a coworker resulted in injury. She further argues that the respondent (carrier) did not file a dispute to her injury within the correct time and, therefore, the injury is compensable. The carrier responded that the hearing officer's decision is supported by the record and applicable case law.

DECISION

We affirm.

The claimant was employed as a short-term sales associate by (employer) since the first of October 1999. She said that on _____, she was coming out onto the sales floor from the shoes stockroom and then turned around because she had forgotten something. When this happened, she ran in to another employee, a taller man, Mr. J, who was right behind her.

She was looking down at the time and the top of her head hit Mr. J's chest. The claimant immediately felt pain on the top of her head. She was able to complete her shift that day. However, she said that by 8:30 that night, before her shift ended, the pain had gotten so bad that she reported her injury to a supervisor named Ms. D. An accident report was filled out. The claimant said that the following day, a Sunday, was her day off.

The claimant went in to work on _____ but could not complete her shift due to pain in her neck. The claimant left early after notifying another supervisor.

The claimant said she went that day to a minor emergency health clinic and was treated by Dr. M. She said she had whiplash and a bump on her head. There were no records, however, from Dr. M put into evidence. The claimant next sought medical assistance around November 21 or 22 at a hospital emergency room. There are also no records from this treatment.

The claimant then testified that she "eventually" began treating with, Dr. N. Records in evidence show that this treatment began the first week of December. The claimant's continuing diagnosis was "whiplash." She had an MRI done which reported a normal cervical spine but for a small disc protrusion at C6-7 that did not impinge on any nerves.

There was evidence that the claimant had lumbar surgery in June 1999 due to a workers' compensation injury while working for another employer. She was also involved in an automobile accident in July 1997 that affected her neck. The claimant noted that she experienced pain and numbness down her left arm. She said that none of this was experienced prior to the date she collided with her coworker. The claimant contended she was unable to work through the date of the CCH.

A letter dated November 22, 1999, from the carrier to the employer was in evidence, requesting a wage statement. The carrier's attorney conceded at the CCH that this reflected that by that date, the carrier had written notice of the alleged injury. The carrier's attorney agreed that no Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) had been filed by the carrier even to the date of the CCH.

The claimant testified that things would get hectic in the shoe department and that she did not particularly like working in that area. She agreed she was reprimanded prior to her accident for taking too many smoking breaks. She agreed she had drafted a note of resignation (in evidence) but did not turn it in because many matters had been resolved in a conference. The draft note was dated November 6, 1999.

Mr. J testified and agreed that he collided with the claimant as she stated. He said he was holding some shoe boxes in front of him when this occurred. Mr. J said that the impact occurred with the shoe boxes, and not with him personally. Mr. J said that the shoe boxes hit the claimant at about chest level. He said that the only response the claimant had to the accident was to joke the rest of the day that she used to be a linebacker for the Dallas Cowboys. Mr. J said that he gave a written statement (consistent with his testimony) on November 16, 1999.

Finally, although sparse, there is medical evidence in this case. Dr. N's records largely document treatment as opposed to specific diagnoses. However, a December 2, 1999, note documented neck spasm, lordosis, and symptoms of discopathy. On December 15, 1999, Dr. N noted stiffness in her neck. When Dr. C, whom the claimant said treated her for her lumbar injury, examined her on January 25, 2000, he noted neck symptoms but treated only her lumbar injury, which he said resulted in intractable pain. Dr. N treated the claimant over the ensuing months for neck pain. He noted on March 7, 2000, that the claimant had a cervical sprain. This letter recorded a belief that the claimant experienced a sudden jerking during the collision with the coworker, not that she hit her head against the coworker.

As the Appeals Panel has noted, the case of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.- Tyler 1998, no writ) held that where there is no injury at all, the failure of a carrier to dispute does not waive an injury into existence. That case does not absolve a carrier of the requirements of Section 409.021 (Texas Workers' Compensation Commission Appeal No. 991955, decided October 18, 1999) but merely rules on what the consequences of a failure to comply with the statute will be under certain circumstances. However, where there is evidence of an injury and the gist of the carrier's

defense is that it did not occur at work, this goes to the heart of "compensability" and the failure to react within 60 days of receipt of written notice of that injury will act as a waiver. Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999.

The case, in total, depends upon whether the claimant sustained physical damage, i.e., an injury. As we read the hearing officer's decision, he plainly believed that the accident in question did not lead to any injury or physical damage to the claimant's body. Although these facts come close to the "line" of where Williamson, *supra*, applies, or where it does not, we are persuaded that the hearing officer believed that the claimant had not shown physical damage resulting at all and, consequently, the carrier's failure to file a TWCC-21 in response to notice of pain treatment did not effect a waiver.

In reviewing the evidence concerning both the occurrence of an injury from the incident in question and waiver, we cannot agree that the fact findings of the hearing officer are so against the great weight and preponderance of the evidence and, accordingly, affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge