APPEAL NO. 001652

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 June 14, 2000, with the record closing on June 21, 2000. The hearing officer determined that although the respondent (claimant) did not sustain a work-related injury in the form of an occupational disease on _____, the appellant (self-insured) waived the right to contest compensability of the disease by not contesting compensability within 60 days of receiving written notice of the injury; and that the claimant had disability from April 26 through June 23, 1998, and from September 29, 1998, through April 20, 1999. The self-insured appealed, contending that the adverse determinations are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The determination that the claimant did not sustain a work-related injury has not been appealed and has become final.

DECISION

Affirmed.

The claimant contended he sustained an inhalation injury from exposure to gasoline and diesel fumes on _____. Diagnoses included right middle lobe lung syndrome and restricted airways disease. The hearing officer found that the claimant has a lung injury, but that it was not sustained in the course and scope of employment as claimed. This finding of the injury not being in the course and scope has not been appealed. The self-insured does, however, appeal the finding of an "injury," arguing correctly that the medical records refer only to the right lung and not "lungs" as found by the hearing officer (Finding of Fact No. 28); that the physician, Dr. P, who diagnosed this condition was hired specifically for litigation purposes and his opinion should be considered "highly biased"; and that on subsequent visits in March and May 1998 to Dr. T, the claimant's lungs were found to be normal.

We agree that the medical evidence diagnoses only a right lung injury. For this reason, we reform Finding of Fact No. 28 to reflect that the claimant sustained damage or harm "to his right lung." The credibility of the medical evidence in establishing a lung injury was a matter for the hearing officer to determine. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer, but find the evidence deemed credible by the hearing officer sufficient to support the finding of a right lung injury. The fact that the claimant's injury may have resolved is not a basis for overturning a finding of an injury.

The carrier, in this case the self-insured employer, is required to contest the compensability of a claimed injury within 60 days of receiving written notice of the injury.[1] Section 409.021(c). The notice can take any written form but to be effective must fairly inform the carrier of the name of the claimant and of the employer, the approximate date of injury, "and facts showing compensability." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (a)(3) (Rule 124.1(a)(3)). On March 26, 1998, the claimant signed a Report of Injury on a form created by the employer. His supervisor signed it the same day. The form provides a reasonably detailed explanation of the circumstances of the claimed injury. Receipt by the employer on this date also constituted receipt by the self-insured. Texas Workers' Compensation Commission Appeal No. 951741, decided December 6, 1995. The hearing officer found that receipt of this report on March 26, 1998, triggered the 60-day dispute requirement. Findings of Fact Nos. 33 and 34. The self-insured appeals this determination, contending that it first received written notice in the form of the Employer's First Report of Injury or Illness (TWCC-1) which was dated March 30, 1998. This argument is somewhat contradicted by the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the self-insured on May 28, 1998, and which indicated that first written notice was received on March 26, 1998. We believe that the internal Report of Injury, no matter what purpose it was intended by the self-insured to serve, clearly meets the definition of written notice contained in Rule 124.1 and was received by the employer on the date it was signed by the supervisor.[2] Because the TWCC-21 was not filed within 60 days of the date the self-insured first received written notice of the claimed injury, the self-insured waived the right to dispute compensability and the claimed injury became compensable as a matter of law.

The self-insured also relies on the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) for the proposition that where there is no injury in the course and scope of employment the failure to timely dispute compensability does not create a compensable injury at all. We have held that Williamson applies only where there is no underlying injury. Texas Workers' Compensation Commission Appeal No. 992907, decided February 10, 2000. In this case, there was evidence of a right lung injury, whether now resolved or not. Thus, Williamson provides no relief to the self-insured.

Also appealed by the self-insured is the finding of disability from April 26 through June 23, 1998, and from September 29, 1998, through April 20, 1999, on the grounds that the claimant was suffering from numerous other conditions and diseases of life which were unrelated to the claimed injury. The self-insured further points to medical releases to return to normal duties on March 26, 1998, and on June 23, 1998. Whether disability existed for any period of time presented a question of fact for the hearing officer to decide

---

[1] *But see* Downs v. Continental Casualty Company, No. 04-99-00111-CV (Tex. App.-San Antonio, August 16, 2000, no pet. h.)

[2] We also observe that the TWCC-1 refers to first written notice on March 26, 1998, but matters contained in this report cannot be used as evidence against the self-insured or employer. *See* Section 409.005(c).

and could be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We have held that a compensable injury need only be a producing cause of the disability, not the only cause. Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994.

The claimant testified that on April 26, 1998, Dr. T advised him to stop working because of his lung condition. On June 23, 1998, Dr. T released him to return to full duty. On September 29, 1998, Dr. P placed the claimant on light duty and described him as being "very, very limited in his activities." According to the claimant, he was told by his supervisor that there was no light duty available. On April 20, 1999, Dr. P returned the claimant to normal duty. The hearing officer accepted the claimant's testimony and this medical documentation at face value and found disability accordingly. The fact that an employee is given a restricted duty release can be construed as evidence that disability continues or recurs. Under our standard of review of factual determinations, we find the evidence sufficient to support the disability determinations of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge