APPEAL NO. 011735
FILED SEPTEMBER 5, 2001

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 commenced on January 18, 2001, and concluded on June 19, 2001. With regard to the five disputed issues, the hearing officer determined that (1) the appellant (claimant) did not sustain a compensable mental trauma injury on _____; (2) the claimed compensable injury did not include an injury to the left knee; (3) the claimant did not have disability due to the claimed injuries; (4) the claimant did not timely notify his employer of the claimed injury and did not have good cause for failing to do so; and (5) the "[respondent] Carrier did not timely dispute the compensability of the claimed injury, but there is no consequence of the Carrier's failure to timely dispute because there was no injury to dispute."

The claimant appeals all the adverse determinations and asserts additional error that the hearing officer "disallowed the testimony" of a witness whose identity the claimant had not timely disclosed (based on newly acquired information). The carrier responds to most of the claimant's allegations and urges affirmance.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant was employed as a delivery truck driver by the employer, which provided delivery service for a computer manufacturer. On _____, the claimant was at the manufacturer's loading dock where there were restrictions against other vehicles passing through the restricted area. The claimant testified that he was struck by a car that he was attempting to stop from going through the restricted area. The claimant graphically described how he was thrown on the hood of the car and was struck three times. The vehicle left the scene and the police were called. The police report indicates a warrant would be issued against the driver for "agg assault with motor veh." The report indicated the claimant complained of pain and "possible bruising to leg." Other testimony, from a supervisor who arrived shortly after the incident, was that the claimant was laughing, denied he had been hit by the vehicle, and demonstrated how he had slapped the hood of the car with his hand.

The claimant did not return to work either the next day or thereafter. In dispute is whether it was due to the incident or a preexisting heart condition. The claimant did not seek any medical attention at the time. The claimant alleges that the other driver was a gang member and asserts a number of harassing/intimidating events by individuals having connection with the driver's gang, which the claimant asserts has caused him to have a mental trauma injury. None of the other incidents, some of which the hearing officer describes in his Statement of the Evidence, were reported to the police. The claimant sought treatment for the alleged mental trauma injury from a social worker on November 18, 1999 (almost four months after the parking lot incident). The claimant subsequently

received treatment from Dr. B, who is apparently a psychiatrist. (It appears that the social worker and Dr. B were paid by the CVAF.) The hearing officer notes that the claimant "has had extensive and severe personal, psycho-social and mental problems almost since birth" and that neither the social worker nor Dr. B "gave any indications that there was a causal relationship between the Claimant and his employment and his mental problems, other than the history that the Claimant provided."

Regarding the alleged knee injury, the claimant (who is 49 years old) had knee surgery when he was in high school. The first time the claimant sought medical attention for his knee after the _____, incident was on September 18, 2000. The doctor recited a history that the claimant "injured his knee while waterskiing yesterday. Apparently the ski was caught on a wake and suddenly caused his knee to twist laterally." The claimant was assessed as having an acute knee strain.

Regarding the exclusion of the testimony of ML, clearly ML's name was not timely exchanged (*see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)), the question was whether there was good cause for the claimant not having timely exchanged that information. Rule 142.13(c)(3). The hearing officer listened to the claimant's contention that he was unaware of what ML had witnessed until some months later when he was talking to ML in a chance encounter in a bar. The hearing officer was not persuaded by the claimant's explanation, and we note that the hearing officer also excluded three of the carrier's witness statements on the same grounds of failure to timely exchange. The hearing officer did not abuse his discretion in excluding the testimony of ML.

Regarding the reporting and contest-of-compensability issues, the hearing officer found that the carrier received notice of the claimed injury on June 27, 2000 (in an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), which asserted both physical injuries and a mental trauma injury on _____), and therefore the claimant had not given timely notice to the employer. The carrier did not dispute the claimed injury until December 10, 2000 (more than 60 days after June 27, 2000). Those findings are affirmable as being supported by the evidence (except, as the hearing officer notes, the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was date-stamped by the Texas Workers' Compensation Commission (Commission) on October 4, 2000, a date still more than 60 days after June 27, 2000).

Our problem lies in the hearing officer's commentary and finding that the carrier's failure to timely contest the claimed injury did not elevate the nonexistent claimed injury into an actual injury status. While that may be so, in this case, the claimant undisputedly had some "severe personal, psycho-social and mental problems almost since birth" and the question was whether, or how, the incident of _____, and its aftermath, affected the claimant's mental problems. The claimant's notice, the TWCC-41, clearly lists mental trauma as part of the alleged injury. Section 409.021(c) provides that if the insurance carrier does not contest the compensability of an injury on or before the 60th day after the

date on which it is notified of the injury the carrier waives its right to contest compensability. While it may be true that waiver cannot create an injury where none existed, in this case the claimant clearly had "mental problems" and the question was whether those mental problems were related to the incident of _____. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), the court noted that an injury and a compensable injury are two different things and held 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." Although, neither party nor the hearing officer reference Williamson, we believe the basis of the hearing officer's comments was the Williamson case.

In Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, a hearing officer found that a claimant did not injure her low back at work and that the carrier failed to timely contest compensability as a matter of law. The carrier appealed the waiver decision. In affirming the hearing officer's decision, the Appeals Panel stated:

> 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, a lumbar sprain/strain and a disc bulge at L3-4 per an MRI, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 982446, decided December 2, 1998; Texas Workers' Compensation Commission Appeal No. 982161, decided October 26, 1998; and Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998. Thus, in affirming the hearing officer's determination that the carrier did not timely contest compensability of the claimant's back injury, we likewise affirm his determination that the claimant's back injury has become compensable as a matter of law.

Applying that rationale to the instant case, the hearing officer recognized that the claimant had "extensive and severe . . . mental problems," and that while Dr. B did not relate the claimant's mental problems to the employment, the carrier did not timely contest compensability of the claimed mental trauma. Therefore, relying on Appeal No. 990135, *supra*, and Texas Workers' Compensation Commission Appeal No. 991668, decided September 16, 1999, we hold that by not timely contesting compensability of the alleged mental trauma injury, it has become compensable as a matter of law. We reverse the hearing officer's Finding of Fact No. 10, which states:

> The Carrier's failure to timely contest the claimed injury did not elevate the non-existent claimed into an actual injury status.

We also reverse portions of the hearing officer's Conclusion of Law No. 7, which holds that the carrier's failure to timely dispute compensability has "no consequence . . . because there was no injury to dispute" as being an erroneous application of Williamson, *supra*, or the law as the hearing officer believed it to be. We render a new decision that the claimant sustained a compensable mental trauma injury as a matter of law.

We affirm the hearing officer's decision that the compensable mental trauma injury does not extend to the knee, that the claimant did not timely notify his employer of the claimed injury and did not have good cause for failing to do so, and that the carrier did not timely contest compensability of the claimed mental trauma injury. Because the hearing officer's determination on disability, as defined in Section 401.011(16), appears to be premised, at least in part, on the basis that the claimant had not sustained a compensable injury, a finding which we have reversed, we also reverse the hearing officer's determination on disability and remand the case to the hearing officer to determine whether the compensable mental trauma injury resulted in disability.

In that this case was concluded after June 17, 2001, the case is also remanded for the purpose of compliance with House Bill 2600 amending Section 410.164, effective June 17, 2001. Section 410.164 was amended by the addition of subsection (c), which provides as follows:

> (c) At each [CCH], as applicable, the insurance carrier shall file with the hearing officer and shall deliver to the claimant a single document stating the true corporate name of the insurance carrier and the name and address of the insurance carrier's registered agent for service of process. The document is part of the record of the [CCH].

The procedure for implementing the statutory amendment is contained in the June 19, 2001, Commission memorandum to hearing officers entitled "Required Insurance Carrier Information." A rehearing on remand is required to obtain this information, admit it into the hearing record, and ensure that a copy is delivered to the claimant.

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 a new decision must file a request for review no later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202

(amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I agree totally with the majority decision. I write separately merely to respond to the dissenting opinion. In my opinion, to affirm the hearing officer in the present case in regard to the waiver issue, would read waiver out of the statute. If waiver only applies where the hearing officer makes a favorable finding on injury, then waiver would be meaningless. While the dissent posits a test where waiver applies when there is not a finding of injury, applying the test articulated by the dissent necessitates reversal of the hearing officer regarding waiver issue in the present case.

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent, and would affirm the hearing officer, remanding only for the required carrier information.

I am concerned about several of the logical pitfalls in the Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) case and do not agree with that case's interpretation; however, it is case law. I do not believe we are at liberty to simply ignore it in every case where, at any point along the time continuum, well after the incident under review, a claimant urges "an injury" and there is medical documentation *at that later time* of a condition which may also be explained as part of a long-standing, on-going condition. I have re-read the Williamson case and cannot distinguish its facts from the case here; the hearing officer has found, and it is amply supported, that the claimant sustained no bodily or mental injury on the date under review. The majority here takes this and attempts to do what the Williamson case said should not be done--waive a nonexistent injury into existence.

I do believe that Williamson does not apply where, within the first 60 days after an incident, there is evidence of a bodily injury and the carrier fails to promptly react with a defense that it happened elsewhere, was preexisting, or arose out of an

intoxicated state or one of the other affirmative defenses. I do not, as the concurring judge argues, purport to read Williamson to do away with the "60 day" statute. That is not, however, the situation here, and Williamson does apply (and was properly applied by the hearing officer) to the facts of this case.

Susan M. Kelley
Appeals Judge