APPEAL NO. 021446
FILED JULY 24, 2002

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 February 22, 2002, and May 5, 2002. The hearing officer resolved the disputed issues by determining that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____, _____, _____, _____ or _____; that the date of the claimed injury is _____; that the claimant did not timely report the claimed injury to the employer; that the claimant did not have disability; and that the respondent/cross-appellant (self-insured) did not waive its right to contest compensability of the claimed injury. On appeal, the claimant contends that the hearing officer erred as a matter of law in determining that the self-insured did not waive its right to contest compensability of the claimed injury and that the hearing officer improperly made a finding that there was no injury when such issue was not raised by the parties. Furthermore, the claimant urges that the hearing officer's determinations are against the great weight and preponderance of the evidence. The claimant filed a supplement to his appeal, within the time frame allowed for filing an appeal, attaching a copy of a Texas Supreme Court case in support of his position. The self-insured responded to the claimant's appeal and supplement urging that the supplemental material should not be considered and, alternatively, that it is not applicable to the claimant's case. The self-insured also appeals, requesting that a clerical error in the decision be corrected and urging that the hearing officer erred in determining that the claimant gave notice of the claimed injury on _____.

DECISION

Affirmed as modified.

In this case, the claimant was employed by an employer that was self-insured through an umbrella organization along with several similarly situated employers. There was conflicting evidence about the dates that the claimant reported that he was hurt, whether he told his doctors that there was a work-related injury, and about the extent of his physical injuries as opposed to preexisting conditions. Although the claimant gave notice to his employer verbally, the employer in turn filed a written notice of the alleged injury (the Employer's First Report of Injury or Illness (TWCC-1)) with the self-insured on October 29, 2001. This TWCC-1 listed all the dates of injury which were asserted by the claimant. The claimant himself gave written notice of an injury in a document received by the self-insured on November 1, 2001, using a date of injury of _____.

SUPPLEMENTAL APPEAL

The self-insured objects to the supplemental appeal filed by the claimant, asserting that it was not filed timely and that there is no authority allowing for "further

appeal or communication with the appeals panel." We do not agree with either of these assertions because the supplemental materials were filed within the 15-day period allowed for appeals. The information has been reviewed and given consideration.

NOTICE OF INJURY DETERMINATION

The self-insured appeals the hearing officer's finding that the claimant gave notice of the claimed injury to his employer on _____. Although there was conflicting evidence, nothing in our review of the record indicates that this finding is 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). Accordingly, we affirm the determination that the claimant gave notice of the claimed injury on _____.

FINDING OF NO INJURY

The hearing officer made findings not only that there was no compensable injury but no physical damage or harm at all to the claimant that occurred on any of the asserted dates of injury.

The claimant argues that it was improper for the hearing officer to make a finding that the claimant has sustained "no injury," because such issue was not raised by the parties. We do not agree with this argument. Whether the claimant sustained a compensable injury was expressly made an issue, and a finding of no physical damage or harm at all is a permissible determination on a matter that is subsumed in the overall injury issue. However, to the extent that the hearing officer found that there was no physical damage or harm at all to the claimant, this is against the great weight of the evidence, which indicates objective evidence of physical damage or harm, however caused. Consequently, the reliance on Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) to find that the self-insured had no obligation to dispute compensability of the claimed injury was misplaced.

WAIVER OF RIGHT TO CONTEST COMPENSABILITY

The Appeals Panel has stated that the Williamson case does not apply where there is plain evidence of injury (i.e. damage or harm to the body) even if the hearing officer ultimately finds that the injury did not arise out of the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 990432, decided April 16, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999. As clearly the claimant has an injury to his cervical spine, the Williamson case cannot be relied upon to support the conclusion that the self-insured did not waive its right to contest compensability.

This does not result in a reversal in this case, because the 60-day limit was not exceeded. The obligation to dispute is triggered by "written notice" of injury; the hearing officer counted the applicable time limit from the date of verbal notice to the employer,

rather than written notice to the self-insured. The facts in this case do not support a determination that the employer and the self-insured were one and the same. Because the record indicates that the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed within 60 days of written notice of injury, the dispute was timely. We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995.

While we note that the claimant argues that a dispute over a _____, injury has "never, ever" been filed, the TWCC-21 in this case was reactive to the first written notice of injury, the TWCC-1, which listed the various dates for which the injury had been claimed. The TWCC-21 that disputes the neck injury used the first of these many dates. Under the facts of this case, it is clear that the TWCC-21 was a dispute of the cervical injury for all dates asserted in that injury. The dispute of compensability is not waived by a subsequent notice that modifies the asserted date of injury.

The supplemental appeal has forwarded the recent Texas Supreme Court decision in Continental Casualty Company v. Downs, (Case No. 00-1309). However, the Texas Workers' Compensation Commission is not implementing the decision until the motion for rehearing process has been exhausted. *See* TWCC Advisory No. 2002-08 (June 17, 2002). Consequently, we will not apply it in this decision to find a waiver. (The ultimate outcome of the Downs case may affect the course of judicial review of this matter.)

CLERICAL ERROR

The self-insured states that there is a clerical error in the decision paragraph in that the hearing officer quite evidently omitted the word "not" from the first paragraph of page 14. We agree, and modify the paragraph's first clause to read: "Claimant did not sustain a compensable injury, ..."

For the reasons listed above, the decision is affirmed as modified.

The true corporate name of the self-insured is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

LG
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Michael B. McShane
Appeals Judge