

APPEAL NO. 992365

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 September 23, 1999. The issues involved whether the appellant (claimant) sustained a compensable injury on \_\_\_\_\_; whether the respondent (carrier) waived its right to dispute the compensability of the injury; and whether the claimant had sustained disability.

The hearing officer found that claimant failed to prove, through credible evidence, that she sustained an injury at work. The hearing officer determined that, because of this, the fact that the carrier filed a dispute over 60 days after it received written notice of the alleged injury did not, under the doctrine set forth in the case of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), convert a noninjury into a compensable injury. The hearing officer further found no disability because of the lack of evidence that claimant's alleged injury caused the inability to work.

The claimant appeals, arguing that the hearing officer has misapplied the Williamson case because there is documented evidence of a physical injury, leaving only disputes over whether such occurred on the job, which the carrier has waived by not timely disputing compensability. The claimant further argues that the hearing officer erred in admitting certain exhibits which were objected to as not timely exchanged. The carrier responds that it had no obligation to dispute the injury since no injury occurred. The carrier argues that the medical evidence of injury, in fact, records only subjective impressions of the claimant.

DECISION

Reversed and rendered on the point that the carrier failed to timely dispute the compensability of the injury. Affirmed on the issue of disability.

The hearing officer has set out many of the pertinent facts. We will briefly summarize what we believe is material to the basis for reversing this decision. In so doing, we will briefly observe that there was sufficient evidence upon which the hearing officer could disbelieve that the injury to the claimant's shoulder occurred during the incident she described. However, in light of the holding on the waiver issue, which is dispositive, we will not discuss this finding further.

Briefly, claimant contended that she was injured by a fraud investigator for the store where she was employed, which was owned by \_\_\_\_\_ (employer). The asserted fraud was that she credited back against her credit card two appliance purchases that she actually did not make. The claimant contended she had bought the items a few days before in cash, and that when she returned them, she had the approval of the then manager, Mr. L, to credit the purchase prices against her account. She had not brought written evidence of this permission with her to the CCH because she said she thought the hearing was about her injury, not about the returns. She said that on \_\_\_\_\_, during a four-hour questioning session in which she was prevented from leaving the room, she was

injured when it was conveyed to her that her sister had been involved in an automobile accident. She said she feared that her infant child was with her sister and jumped up to flee the room, and the investigator, Mr. D, grabbed her by the shoulder. She said that this occurred out in the hallway, outside the interview room.

As the facts were more fully developed, she said on cross-examination that he also jabbed her in the head with a ball point pen, drawing blood, to force her to sign a confession. There was no claim made for this alleged injury in the record. The confession was read into evidence and indicated that she wrote, in cramped, barely legible handwriting, the words "underduress" as one word throughout the document. Mr. D stated that when he questioned claimant, which he estimated lasted two hours, she remorsefully admitted issuing credits to her credit card because of financial pressures and the desire to bring her balance down. He said that the numbers that were keyed into the refund related to purchases made by other people, on other credit cards, and that it would be possible for someone in claimant's capacity to have processed the refunds without approval of a manager. It was also brought out that claimant left the room once to go to the restroom, and did not mention being harassed or abused by Mr. D to persons outside this room. After her interview by Mr. D, during which he told her that criminal charges would be brought, she had an exit interview with Ms. V. The purpose of the exit interview was to enable her to raise any questions about the investigation that she had. Ms. V said that no concerns about claimant's treatment by Mr. D were raised. Both Ms. V and Mr. E, the loss prevention specialist who was also outside the room, saw claimant leave the room and said that Mr. D did not grab the claimant.

The claimant said she assumed that when she received word that her sister was hurt, her son was too, but when she called her husband on the car phone in the parking lot, she found out her son was home and that was where she went. The claimant's husband called in (according to claimant, because her husband did not testify) to work the next day to say she would not be coming to work. In the days that followed, the claimant filed a police complaint against Mr. D, and an EEOC complaint (on April 16, 1999), in which she contended that the entire investigation interview had been part of a conspiracy in that particular store to replace Caucasian employees with African-American employees. Mr. D said that further criminal charges were on hold pending the outcome of the proceedings that claimant had filed against the company (EEOC, worker's compensation).

The claimant said that soreness in her shoulder increased and she had trouble moving it. She went to the emergency room at \_\_\_\_\_ (local hospital) on \_\_\_\_\_, from around noon until about 3:45 p.m. These records clearly document complaints of left shoulder pain and include an impression that she had a shoulder sprain and separation and was put in an arm sling. The initial intake notes by the nurse note bruising and discoloration on the upper arm. The notes of the doctor do not record one way or the other observations about contusions, but the doctor did sign the record stating the diagnosis as shoulder strain. She was referred to a chiropractor the next day, the same doctor who

treated her sister. This doctor, Dr. W, treated her extensively at first; his initial report indicated that claimant could return to limited work some time in May 1999. His first off-work slip kept her off work for four weeks. She was then referred by her previous attorney to Dr. G. Dr. G's July and August reports are silent, one way or the other, on whether claimant can work. The claimant said she was terminated on March 17th, but did not testify as to her ability to work.

Claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on March 12th; the Commission opened a claim file on March 31, 1999. Her previous attorney wrote on March 18th to the employer, informing them of the claim, and the employer's adjusting firm acknowledged receipt of this on March 30th.

The record includes an Employer's First Report of Injury or Illness (TWCC-1) filed by the employer, setting out the facts of the alleged injury and identifying the left shoulder as the injured region. It appears that the carrier initially accepted liability for the claim and initiated temporary income benefits in a May 28, 1999, Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21). (The copy in the record is not date-stamped by the Texas Workers' Compensation Commission.) For reasons not explained in the record, the carrier filed a dispute of compensability in another TWCC-21 filed on July 16, 1999. The carrier disputed that there was a "compensable injury." The reasons asserted therefore were: 1) untimely notice to the employer; 2) that the injury arose from willful intent to injure herself or others; and 3) personal animosity exception. The dispute did not contend that there was no physical damage or harm to the body. The carrier did not assert that there was newly discovered evidence underlying its dispute.

During cross-examination, the carrier tendered three exhibits relating to the credit card refund, the EEOC complaint, and the interview. The claimant objected that these had not been timely exchanged (although they were exchanged before the CCH), and carrier responded that many of these documents had been held up due to the employer's internal investigations, but that carrier exchanged them when released. We note that most of the matters covered therein were testified to by the claimant without objection, and thus any error would be harmless. The hearing officer found good cause and admitted all documents.

The hearing officer found that the dispute was filed by the carrier beyond 60 days after it received written notice of injury, and stated that if there was "an injury," then waiver would apply. She found that there was no "injury," and that, by virtue of the Williamson, *supra*, case, there would be no waiver of a noninjury into existence. Because we cannot agree that there is "no" evidence of physical damage or harm to the body, *i.e.* an "injury," as were the facts in the Williamson case, we cannot agree that this case applies to relieve the carrier in this case from the apparent effects of deferred investigation of the facts of this claim. Section 409.021(c) is unequivocal on the consequences of the failure to raise defenses to the occurrence of an injury within 60 days after notice of injury is received. We

decline to expand the Williamson case into situations where there was plain evidence of an injury, but carrier asserts that it was not "compensable." This would effectively write Section 409.021 out of existence. When the 60 days are allowed by a carrier to lapse, it can truly be said that a belated dispute is not so much won as it is lost.

We affirm the hearing officer's determination that the asserted injury did not result in the inability to obtain and retain employment equivalent to the preinjury average weekly wage. We likewise find no reversible error in admission of the evidence admitted by the hearing officer.

For the reasons set forth above, we render a decision that the carrier failed to timely dispute compensability of the claim and waived the right to dispute compensability of the injury. We render a decision that claimant's injury is compensable, and the findings that the injury did not occur at work are therefore moot. We affirm the determination that claimant sustained no disability. Medical benefits are to be paid in accordance with this decision.

Susan M. Kelley  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Judy L. Stephens  
Appeals Judge