

APPEAL NO. 92635

On October 26, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant, claimant herein, did not suffer a compensable mental trauma injury resulting from a combination of legitimate personnel actions. He denied her benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

Claimant timely appealed, disputing certain factual inaccuracies and the hearing officer's Finding of Fact Nos. 3, 4, 5, 6 and 7 and Conclusion of Law 2. Respondent, carrier herein, filed a timely response.

DECISION

The decision of the hearing officer is affirmed.

The issue at the benefit review conference and the contested case hearing (CCH) was "[w]hether claimant suffered a compensable mental trauma injury while working for [employer] on (date of injury)."

Claimant testified that she was employed as a cost cashier in a cash cage by (employer), employer, on (date of injury) when she was questioned about the theft or embezzlement of \$1,598.82. The testimony is that in the month that followed she was referred to a grand jury, and reassigned to a different position at no loss of pay. The testimony further was that the grand jury did not indict claimant and the loss was never solved. Claimant alleges that the length and tone of the questioning caused her to suffer post traumatic stress syndrome beginning on (date of injury).

The testimony and exhibits show that sometime in November 1991, a theft was committed by someone taking a company check out of an unlocked drawer, typing certain information on the check and making it payable to petty cash, forging the controller's signature on the check and placing the check with other deposits while removing cash. The investigation commenced on the afternoon of (date), and continued to (date of injury). Claimant and other witnesses agreed that claimant was questioned by three employer security representatives for four to five hours and that there was no shouting, yelling, or swearing. Claimant nonetheless testified she felt intimidated and harassed and that the investigation was "unfair" and "cruel." Claimant alleges unfair treatment by being harassed, "not allowed to apply for job openings," and by being "permanently reassigned." The testimony was that claimant and the manager of accounting were the prime suspects because of their accessibility to the check and cash. The testimony was that the manager of accounting was also questioned on two occasions for a total of five to seven hours. The manager of accounting testified she thought the investigation was fair under the circumstances.

Claimant testified the (date of injury) questioning session caused bad dreams which became progressively worse until (date of injury) when she was hospitalized with a diagnosis of post traumatic stress disorder. Claimant testified that had she been allowed to keep her job as a cashier and had she not been investigated by the grand jury she "would not have had the problem." The testimony was that the employer reorganized its cash handling procedure and the position of cashier had been eliminated.

The hearing officer found, in pertinent part:

FINDINGS OF FACT

3. On (date of injury), Claimant was questioned in a non-accusatory manner for approximately four and one-half hours by security investigators employed by [employer] who were investigating the theft of \$1,582.94 from [employer].
4. Based on Claimant's opportunity to have committed the theft, the length and tone of this questioning was reasonable.
5. Because of the alleged theft Claimant was reassigned, was investigated by the Grand Jury, and was also reprimanded for not verifying currency differences.
6. The actions taken concerning Claimant with respect to the alleged theft of \$1,594.86 were all legitimate personnel actions.
7. Claimant suffered a post traumatic stress disorder on (date of injury), because she had been investigated, accused of theft, reprimanded, and transferred, and not because of the length and tone of the questioning on (month year).

CONCLUSION OF LAW

2. Claimant did not suffer a compensable mental trauma injury on (date of injury), or (date of injury).

Claimant alleges erroneous information in that the amount of the missing check is listed in various portions of the hearing officer's decision as \$1,598.82, \$1,594.86 and \$1,582.94. Claimant's contention is correct in that the precise amount of the check is erroneously listed in various parts of the decision. However, the exact amount of the check is not a decisive issue. What is important is that the check was a relatively large amount in excess of \$1,500.00. We view such a minor mistake in listing the precise amount of the check as harmless error in that the consistent recitation of the correct amount would not have changed the outcome of the decision. See Texas Workers' Compensation

Commission Appeal No. 92519, decided November 2, 1992.

Claimant also alleges error in that carrier's exhibits CR-EX-C dated 1-6-92, CR-EX-D dated 6-4-92 and CR-EX-I dated 5-01-92 were not exchanged "at the time of the October 26, 1992 hearing." We note on page 138 of the transcript that carrier offered Exhibits "A" through "R" and the hearing officer asked claimant "[d]o you have any objection to any of those exhibits [claimant]" to which claimant replied "[n]o. I do not." We are unable to determine if these exhibits were exchanged or not. Had there been an objection at the hearing the matter could have been developed and would have been resolved at the time. Evidence which is admitted without objection normally cannot be complained of on appeal. Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992 citing Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.).

The bulk of claimant's objections deal with minor factual issues. Claimant challenges Finding of Fact No. 3, quoted above, disputing who asked two of the employer representatives to leave the room during the questioning, reiterating claimant's testimony at the CCH that one of the employer investigators accused claimant of theft, that claimant was told to take the rest of the day (of the investigation) off, how claimant only had one ten minute break and no one from employer's personnel department was present during the investigation on (date of injury). All of these allegations were brought out, in one fashion or another, at the CCH. 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 hearing officer had an opportunity to hear and see the witnesses and judge their credibility. When presented with conflicting evidence the hearing officer, as the trier of fact, may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlman, 722 S.W.2d 694, 697 (Tex. 1986). Both claimant's testimony and the testimony of the employer's manager of accounting and security manager supports the findings that claimant was questioned in a nonaccusatory manner by security investigators, that the questioning, under the circumstances, was reasonable, that claimant was reassigned, investigated by a grand jury and reprimanded for not verifying currency differences. The hearing officer determined that the action taken was a legitimate personnel action, in view of the amount of money taken.

Claimant points out the benefit review officer had recommended "a finding that the claimant suffered a mental trauma injury on (date of injury) . . ." and further stating that questioning the "claimant for 4-5 hours . . . does not meet the definition of 'legitimate personnel actions'." Pursuant to Article 8308-6.13 and Tex. W.C. Comm'n, 28 TEX ADMIN CODE §141.5 the benefit review officer (BRO) identifies the disputed issues and assists the parties. The BRO does not take testimony or make a formal record. Article 8308-6.13(c) and (d). Rather, it is the duty of the hearing officer in accordance with Article 8308-6.34(g) to make a written decision based on the testimony and evidence he/she has received. Consequently the recommendations and comment of the BRO, based on what information

he/she might have, is not binding on the CCH hearing officer.

Under the 1989 Act, as under previous law, mental trauma can produce a compensable accidental injury but there must be proof of a definite time, place and cause. See Texas Workers' Compensation Commission Appeal No. 92607, decided December 18, 1992 citing Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979). Claimant alleges the investigation and interview conducted on (date of injury) regarding the forged check was the definite time, place and cause of her mental trauma. Claimant, however, listed a number of other factors in a statement dated July 8, 1992 which included being harassed by management with false reprimands, receiving notice from a grand jury for investigation of theft charges, and being permanently assigned to another department with less than eight hours training. Article 8308-4.02(b) states "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 purposes of this Act." The hearing officer found, and the finding is supported by sufficient evidence, that the entire episode of claimant's being investigated, accused of theft, reprimanded and transferred (in January 1991) was the cause of claimant's stress disorder rather than the length and tone of the questioning on (date of injury). We have upheld a hearing officer's determination that a direction to perform duties in a foreign country with another employee was a legitimate personnel action, even though claimant, in that case, asserted that the resulting stress caused her mental trauma. See Texas Workers' Compensation Appeal No. 92149, decided May 22, 1992. We have also previously held in Texas Workers' Compensation Commission Appeal No. 92396, decided September 25, 1992, a transfer to a new position was held to be a legitimate personnel action, although it resulted in emotional and physical upset. The 1989 Act does not define "legitimate personnel action" other than the exceptions noted above in Article 84308-4.02(b). The four or five hours of questioning claimant endured may appear lengthy, however, we note that the other principal suspect in the theft endured two sessions of questioning, for a total time substantially longer than that of claimant. The hearing officer found that under the circumstances, the length and tone of the questioning was reasonable and constituted a legitimate personnel action.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak, or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 92598, decided December 23, 1992, citing Atlantic Mutual Insurance Co. V. Middleman, 661 S.W.2d 82 (Tex. App.-San Antonio, 1983, writ ref'd n.r.e.). We cannot say that the hearing officer's findings, that the four and one-half hours of questioning on (date of injury) was a reasonable and legitimate personnel action, is clearly wrong or manifestly unjust. Similarly we cannot say that the findings and conclusion that the cause of claimant's stress disorder was the result of being investigated, accused of theft, later reprimanded and transferred, rather than the (date of injury) questioning, is clearly wrong or manifestly unjust. We therefore find that the hearing officer's determination is supported by the evidence and we will not disturb his decision.

We have carefully reviewed the evidence of record and determine that it is sufficient to support the findings and conclusions of the hearing officer. The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge