APPEAL NO. 92590

On August 21, 1992 a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The record was left open and the hearing continued until August 28, 1992 "for the sole purpose of receiving the transcript." The hearing officer found that the appellant (claimant herein) was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Claimant appealed alleging several errors by the hearing officer in admitting evidence of claimant's misconduct which allegedly unduly prejudiced claimant's credibility in the eyes of the hearing officer. Claimant also alleges she should have been provided with a copy of her employee performance so it could have been used to show claimant was an "excellent practitioner." (carrier) filed a response requesting us to affirm the decision of the hearing officer and raising an issue of appellate jurisdiction.

DECISION

After review of all the evidence and issues raised, the hearing officer's decision is affirmed.

The carrier raises the issue that claimant's appeal was not timely filed. Carrier correctly cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Texas Workers' Compensation Commission [TWCC] Rule 143.3(a)(3)) which states that the appeal shall "be filed with the commission's central office in (city) not later than the 15th day after receipt of the hearing officer's decision . . ." as the applicable rule. TWCC Rule 102.5(h) states that for purpose of determining a date of receipt ". . . the commission shall deem the received date to be five days after the date mailed." The hearing officer's decision was mailed on October 13, 1992. Claimant's appeal was received by the Commission on November 3, 1992. This would appear to be one day late, being more than 15 days after the deemed date of receipt. Claimant's appeal did not recite a date of receipt of the hearing officer's decision, nor was such a date apparent on the face of the appeal. It was noted, however, that the deemed fifth day for mailing fell on a Sunday. Inquiry of claimant's office disclosed a date stamped day of receipt of the decision on "Oct 19, 1992." We have held on several occasions that if a reasonable actual date of receipt is later than the deemed date, we will accept the recited or proved actual receipt date absent probative evidence to the contrary. *See* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992 and Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992. The appeal was timely filed.

This case involves two separate injuries with two separate docket numbers. As the cases were apparently consolidated and heard together at the same contested case hearing (CCH), we will address the appeal in the same manner. The injuries were a (date of injury) injury and a (date) injury. It is not clear from claimant's appeal whether the decision on one or both injuries is being appealed, therefore we will address both injuries in our review of the case.

Claimant was employed as a registered nurse (R.N.) at (employer) from April 1, 1991 through (date). The hearing officer found, and is supported by the evidence, that claimant has had physical and emotionally problems in recent years (Finding of Fact No. 10) and that claimant has been taking numerous medications for various physical and emotional problems (Finding of Fact No. 11). Claimant has had two prior workers' compensation claims for back injuries and two other prior workers' compensation claims for reflex sympathetic dystrophy (RSD) in April 1988 and May 1989. As set out in the hearing officer's statement of evidence, claimant settled the four workers' compensation cases against another employer in early 1992.

On (date of injury) claimant undertook required cardiopulmonary resuscitation (CPR) training to allow annual recertification. The claimant testified that the CPR instructor required claimant to use her right hand in performing maneuvers on a dummy. According to claimant, the CPR instructor absolutely refused to allow the claimant to substitute hands during the procedure telling claimant if she wanted to pass the instruction, claimant would have to use her right hand. This is absolutely denied by the CPR instructor, who conducted the class. The CPR instructor firmly stated there would be no problem allowing someone to substitute the left hand or to stand on the opposite side of the dummy had there been such a request. The CPR instructor did not specifically recall claimant in the class but did testify requests by a student to use other than the dominant hand had been honored on other occasions. The CPR instructor testified no such request was made in this class. There is also some disagreement on the date of the injury. The CPR class was clearly held on (date of injury); however, the report of injury form indicated claimant told her supervisor of the injury on (date) or (date) and claimant testified she told her supervisor of the injury the next day after the injury. On June 26, 1991 claimant went to see a doctor and reported she had been hurt on the job doing CPR training "yesterday," which would have been June 25, 1991. The claimant's position is that she injured her right hand and shoulder while performing CPR training for recertification resulting in aggravation of her RSD and she had disability from July 10, 1991 through July 17, 1991.

The issues framed at the contested case hearing (CCH) for the (month year) injury were:

a.did the Claimant sustain an injury in the course and scope of her employment on (date of injury); and,

b.if so, has the claimant had disability and was she entitled to receive temporary income benefits.

The hearing officer found in part:

Findings of Fact

4.The Claimant participated in CPR training on (date of injury).

5.The Claimant did not notify the CPR trainer of any problems or difficulties in performing the CPR procedures.

6.The Claimant did not have any difficulties in performing the CPR procedures.

7.The Claimant did not seek medical treatment for a claimed injury of (date of injury), until she saw (Dr. J) on June 26, 1991.

8.The Claimant told the doctor that she had injured her hand in CPR training "yesterday", i.e., June 25, 1991.

9.[Dr. J] found that the claimant's symptomatology was bizarre and that there definitely was no sign of RSD then.

and concluded:

Conclusions of Law

2.The Claimant did not sustain an injury in the course and scope of her employment on (date of injury).

3.The Claimant did not have disability as a result of a claimed injury in the course and scope of her employment on (date of injury).

Claimant's appeal is focused on the erroneous admission of evidence which, it is urged, resulted in prejudice to the claimant's credibility and an incorrect result. We will first address the earlier injury and review the sufficiency of evidence.

We have consistently held the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence in accordance with Article 8308-6.34(e). The claimant has the burden to prove, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. *See* Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer obviously did not find the claimant's version of what happened during the CPR training credible. The hearing officer's findings and conclusions are supported by the testimony of the CPR instructor and by claimant's vagueness in referring to the date of injury as possibly (date) or (date) in addition to the (date of injury) CPR session. It may be noted that one of claimant's prior RSD workers' compensation claims also involved an aggravation of her RSD during CPR recertification training. The hearing officer's findings, conclusions and decision regarding the (date of injury) injury are supported by the evidence and are not so weak or against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951), and Texas Workers'

Compensation Commission Appeal No. 92447, decided October 5, 1992.

The issues framed at the CCH for the (date) injury were:

a.whether the Claimant sustained an injury in the course and scope of her employment on or about (date);

b.if so, has the Claimant had disability and was she entitled to temporary income benefits; and,

c.whether the Claimant gave the Employer notice of her injury within 30 days.

After defining the issues, the hearing officer summarized claimant's position to be "that inadequate staffing resulted in the overuse of her right hand, leading to a reactivation of reflex sympathetic dystrophy . . ." After so having summarized claimant's position and receiving some evidence from both the claimant and the carrier on the subject, the hearing officer did not make a specific finding on claimant's contention of overuse. Claimant on page 114 of the transcript reaffirmed that inadequate staffing led to overuse of the right hand leading to "a reactivation of RSD." However, in Carrier's Exhibit #9, an employee injury report filed by claimant on (date of injury), claimant alleges the cause of injury as "stress from mtg Friday (date) 1300 $\rightarrow$ 1645." Beginning at page 118 of the transcript the focus of claimant's (month) injury shifts from overuse of the hand to stress related injury based on the claimant's injury report. Carrier's Exhibit #9 was admitted without objection as reflected on page 120 of the transcript. Claimant's attorney subsequently objected to the line of questioning about mental trauma stating claimant's position is she overused her arm. Carrier responded that the employee injury report, Carrier's Exhibit #9, was that the RSD had been reactivated by stress on the job (date) and (date of injury). Carrier's Exhibit #13, admitted without objection, is an employee's notice of injury or occupational disease dated 03-24-92, completed by claimant, listing as the accident "Short R.N. staffing, overuse of RA (right arm), job stress" with the nature of the injury "[r]eactivation of Reflex Sympathetic Dystrophy." Claimant subsequently testified on direct examination regarding her job stress.

The hearing officer found, and is supported by the evidence, that claimant was off work numerous times between August 1991 and (date) for non-work-related reasons (Finding of Fact No. 12), that claimant suffered from severe depression for several months before (date) (Finding of Fact No. 13), that claimant received verbal counseling for inappropriate behavior in November 1991 (Finding of Fact No. 14), that claimant sought and received medical treatment from her psychiatrist in early (date) (Finding of Fact No. 15) and that claimant had been involved in a number of work-related incidents in early (month) which had caused her to be counseled (Finding of Fact No. 16). The hearing officer concluded that claimant did not sustain an injury in the course and scope of her employment on or about (date) and consequently did not have a disability as defined by the 1989 Act.

Both claimant and carrier's witnesses testified that there were staff meetings on

(date) and (date of injury) to discuss claimant's work status and counsel claimant for alleged inappropriate behavior. During the (month) time frame claimant submitted several lengthy, unsolicited proposals and in general exhibited problems which led to the counseling sessions. By memo dated 2-26-92, (Dr. N), claimant's psychiatrist, took claimant off work because of "acute depression complicated by chronic physical illness and job stress." Claimant subsequently filed her workers' compensation claims. Claimant, in the appeal, raises four points of error. In the first two alleged errors, claimant states that there were "numerous objections . . . to all evidence of claimant's personnel actions . . . on the grounds that it was not relevant . . . and an overwhelming amount of evidence of misconduct was admitted." Claimant contends that admitting the objected to evidence ". . . severely damaged her credibility . . ." It is noted that while claimant alleges "numerous objections . . . to all evidence of claimant's personnel action . . ." in fact, claimant objected to only Carrier's Exhibit #24 (transcript page 124), documentation of a verbal counseling dated 2/19/92; Carrier's Exhibit #25 (transcript page 135), a typed memo with claimant's responses dated 2/26/92; and Carrier's Exhibit #21 (transcript page 189 and following), documentation of a verbal counseling dated November 1991. The record reflects carrier introduced and had admitted 34 exhibits, and as noted above, only three were admitted over claimant's objection.

Claimant urges the Appeals Panel to "read the entire statement of evidence" and specifies pages 4, 5 and 6 of the hearing officer's discussion of the evidence. Claimant, by filing injury reports which cited job stress as "reactivating" her RSD, opened the door to testimony regarding job stress. In claimant's testimony, on both direct and cross-examination, claimant expanded her claim from overuse of the right arm as being the cause of the reactivated RSD to include job stress and hence mental trauma. Certainly there was direct testimony regarding claimant's counseling and job stress as well as extensive unobjected to cross-examination. Finally, Claimant's Exhibit #11, the medical notation by claimant's psychiatrist, lists "acute depression complicated by . . . job stress" as the reason for taking claimant off work. Evidence and testimony regarding claimant's personnel actions and facts surrounding claimant's counseling in (date) had a direct relationship to claimant's stress related employee injury reports filed with the employer. The hearing officer does extensively recite the evidence presented at the hearing, including recitations on pages 4, 5 and 6 under the statement of evidence. That evidence was, with the exception of three of carrier's exhibits, largely unobjected to. In Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991, we stated "[g]enerally, a party may not complain of improper evidence introduced by the opposing side where he, himself, has introduced evidence of a similar character," citing Hughes v. State, 302 S.W.2d 747 (Tex. Civ. App.-Eastland 1957, writ ref'd n.r.e.). We held in Appeal No. 91065, *supra*, "[a]ssuming that it was error or otherwise improper for the hearing officer to admit and consider this evidence of specific misconduct for purposes of credibility assessment, we look to see if there is cause to reverse." Here there was ample unobjected to evidence from claimant's supervisors, other unobjected to documentary evidence and claimant's own testimony regarding the counseling sessions and their cause which preclude us from reversing, even if the objected to evidence were improper. Although the recitation

was lengthy, we do not believe the hearing officer used improperly admitted, prejudicial evidence. It should be pointed out that the substance of the objected to Carrier's Exhibits #24 and #21 was admitted, without objection, through the direct and cross-examination of claimant's supervisor, who made the objected to documentation of verbal counseling.

It is apparently conceded that no discreet physical trauma occurred on (date) and/or (date of injury). Rather it appears that claimant is alleging aggravation of her RSD due to overuse and mental stress during the course of meetings on (date) and/or (date of injury). Texas Workers' Compensation Commission Appeal No. 92149, decided May 22, 1992, was a case involving somewhat similar circumstances. That case, as does carrier's response, cites Article 8308-4.02(b) which provides "a mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination, is not a compensable injury for the purposes of this Act." Appeal No. 92149, *supra*, contains a thorough survey of the case law on this subject. In the instant case the hearing officer specifically found, and is supported by the evidence, that the staff meetings with claimant on (date) and (date of injury) were legitimate personnel actions (Findings of Fact Nos. 18 and 22), that claimant experienced stress as a result of those meetings (Findings of Fact Nos. 19 and 24) and concluded that claimant did not sustain an injury in the course and scope of her employment on or about (date) or (date of injury) (Conclusion of Law No. 4). From this conclusion, a finding of no injury through overuse of claimant's hand can be inferred.

In Appeal No. 92149, *supra*, the panel held "[a]lthough the record could lead us to conclude that no `injury' occurred . . ." as a result of stress, in the instant case the hearing officer did conclude no injury occurred. In applying principles stated in Appeal No. 92149, *supra*, we agree with the hearing officer that counseling claimant about inappropriate and unprofessional behavior and placing claimant on probation constitutes a "legitimate personnel action" within the meaning of Article 8308-4.02(b). Therefore, evidence and testimony concerning claimant's behavior leading to counseling sessions and the counseling sessions are clearly relevant to the disputed issue of whether claimant suffered mental injury and whether that mental injury arises principally from a legitimate personnel action. Claimant's contentions on the relevancy of claimant's conduct are not meritorious.

Claimant then argues that claimant should have been provided with a copy of her employee appraisal from the employer and attaches a copy dated 2/17/92 to the appeal. This issue was not brought up at the CCH and pursuant to Article 8308-6.42(a) our review is limited to the record developed at the CCH. We do note, however, that the document submitted appears to have been signed by claimant on 2/17/92. If so, claimant is in no position to allege it was newly discovered evidence. Claimant was apparently aware of the document and its contents. We are hard-pressed to understand claimant's contention that the carrier should have provided claimant a document of which claimant had knowledge, but was not necessarily in carrier's interest to offer.

Claimant's last allegation of error is that the hearing officer "failed to properly consider

the medical records of (Dr. W) which indicate an `exacerbation' (arguably an `aggravation of a preexisting condition') of RSD." As noted previously, pursuant to Article 8308-6.34(e), the hearing officer is the sole judge of the credibility and of the weight of the evidence. Regarding the medical evidence, there is substantial medical evidence from Dr. J contradicting Dr. W's contention. Dr. J, in fact, found no evidence of RSD and in Claimant's Exhibit #3, thought "[t]he patient's symptomatology is somewhat bizarre." Furthermore, once the hearing officer concluded that claimant did not sustain an injury in the course and scope of her employment on or about (date) or (date of injury), the question of disability, as defined by the Act, and medical evidence regarding the severity of the injury, is mooted.

The hearing officer's decision on both the (date of injury) and the (date) or (date of injury) alleged injuries are affirmed, as being supported by the evidence.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge