

APPEAL NO. 131356
FILED AUGUST 6, 2013

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 30, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the date of the claimed injury is [date of injury]; (2) the appellant/cross-respondent (carrier) did not timely contest the injury in accordance with Section 409.021 and has waived the right to contest compensability of the claimed injury; (3) the respondent/cross-appellant (claimant) sustained a compensable injury because the carrier waived its right to contest compensability; and (4) the claimant had disability from the compensable injury for one day, November 20, 2012, and not otherwise through the date of the CCH.

The claimant appealed the hearing officer's finding of fact that the claimant failed to establish that the neck spasm, right shoulder complaints and chest wall pain were caused by her work activities. Also, the claimant appealed the hearing officer's disability determination that was adverse to the claimant. The carrier appealed the hearing officer's determinations on the issues of carrier waiver, compensability, and disability.

DECISION

Reversed and remanded for reconstruction of the record.

Section 410.203(a)(1) requires the Appeals Panel to consider the record developed at the CCH. The appeal file in this case contains two compact discs (CD). The CDs are labeled 1 and 2. Review of CD 1 indicates that it has 2 tracks, 59 seconds each, and there is no further recording of the CCH on April 30, 2013, on CD 1. Review of CD 2 indicates it has 41 tracks, with tracks 1-40 having 59 seconds each and track 41 having 36 seconds. CD 2 begins with a statement from the hearing officer that the parties are back from recess and are ready for the second witness to testify. Consequently, there is an incomplete recording of the CCH on April 30, 2013. The file indicates that there was no court reporter and the file does not contain a transcript or tape recording of the CCH proceeding. We reverse and remand this case to the hearing officer for reconstruction of the CCH record. See Appeals Panel Decision (APD) 060353, decided April 12, 2006.

Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. Given that we are remanding this case for reconstruction of the record, we have reviewed the documentary evidence, the hearing officer's decision, the appeal, and the response with regard to the issues in dispute.

With regard to carrier waiver, the hearing officer's background information discusses that the carrier waived the right to contest compensability of the claimed injury. When a carrier waives its right to contest compensability of the injury, the injury becomes compensable as a matter of law, provided that there is physical harm or damage to the body, and the carrier is liable for workers' compensation benefits. APD 023017, decided January 27, 2003. The hearing officer references Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) in his decision. The court in Williamson stated 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." Applying the rationale in Williamson, carrier waiver cannot create an injury that does not exist. APD 070903-s, decided July 27, 2007. In this case we note that the hearing officer found that the claimant sought medical treatment on November 20, 2012, and received treatment for neck spasms (Finding of Fact No. 4); however, he did not make a finding of fact that the claimant had sustained an injury as defined in Section 401.011(26) as "damage or harm to the physical structure of the body" to support his carrier waiver determination.

We reverse and remand this case to the hearing officer for reconstruction of the record. On remand, the hearing officer is to: (1) reconstruct the record; (2) make a specific finding of fact on whether the claimant had sustained an injury, defined as damage or harm to the physical structure of the body; and (3) make findings of fact, conclusions of law, and a decision and order on the issues of compensable injury, disability, date of injury, and carrier waiver consistent with this decision.

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 Texas Department of Insurance, Division of Workers' Compensation, 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 APD 060721, decided June 12, 2006.

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

**CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge