APPEAL NO. 021619
FILED AUGUST 6, 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 May 22, 2002. With regard to the disputed issues, the hearing officer determined (1) that the appellant (claimant) had not sustained a compensable injury (because he was not in the course and scope of his employment and because "there was no damage or harm to the physical structure of the claimant's body"); (2) that the claimant was not in the course and scope of employment on _____, (all dates are 2001 unless otherwise noted); (3) that the claimant did not have disability (because there was no compensable injury) and (4) "[b]ecause there was no injury, the respondent (carrier) was not required to contest compensability in writing" and that if "the carrier were required to contest compensability in writing, it did not waive its right to contest compensability." The hearing officer made clear in his Findings of Fact that he found that the carrier had "properly" contested compensability within 60 days of receiving written notice and again had "properly" contested compensability based on newly discovered evidence on or about August 23.

The claimant appeals, asserting he was in the course and scope of his employment, that he sustained injuries which are amply supported by medical evidence, and that the carrier waived its right to contest compensability by not filing a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until February 14, 2002. The carrier responded urging affirmance.

DECISION

Reversed and rendered in part; reversed and remanded in part.

The claimant was employed as a used car salesman. The claimant testified that on _____, he and a female worker were "test driving" a "wholesale car" when they were involved in a motor vehicle accident. The vehicle the claimant was riding in was sideswiped by another vehicle. The evidence was in conflict whether the claimant was in the course and scope of his employment or whether he was on a deviation to see if he wanted to buy the vehicle for personal reasons. There is a police report of the accident in evidence.

It is relatively undisputed that the carrier received the first written notice of the claim on May 16. In evidence is a TWCC-21 dated May 25. This TWCC-21 disputed the claim on the basis that the claimant had not sustained an injury. There is no evidence that this TWCC-21 was ever filed with the Texas Workers' Compensation Commission (Commission). One of the carrier's claims representatives testified that it was normal office practice to mail the TWCC-21 on or about the date it was prepared, however, the claims representative testified that he had not completed this TWCC-21. Also in evidence is another TWCC-21 dated August 23 contesting compensability based

on "newly discovered evidence." The newly discovered evidence was the claimant's transcribed statement. The carrier contends it was newly discovered evidence because the claimant "evaded contact by carrier's adjuster." There is also no evidence that the TWCC-21 dated August 23 was ever filed with the Commission.

Section 409.021 provides, in pertinent part:

> (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
>
> (1) begin the payment of benefits as required by this subtitle; or
>
> (2) notify the Commission and the employee in writing of its refusal to pay and advise the employee of:
>
> (A) the right to request a benefit review conference; and
>
> (B) the means to obtain additional information from the Commission. [Emphasis added.]
>
> * * * *
>
> (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

The hearing officer found that the evidence of the carrier's "standard office practice" regarding mailing of documents established that the TWCC-21's "were filed on or about the dates stated." In that no date-stamped TWCC-21 was ever produced the great weight and preponderance of the evidence is that no TWCC-21 was ever filed. We reject the hearing officer's, and the carrier's, contention that evidence of the "standard office practice" constitutes filing of the required TWCC-21 with the Commission and the claimant. We further reject the carrier's contention that the claimant has a burden to prove that the TWCC-21's were "not prepared and submitted for filing as of that date." We reverse the hearing officer's decision that one or both TWCC-21's were either timely filed or were filed pursuant to Section 409.021(d).

While the evidence of whether the claimant was in the course and scope of his employment was in conflict, and we would normally defer to the hearing officer's factual determination on this issue, we hold that because the carrier failed to timely contest compensability, the claimant by operation of law has sustained a compensable injury.

The carrier contends that the "waiver issue is moot given the hearing officer's ruling on the question of an injury occurring" citing Continental Casualty Co. v.

Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). In that case, the court 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." 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 there is an injury 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, (Unpublished); Texas Workers' Compensation Commission Appeal No. 982161, decided October 26, 1998. In the instant case there is ample evidence that the claimant has at least a strain/sprain of his neck and back. While the carrier argues these injuries were, or may have been, caused by playing football, nonetheless, any finding that there is no injury at all is against the great weight and preponderance of the evidence and therefore Williamson does not apply.

We reverse the hearing officer's decision on all of the issues and we render a new decision that the claimant sustained a compensable injury in the course and scope of his employment, as a matter of law, due to the carrier's failure to timely contest compensability, and that the carrier waived the right to contest compensability of the claimed injury by not timely contesting compensability. The hearing officer makes no specific determination on the disability issue, basing his decision on the finding, apparently, that without a compensable injury the claimant cannot have disability. In that we have rendered a new decision that the claimant has a compensable injury by the operation of law, we remand the case back to the hearing officer for a determination of disability. We point out that the carrier is liable for the claimed injury and the hearing officer may not premise a finding of no disability on the basis that there was no injury or that the injury is due to playing football.

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 new decision must file a request for review not 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 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF ILLINOIS** and the name and address of its registered agent for service of process is

C T CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge