APPEAL NO. 92710

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On October 15, 1992, a contested case hearing was held to determine whether the claimant, was injured in the course and scope of employment on _____, while employed by the (employer). The second issue was whether timely notice of injury had been given to her employer as required by Article 8308-5.01.

The hearing officer determined that the claimant did not injure her knee (sic) and back as she alleged, and further did not sustain a mental trauma injury, on _____. The hearing officer further found that an incident with the claimant's supervisor that was claimed as the basis for mental trauma injury was a personnel action, and that the claimant had not shown that it was not a legitimate personnel action as that term is used in Article 8308-4.02. Finally, the hearing officer determined that the claimant had not given timely notice of her injury to her employer, that she had failed to demonstrate good cause for her failure to do so, and that the employer did not know that claimant had an injury on _____, so that the carrier had no liability under Article 8308-5.02.

The claimant has filed an appeal contending that the preponderance of the evidence supports both a mental trauma and neck/back injury, that the mental trauma did not occur as the result of a legitimate personnel action, that the employer had notice of injury, and that the evidence proves that the insurance carrier had actual knowledge of injury through bills submitted by the claimant's doctor within 30 days. The carrier responds by pointing out the claimant's inconsistent versions of the accident, and asks that the decision of the hearing officer be upheld.

DECISION

We affirm the hearing officer's decision that the claimant did not sustain a compensable injury on _____. We affirm his conclusion of law with respect to lack of notice regarding the alleged mental trauma injury. However, with respect only to the alleged neck and back injuries, we reverse his conclusion of law regarding discharge of liability based on Article 8308-5.02, and render a decision that the insurance carrier had actual knowledge of alleged injuries to the neck and back as of December 9, 1991, through receipt of a doctor's bill. We note that our reversal and rendering on this portion of the notice issue does not change the outcome of the case because such injuries were held not to have occurred in fact.

The extensive testimony and record will be very briefly summarized here. The claimant, a school custodian, stated that on _____, she was confronted around 11:00 a.m. by her immediate supervisor, Ms. G, who accused her of talking behind her back, and stated an obscenity. She said that Ms. G screamed at her at the top of her lungs. The term is stated in Spanish in the record, and the context of testimony clearly leads to

the inference of what it means.[1] She stated that she was extremely upset when she went to load towels into a drier, and fell. The fall was described in testimony by the claimant first as a slip in some water; claimant said she caught herself and did not fall completely to the ground, but hit her back and neck against the wall. The claimant's testimony about the accident later evolved into describing it as passing out with loss of consciousness, although she was not able to explain how she caught herself if she blacked out.

Claimant then went to the employer's nurse's office and after a couple of hours was transported by ambulance to the hospital. Hospital records from _____ indicate emotional distress, but also indicate that the claimant's neck was supple and she was without tenderness or pain in her neck and back. She went to Dr. A, who took her off work. Dr. A's records of _____ indicate a history of an argument with her supervisor, followed by passing out in the nurse's office. Dr. A's records state that he treated her for neck and back strain. He wrote a letter on September 8, 1992, that said her physical injuries were caused by a fall triggered by a stressful incident.

Ms. G said that she talked with the claimant in the cafeteria at around 11:00-11:30 because other coworkers had complained that the claimant was talking about them behind their back, or telling them that they were not getting to work on time or not doing their work. Ms. G also stated that she discussed with claimant her use of a bad word in Spanish that she had used against another coworker, Ms. J. Ms. G said that she told claimant, without anger or shouting, that she must come to her about anything she had against any of her coworkers, and she should stop talking behind people's back. She said claimant began to cry. She gave her the key to the laundry room; claimant returned the key after about ten minutes, and did not tell her about any fall. Ms. G said she had no contact with claimant after this day until the claimant returned to the school in early January to file a report. She said that the claimant asked her to sign a paper saying that she had fallen in the laundry room, and she refused. Ms. G said that claimant had appeared sad for a few days. She said that the claimant told her when she asked that she was having problems with a daughter coming from Central America.

The claimant's recollection failed her during cross-examination when questioned about inconsistencies in her accounts of the fall given at the hearing. Her recollection also failed when asked to explain why her doctor's records indicated that she was hurt when she fainted in the nurse's office. Claimant's recollection also failed about any events that transpired in the nurse's office. She was also unable to fully recall her conversation with the police at the hospital that led to a report that she believed that Ms. G had assaulted her, although she indicated that she considered the verbal encounter

[1] Because of this, we do not agree with the claimant that the hearing should have been reconvened to have the term, which itself is in the record and transcript, translated. Moreover, the hearing officer found, as fact, that language was used that the claimant considered inappropriate.

an "assault" and that this would be the context in which she had filed such a complaint. The claimant verified that she had called her son's babysitter that morning between 10:00 and 10:30 a.m. but she denied that she was upset during or after that telephone call. She acknowledged that she had encountered problems with immigration regarding a minor daughter who eventually came to live with her from Central America, but said that this was not a problem in (month year).

The claimant stated that she and her husband regularly delivered "off work" notes from Dr. A to the employer. These notes very briefly verify that he is treating claimant and she is not able to work for a certain period; the nature of the condition is not disclosed. On December 3, 1991, claimant requested a leave of absence because of a nervous breakdown. The cause of the breakdown is not disclosed on the request.

The claimant contended that she tried to file a report of the accident a week after it occurred but that Ms. G said she would not file a report because she would have to talk to her own supervisor. She stated that Ms. G did not follow up with her about filing a report. Later in her testimony, claimant stated that she did not file an official report of the accident until January because she understood that Ms. G was going to file one. She filed a written report of the accident with the employer on January 9, 1992.

Ms. S, the school secretary, stated that at around 10:00 a.m. on _____, she saw the claimant talking on a telephone in the teachers' lounge. Ms. S said that claimant was crying, in a wailing manner, and that she observed her for a few minutes but did not interfere. The claimant was speaking in Spanish and Ms. S did not understand what she was saying.

The school nurse, Ms D, and her assistant, Ms. T, verified that claimant came to the nurse's station during the lunch hour and was extremely upset. She was asked in Spanish several times if she was hurt, or had fallen, and said no. A written statement from Ms. T says that claimant told her she was upset with someone at work, but would not say who. Ms. D said claimant hyperventilated, was wringing her hands, and was occasionally glassy-eyed. Ms. D said that after trying for a couple of hours to contact a family member to get her, she called the ambulance thinking that the hospital could give more effective treatment and evaluation than she could. Ms. D said that although claimant knew the date and responded to questions, Ms. D did not think she could drive home. Ms. D said that an ambulance technician shouted at the claimant and said that she was having a temper tantrum.

I.

FINDINGS AND CONCLUSIONS THAT THERE WAS NO INJURY ON _____ RESULTING FROM A FALL AT WORK

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 a

contested case hearing. Art. 8308-6.34(e). Because of this, we will set aside the hearing officer's determination only if the evidence supporting the decision is so weak, or against the great weight of the evidence, so as to be manifestly wrong or unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). A trier of fact is not required to accept a claimant's testimony at face value, even when it is not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ).

There is sufficient evidence from which the hearing officer could conclude that claimant was not injured in a fall as she contended. The hearing officer could consider the lack of objective findings of injury at the hospital on _____, as well as her denial to the school nurse, immediately after the alleged incident, that she was physically injured. We do not find reversible error in the hearing officer's decision.

II.

WHETHER THE ALLEGED MENTAL TRAUMA WAS COMPENSABLE

Although claimant argues that it is enough to demonstrate a specific time and place to find a mental trauma injury, we would point out that "cause" must also be shown. In this case, the hearing officer discounted the discussion with Ms. G as a cause of mental trauma. There was testimony that the claimant was upset before the confrontation with Ms. G occurred. There was sufficient evidence to support the determination that a mental trauma injury did not occur.

The hearing officer also found that the discussion with Ms. G was a personnel action. The claimant argues that it was not a legitimate personnel action under Article 8308-4.02(2), either because of the content of the discussion or because it is not listed as an example in the statute.

The Appeals Panel has noted before that the statute is not exhaustive in its listing of personnel actions, and that reprimands or evaluations would be included. Texas Workers' Compensation Commission Appeals Panel Decision No. 92149, decided May 22, 1992, *quoting* 1 Montford, Barber & Duncan, A Guide to Texas Workers' Comp Reform, Part 4. A.02b, 1991. It is clear to us that discussion with a supervisor about matters relating to the ability to get along with coworkers in the performance of the work qualifies as a legitimate personnel action. As to whether a discussion can move beyond the range of "legitimate," because of the language used, or the way in which it was conducted, we would note that there was controverted testimony in this case about the nature and intensity of the discussion. Also, the hearing officer apparently inferred from Ms. G's testimony that discussion using any bad word in Spanish arose in the context of the issue that claimant used it about a coworker, and that it was not directed at the claimant. There was sufficient evidence to support the hearing officer's findings that Ms. G's reprimand was a legitimate personnel action.

The 1989 Act makes clear that a compensable mental trauma injury will not encompass the emotional stress that an employee might have from personnel actions. As such, it codifies previous case law holding that any injury resulting from such stress did not occur while an employee was engaged in furtherance of the affairs of the employer, as articulated in City of Austin v. Johnson, 525 S.W.2d 220 (Tex. Civ. App.-Beaumont 1975, writ ref'd n.r.e.), and Duncan v. Employers' Casualty Co., 823 S.W.2d 722 (Tex. App.-El Paso 1992, no writ). The Duncan case court even observes that a negative reaction to an undeserved reprimand would not be compensable and would fall outside the ambit of course and scope of employment. It could be similarly argued that even if crude language is used during a reprimand, such language would not inexorably remove the reprimand from the ambit of 4.02(2).

We affirm the hearing officer's finding that no compensable mental trauma injury occurred.

III.

ACTUAL KNOWLEDGE OF INJURY

There were two stipulations entered into during closing argument at the hearing that were inadvertently omitted from the hearing officer's decision, and the decision is hereby modified to add them. These are: 1) that (agent), is the employer's servicing agent, and 2) that there is an "Ms. E" who works for (agent).

While the hearing officer's decision that claimant failed to give timely notice to the employer is supported by sufficient evidence, and that she did not have good cause for such failure, and that the employer had no actual knowledge of injury, the hearing officer did not consider the actual knowledge exception set forth in Article 8308-5.02(1) with regard to the carrier. In that exception, it is clear that actual knowledge of injury (or contended injury) by the insurance carrier will preclude the carrier from contending it is relieved of liability for failure of notice.

The compelling evidence in this case of actual knowledge by the carrier of a neck and back injury[2] within 30 days are bills from Dr. A that were stamped in as "received" by (agent) on December 9 and December 13, 1991. Both bills clearly identify the claimant, the employer, the date of "accident", indicate that it was work-related, and list diagnoses of cervical, dorsal, and lumbar strain and sprain. The information contained on these bills exceeds the bare minimum information found adequate to trigger notice, and actual knowledge, in DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980)

[2] The hearing officer's reference to a "knee" and back injury in Conclusion of Law No. 4 is erroneous, as claimant points out. Because the hearing officer in his discussion of the evidence discusses a neck injury, the conclusion of law is likely an administrative error.

and was similar to information on a doctor's report and bill held sufficient to constitute filing of a timely claim in Cadengo v. Compass Insurance Co., 721 S.W.2d 415 (Tex. App.-Corpus Christi 1986, no writ). Contact with the insurance company is also indicated in Dr. A's phone logs reflecting conversations with "Ms. E" (although such logs, standing alone, would not be sufficient to prove that the elements of injury and its work-relatedness were disclosed). Consequently, we reverse the hearing officer's determination on notice as to the back and neck injuries only and render the decision that the insurance carrier had actual knowledge of the alleged injuries to the back and neck on December 9, 1991.

There is no similarly compelling evidence to demonstrate that the insurance carrier, or employer, had actual knowledge of a mental trauma injury. Simple observation of claimant's emotional distress on _____, did not, we believe, compel the employer to speculate about the connection between employment and the distress, especially in light of the claimant's verbal disclaimers at the time that she was hurt. Dr. A's billings that are listed above, and were proved as received by the carrier's agent, do not include diagnoses of emotional or mental injury. The December 19, 1991 doctor's notes entry reflecting a possible conversation with the school nurse (which was denied by the school nurse) does not establish disclosure of a mental trauma, as opposed to neck and back injury. Dr. A's "off work" notes to the employer merely verify that he is treating claimant and that she is excused from work. The claimant did not connect her nervous breakdown to work in her leave request. The hearing officer's determination that the carrier is not liable for the mental trauma injury by operation of Art. 8308-5.02 is affirmed.

Notice alone, of course, does not establish the existence, or the compensability, of an injury. Broomfield v. Texas General Indemnity Co., 201 F.2d 746 (5th Cir. 1953). Consequently, our limited reversal as to the neck and back injuries does not change the outcome of the hearing officer's decision, although it does shift the burden of proof on notice for neck and back injuries if judicial review is requested. *See* Article 8308-6.62(c)(1).

The decision of the hearing officer is affirmed in part, and reversed in part, as noted above.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge