APPEAL NO. 92266

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts 1.01 through 11.10 (Vernon Supp. 1992). On May 18, 1992 a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She found that claimant, appellant herein, experienced mental trauma from a legitimate personnel action resulting in a noncompensable injury. Appellant in her request for appeal restates the evidence, asks that the appeals panel consider the report of (Dr. G), and mentions that (Mr. B) was not allowed to testify. Her appeal will be considered as an attack on the sufficiency of the evidence and on the ruling against (Mr. B) testifying.

DECISION

Finding that the evidence sufficiently supports the decision of the hearing officer, we affirm.

Appellant testified in her own behalf at great length about many employment questions better addressed in another forum. Appellant stated that she had been employed at the (employer) as a room inspectress. Her duties required her to inspect the work of the room attendants (chambermaids), and to clean guest rooms when necessitated by the absence from work of the room attendants. Appellant stated that inspectresses were assigned room cleaning duties on the basis of seniority, with the inspectress having the least seniority being assigned such duties first. However, on April 25, 1991, appellant was asked to acknowledge by her signature a memorandum instituting a change in the seniority policy which would require inspectresses to clean rooms, as needed on a rotating basis, rather than on a seniority basis. Appellant refused to sign this memorandum, since she had not completely recovered from a compensable injury to her wrist and was physically unable to clean rooms in April of 1991. She stated that she felt that if she signed the memorandum, she would be giving up her right to claim a medical excuse from room cleaning duties, and was afraid that if she undertook to clean a room, she might reinjure her wrist. She further stated that the general manager of the hotel, (FA), admitted to her that the memorandum was poorly worded, and agreed to ask her to sign a revised memorandum which would reflect her medical status, but that this memorandum was never presented to her. Appellant stated that she developed emotional stress as the result of these events, which stress rendered her unable to perform her job duties. However, she admitted that FA asked her whether she had been requested to clean a guest room, and that she had not actually been requested to perform such duties. Appellant stated that she was suspended on April 25, 1991, for her refusal to sign this memorandum, and denies that the cause of her suspension was her insubordinate behavior on this occasion. She also stated, in answer to a question asking her to identify things that caused her to feel stress at work, that in February 1991 her supervisor, (BL), told her she would "be watching me so that she could get me fired . . . ." This line of questioning continued with the following:

Q.Compare that day at work to your day at work on April 25th, 1991. Were you more upset when you left work in February than when you left in April?

A.Was I more upset?

Q.Yes, ma'am.
A.I wouldn't say upset.

Q.Angry?
A.Not angry because -- I wasn't angry because I felt like what I had said and the way I was aching, I was not -- and the statements and all the proof I had from the doctors, all the evidence and everything, I felt like this -- I said, "I can't believe this is happening. I can't believe I'm being suspended."

Q.Okay. So, now you're talking about April. Okay?
A.Yeah. That's what you asked me if I was more upset in April than I was in February on my return to work.

Q.And what was your answer? Were you more upset in April at that meeting than the one in February or vice versa?
A.I don't feel I was upset.

FA was called as a witness by appellant. He stated that he became the hotel's general manager on March 4, 1991. At that time, appellant was still on leave, recovering from surgery to her wrist as the result of her previous compensable injury. He stated that the memorandum in question was produced because there had been some questions raised by workers regarding seniority in room cleaning assignments, the memorandum was intended to clarify, rather than change, existing policy in this regard, and was not aimed at appellant. FA stated that he was aware that appellant had an injury to her wrist, and was physically unable to participate in rotating room cleaning assignments. However, he stated that appellant had not been asked to clean a guest room, but had merely been asked to sign the memorandum indicating her understanding of the policy.

(JH), the former general manager of the (employer), was called as a witness by appellant. JH stated that appellant disliked cleaning rooms, and became upset about this matter on several occasions. According to the witness, appellant averred that she should not clean rooms because of her seniority, and later, because of her injury. The witness stated that he would need a doctor's excuse to exempt appellant from room cleaning duties.

JH stated that while he was general manager, all inspectresses cleaned rooms, and he therefore assumed that appellant did as well. He recalled that appellant felt that she was discriminated against because of her race, but that appellant's perception in this regard was incorrect. The witness stated that he would characterize appellant as excitable, but stated that he did not believe she suffered stress as a result of any events which occurred while the witness was general manager of the hotel. He stated that appellant was not insubordinate while he was general manager, but did raise her voice to him on several occasions.

BL, who no longer lives in (city) nor is employed by Holiday Inns, but who was formerly executive housekeeper of the (employer), was called as a witness by appellant. BL was appellant's supervisor during the time period relevant to this case. She stated that inspectresses, such as appellant, would only clean rooms when needed, and then would do so on a rotating basis. She stated that on the date appellant was suspended, April 25, 1991, she behaved in a grossly insubordinate manner, stated that BL was unfair and prejudiced, that other employees did not do their jobs, and that the employer was trying to get rid of appellant. The witness stated that appellant was suspended to give her an opportunity to decide whether or not she wished to retain her job, and not because of her refusal to sign the memorandum in question. BL stated that appellant was requested to sign the memorandum so that other inspectresses would see that appellant's employer was fair to everyone. She added that the memorandum was only made up after the meeting appellant and others initiated with FA in which a discussion on cleaning rooms took place. She stated that appellant would be expected to resume her job duties, as indicated by her job description and the memorandum, as soon as her medical restrictions were lifted. She denied saying that she did not want appellant working there at their meeting in February.

(PC) testified as a witness for appellant. PC stated that she was previously employed as an inspectress at the (employer), and now works as a supervisor there. PC stated that the memorandum in question represented a change from prior policy, but that this memorandum was not, as appellant contended, intended to force appellant to terminate her employment, or to otherwise harass her. She had worked with appellant five years and saw her upset at work over that period.

Article 8308-1.03(27) of the 1989 Act defines injury as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm. The term also includes occupational diseases." A leading case under prior law, Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979) said that mental trauma can produce an accidental injury so long as there is proof of a definite time, place and cause. This court then said "there is no precedent that holds . . . that mental trauma can produce a compensable occupational disease." Medical documents in evidence that most closely tied appellant's alleged "accidental injury" to a definite time, place and cause (*See* Dir. State Emp. Wkrs. Comp. v. Camarata, 768 S.W.2d 427 (Tex. App.-El Paso 1989, no writ) and Duncan v. Employers Cas. Co., 823 S.W.2d 722 (Tex. App.-El Paso 1992, no writ his'y) include the statement of (Dr. B) who noted on April 25, 1991, "I had placed this patient on restricted work and she has now been suspended for three days. She is tearful at this time and becoming significantly depressed. I would like for her to check with her family doctor in regards to possible medication in regards to this." (Dr. D) wrote on April 26, 1991 "[appellant} is having some emotional problems at this time and is to see a doctor regarding this. She is to be off work until the time of her appointment." (Dr. G) on May 9, 1991, related the history appellant gave him regarding her "relationship" at work and her refusal to sign a document. He noted that she took Flexeril and Elavil for her arm. More importantly, he states "[a]t the present time, I feel I need more information to make an appropriate diagnosis and recommendation for treatment. There may be a very important secondary gain component to this patient's picture." Thereafter on May 16, 1991, Dr. G

wrote, "I discussed with [appellant] that her presentation to me is consistent primarily with an adjustment disorder as a result from the stressful job situation. Because of her injury to her hand and her poor response physically, she is unable and unwilling to do the physical parts of the work required of her job. She does have what seems to be a personality conflict with her immediate supervisor." Next, on July 9, 1991, Dr. G said "[appellant] presented today with a form for total disability protection from her creditors. I discussed with her that I have never claimed that she was totally disabled. She does have an arm injury with some emotional problems resulting from the stress of her job and some personality conflict with bosses. However, I do not feel this constitutes a complete disability." Finally Dr. G wrote on January 14, 1992, "I reviewed [appellant]'s case with her. She is still off of work. She still has some concerns about her arm pain, that she is not able to go back to work because of this as well as because of being told by previous physicians that she has `emotional distress' caused by the injury. She produced a letter today dated September 30, 1991, from (Dr. H), orthopedic surgeon at (address), (city), Texas. His final statement was `[t]here is no orthopedic reason for this woman to be off of work. Her neck and wrist have normal range of motion. She complains of weakness in the right wrist, but I could detect none with a physical examination. She is off of work for emotional distress, and she needs psychiatric guidance. From an orthopedic point of view, she certainly could work.' After reviewing this with her, I discussed that her emotional distress she experienced was certainly appropriate at the time of the injury and subsequently due to what she describes as inappropriate behaviors on the part of her supervisors. She related that, in fact, the situation was closer to a discrimination situation than it was purely for medical problems. I discussed with [appellant] that as of October of 1991 I would no longer be able to make statements to the effect that her emotional distress was a significant impediment in her ability to go back to work."

(Dr. H), in addition to the quote of his observation made by Dr. G, also said on September 30, 1991, "[h]er chief complaint now is that she is off work with `emotional distress.' These are her actual words. She also states that she has applied to work on two separate occasions since the carpal tunnel release a year ago and she went to work for less than one hour on the first occasion and, on the second occasion, she worked for two weeks but she is off work now under psychological evaluation for `emotional distress'."

No physician attempts to make a diagnosis regarding appellant's mental condition and to then say what caused it. The closest to a diagnosis comes from Dr. G on May 16th when he says that what she presents with is consistent with an adjustment disorder. The only time he discussed appellant's "emotional distress" with her was on January 14, 1992 after he had first referred to "emotional distress" in quotation marks as something she related to him that she was "told by previous physicians." With no diagnosis, no physician's record in evidence purports to ascribe a cause to the condition. While Camarata and Duncan, *supra*, required a "definite time, place and cause," the most these records say is "stressful job situation," "personality conflict," "what she describes as inappropriate behaviors on the part of her supervisors," and "she has now been suspended for three days. She is tearful at this time and becoming significantly depressed." There is no conflict between medical evidence here; none provides a "definite time, place and cause." While Camarata recited

that Camarata's testimony itself was sufficient to trace his problem to a particular event, it also had physician testimony that Camarata's reading of the memo on "September 30, 1985 . . . caused him to suffer from a post-traumatic stress disorder . . ." Thereafter, Duncan, in reviewing a question of post-traumatic stress disorder as a result of a reprimand, stated that Camarata "extended the concept of physical injury to its outer limit," noted that the psychiatrist in the Duncan case did not state a cause but merely related that Duncan alleged she was devastated that she was demoted, and affirmed a summary judgment for the carrier. While Camarata did say that lay testimony alone could trace a condition to a particular event, appellant's testimony stresses the April meeting but does not say she was more upset by that meeting than she was by the February meeting with BL. Unlike Camarata, where it was so "upsetting that he struck his fist against some computer print-out paper," appellant said she was not upset. Undoubtedly, within her testimony appellant also said that she was upset, but her reaction to the April meeting was, at best, reported in conflicting ways.

In addition to the question of when mental trauma can cause injury under the 1989 Act, article 4.02(b) of the 1989 Act adds that a mental injury that arises principally from a "legitimate personnel action" is not a compensable injury. If Article 8308-4.02 of the 1989 Act did not address and control this fact situation which the hearing officer correctly found in denying benefits, the facts of this case would require that it be reversed and rendered on the issue of whether a mental trauma event caused injury.

The evidence before the hearing officer as to the April meeting sufficiently supports the hearing officer's Finding of Fact Nos. 8, 9, and 10, which support the decision that there is no compensable mental trauma. The meeting in question resulted from a memorandum to clarify, because of questions raised by appellant and others, certain employees' job responsibilities. Appellant, and others, were asked to sign acknowledging understanding, which appellant refused to do. Even appellant's witness, PC, stated the memorandum was not intended to force appellant to quit. The meeting to sign the work memorandum was a legitimate personnel action. In view of appellant's existing job description, this personnel action was of less magnitude than the examples of personnel actions given in Article 8308-4.02, "transfer, promotion, demotion or termination." However, as part of the meeting, appellant received a three day suspension which is very comparable to the listed examples. FA and BL both indicated that the suspension was given for insubordination based on defamation.

Appellant asserts error in that the hearing officer would not allow a witness called by appellant, (Mr. B), to testify. The hearing office correctly applied Tex. W.C. Comm'n,. 28 TEX. ADMIN. CODE § 142.13 (rule 142.13) since appellant had not listed Mr. B as a witness she planned to call. She had replied to interrogatories and listed witnesses but Mr. B was not one of them. Appellant stated she did not know Mr. B's full address and only thought that his testimony would be relevant last week. This was not found to be good cause for failing to comply with the rule. The hearing officer did not act arbitrarily in applying the rule or failing to find good cause to allow noncompliance. *See* Texas Workers' Compensation Commission Appeal No. 91076 (Docket No. redacted) decided December 31, 1991.

Appellant also wants the panel to consider the report of (Dr. G). The transcript shows, however, that appellant objected to it when it was offered into evidence by respondent. The hearing officer sustained appellant's objection on the ground that it had not been exchanged. The appeals panel will only consider the record, the appeal and the response. Article 8308-6.42(a) of the 1989 Act. The report of (Dr. G) will not be considered.

The decision is not against the great weight and preponderance of the evidence and is sufficiently supported by Finding of Fact Nos. 3, 4, and 8 through 10 that address the circumstances of the memorandum in question as a legitimate personnel action. We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge