APPEAL NO. 92311

A contested case hearing was convened in (city), Texas, on December 12, 1991. The hearing officer, (hearing officer), recessed the hearing in order to allow for a full and complete record on the issue of receipt of notice of injury. The hearing was reconvened on February 28, 1992, in (city), Texas, and after evidence was adduced was again recessed to allow both parties the opportunity to conduct additional discovery. On June 15, 1992, after both parties indicated they had nothing further to present, the hearing officer entered a decision and order based on evidence previously heard.

The issues from the benefit review conference were whether the claimant (appellant herein) sustained a compensable injury on (date of injury), and whether the insurance carrier (respondent herein) contested compensability within 60 days from the date of its first notice of injury. The hearing officer held that appellant's claim was based upon "repetitious mental trauma" and thus was not compensable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.03 *et seq*.(Vernon Supp. 1992) (1989 Act) and that appellant was not injured on (date of injury) in a verbal confrontation with her supervisor. He also held that the respondent contested compensability within sixty (60) days of its first notice of injury as required by Article 8308-5.21(a)

DECISION

We affirm the decision and order of the hearing officer.

Appellant worked as a paralegal for (employer). On (date of injury) she and (Mr. H), her supervisor, got into a verbal altercation concerning her written reply to a memorandum he had sent her. She said Mr. H. did not strike her or attempt to strike her, but he screamed and cursed at her and followed her down the hall and to her office cursing and screaming that he was going to fire her. At the time of the hearing appellant had been working for employer for 13 years, and Mr. H had worked for employer for eight years. She said she and Mr. H had had disagreements in the past and that she had encountered problems in the work place for the past four or five years, but nothing like this encounter, which she said caused her to fear for her life. She said as a result of this episode she suffered from migraine headaches that could not be relieved by medication, swelling in her face and neck, painful joints, insomnia, and anxiety.

Appellant testified that she had suffered from migraine headaches since she was nine years old. She said, however, that her earlier headaches occurred on a random basis and were treatable with medication and rest. She said since (date of injury) the migraine headaches became constant and debilitating, and she was not able to get relief. Medical records from Doctor's Care Clinic from the period of February 29, 1988 through July 10, 1991 showed appellant had been treated for migraine headaches, some of them severe, since 1988. Appellant pointed out that the medical records show she was not treated for migraines during 1990. Medical records for the period July 25 through

September 11, 1991, which were included as a hearing officer's exhibit, show appellant was given injections for severe headache pain on at least six occasions. An MRI of the head was normal.

The 1989 Act defines "injury" as follows: "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." Article 8308-1.03(27). The act also provides that it is the express intent of the legislature that nothing in the act shall be construed to limit or expand recovery in the case of mental trauma injuries. Article 8308-4.02(a). (The "legitimate personnel action" exception, Article 8308-4.02(b), was not raised and it will not be considered here). Therefore, case law interpreting the prior statute will be considered. The Texas Supreme Court has held that mental trauma can produce a compensable injury, even without any underlying physical injury, if it arises in the course and scope of employment and is traceable to a definite time, place, and cause. Bailey v. American General Insurance Company, 279 S.W.2d 315 (Tex. 1955). On the other hand, it has been held that damage or harm caused by a repetitious mental traumatic activity, as distinguished from a physical activity, cannot constitute an occupational disease. Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979).

In this case, appellant related her alleged injuries to a specific time and place, the morning of (date of injury). However, it was also necessary for her to establish a causal relationship between the event causing the alleged injury and the ultimate condition. Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex. 1948). She testified that the particular events of (date of injury) caused her to have migraines that were more constant, and more resistant to treatment, than her former headaches. Appellant said she went to the doctor on July 25th, and saw two doctors over a period of time thereafter. However, the medical reports introduced by respondent show appellant being treated for a headache as the result of an insect bite on July 10th, and a headache on May 5th for which the report said she received no relief from medication. It is clear that the existence of an injury may be established through the testimony of a claimant alone, and that indeed the finder of fact can believe a claimant's testimony over expert medical testimony. Fireman's Fund Insurance Company v. Martinez, 387 S.W.2d 443 (Tex. Civ. App.-Austin 1965, writ ref'd n.r.e.). However, it has also been held that when a subject is one of such scientific or technical nature that a fact finder could not have or be able to form opinions of their own based on the evidence presented, only the testimony of experts skilled in the subject has any probative value. The cause, progression, and aggravation of a disease has been characterized as such a subject. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. App.-Texarkana 1974, writ ref'd n.r.e.). Even in cases in which expert testimony or causation is considered unnecessary, the lay testimony must prove at least that the injury in reasonable probability caused the claimed result. Griffin v. Texas Employers' Insurance Association, 450 S.W.2d 59 (Tex. 1970). In this case, the hearing officer found appellant was not injured on (date of injury)

in a verbal confrontation with her supervisor. We find that the record contains sufficient evidence upon which this finding could be based, and that it was not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Appellant also disputes the language in the decision and order's statement of evidence that appellant and her supervisor had a long history of "friction, ill-will, and verbal assaults;" she likewise disagrees with Finding of Fact No. 3 that her claim was based on repetitious mental trauma. Appellant testified that she had experienced problems at work for some time, although not of the same magnitude as those which occurred on (date of injury). The memoranda exchanged by appellant and Mr. H, which contain terms such as "slander," "untruths," and "retaliation," also demonstrate preexisting grievances the two harbored against each other. We find there was sufficient evidence in the record to allow the hearing officer to characterize the claim in this case as based upon a repetitive-type mental trauma. Even if there were not, the hearing officer also addressed the particular events of (date of injury), determining in Finding of Fact No. 4 that no injury occurred on that date.

An Employer's First Report of Injury or Illness (TWCC-1) was prepared by employer on July 31, 1991. The respondent appeared at the benefit review conference on October 17, 1991, and contested the compensability of the claim. The 1989 Act provides that if the insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Article 8303-5.21(a). Thus the date the respondent received written notice of injury was crucial to the prosecution of its case; if it was notified of appellant's injury before August 17, 1991, its contest of compensability of the claim was not timely.

Admitted into evidence was an unsworn letter from (Mr. E), business manager for employer, stating that on August 8, 1991 he mailed the TWCC-1 to the following: the Texas Workers' Compensation Commission (Commission); respondent insurance carrier; (insurance agency); and the appellant. An affidavit of (Ms. A), an employee of the insurance agency, stated she received the TWCC-1 on or about August 20th; that she called respondent insurance carrier and was told they had no knowledge of the claim; and that she then telecopied the form to respondent. An affidavit by Mr. E dated February 21, 1992, stated in pertinent part that the form was mailed on August 8th to respondent's Houston office. Notices of Refused/Disputed Claim (TWCC-21) filed by respondent and included in the record gave various dates on which the TWCC-1 was received, including August 22nd, August 21st, and (date of injury). Respondent's attorney stated that the latter date was a typographical error wherein the date of injury had been substituted, and that this was corrected on a later TWCC-21.

In deciding the issue, the hearing officer chose to rely on the affidavit of Ms. A

which stated she telecopied the employer's notice to respondent upon its employee's representation that he had not seen it. Such affidavit provided sufficient evidence to support Finding of Fact No. 5 that the carrier's first notice of injury was August 20, 1991, and that the carrier contested compensability on October 17, 1991. Appellant complains that, without her knowledge, certain information was not included in the record. Appellant was of course present at both phases of the hearing and could have sought at that time to have additional information made part of the record, which she did not do. She also complains that certain information she provided the hearing officer after the second session of the hearing was recessed on February 28th (a letter from the insurance agency to her employer about claims) was not included in the record. The decision and order does not indicate why the information was not included. A June 1, 1992 letter to the parties from the hearing officer proposed closing the record in the case on June 15th, due to neither party having any additional evidence to submit; while this may have been confusing to appellant, there is nothing to indicate that she sought at that time to have the letter admitted into evidence. While the hearing officer's communication on this point may have been somewhat imprecise, we find that his failure to include the letter as an exhibit was not error. We also believe it was not an abuse of discretion for the hearing officer, upon recessing the hearing for the second time, to refuse appellant's request to subpoena unnamed employees of respondent.

Finally, we address appellant's plea that we take into consideration the fact that appellant was unrepresented by counsel, believing the proceedings would be fair and impartial. At the outset of the hearing appellant was asked whether she wished to go forward without counsel, to which she agreed. She could have sought counsel during one of the two recesses, the first of which was for a period of eleven weeks, if she required the assistance of an attorney. We thus find no merit in this argument.

The decision and order of the hearing officer are affirmed.

_____

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____

Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge