APPEAL NO. 93523

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing (CCH), (hearing officer) presiding, was opened on May 11, 1993, and the record was closed on May 28, 1993. Testimony was taken on May 11, 1993, and at a second session of the hearing on May 21, 1993. The issues at the CCH were: 1. whether the appellant (claimant herein) suffered a mental trauma injury in the course and scope of her employment; 2. whether the claimant timely reported any such injury; and 3. whether the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (NICC) with the Texas Workers' Compensation Commission (Commission) within one year of the date of injury, and if not, did she have good cause for failing to do so.

The hearing officer concluded that the claimant did not suffer a compensable mental trauma injury on (date of injury), while in the course and scope of her employment. The hearing officer also held that the claimant failed to timely report this injury to the employer and failed to timely file an NICC with the Commission regarding this injury. The hearing officer determined that the preponderance of the evidence did not establish that the claimant had good cause for either failing to timely report her injury to the employer or to timely file an NICC.

The claimant filed a request for review essentially arguing that the determination of the hearing officer that the claimant was not injured in the course and scope of her employment was against the great weight and preponderance of the evidence. The claimant also argues that she gave notice of her injury to the employer when she became aware that it was job related and, the employer was aware of her physical difficulties within 30 days of her injury. The claimant submits that she timely filed a NICC with the Commission within one year of the injury. The respondent (carrier herein) replies that the findings of the hearing officer are supported by sufficient evidence and should not be disturbed. The carrier also argues that the claimant does not have a compensable mental trauma injury because she originally alleged a repetitive mental trauma injury which is not compensable and now argues an injury from what the carrier submits is a valid personnel action. The carrier contends that the claimant's mental difficulties predated the date of injury she now alleges and according to the medical records are caused by problems unrelated to her employment. The carrier asserts that the claimant failed to report her injury to the employer within 30 days as required by the 1989 Act and that while she filed a NICC within one year of her accident it alleged an occupational disease with an onset date of January 1, 1991, but the claimant is now pursuing a claim for an accidental injury of (date of injury), and no notice of this accident and accident date was filed until after March 16, 1993.

The claimant filed a reply to the carrier's response to claimant's request for review and the carrier filed an objection stating the there is no provision for a reply to response and arguing that the claimant's reply should not be considered.

DECISION

Finding no reversible error and the decision of the hearing officer supported by sufficient evidence, we affirm.

Commission records show that the hearing officer's decision was distributed on June 16, 1993. The claimant in her request for review, which was filed with the Texas Workers' Compensation Commission (Commission) on June 25, 1993, stated that she received the decision of the hearing officer on June 19, 1993. The carrier filed its response to the claimant's request for review on July 9, 1993. The claimant's reply to the carrier's response was mailed to the commission under cover letter dated July 19, 1993, and was received July 20, 1993. There are no provisions under the 1989 Act or the rules of the Commission for the filing of a reply to a response. In Texas Workers' Compensation Commission Appeal No. 93088, decided March 3, 1993, we held that a reply to a response which was itself filed within the time limit required for the filing of a response to a request for review would be considered. In the present case the reply was not filed within the time a response was due, and we will not consider it.

The hearing officer in the Decision and Order, well summarizes the evidence in this case and her description of the evidence is adopted for purposes of this decision. Briefly, the evidence is that the claimant was employed for several years by (employer), a business which manufactures unit handling conveyors. She was essentially the right hand of the employer's owner and president, (Mr. S). The claimant testified that she had been for a period of years prior to 1991 taking Prosac by prescription because she was not "feeling well" and had difficulty sleeping. There was also evidence that prior to 1991, and continuing into 1991 that the claimant had been suffering from depression. The evidence showed a number of factors involved in this depression including her job, her relationship with Mr. S, separation from her husband, terminal illness of her sister and her own health problems (which included diabetes, hypertension, and heart, arthritic, gastric and knee problems).

In October of 1991 the claimant filed an NICC stating a date of injury of (date), and describing her injury as "extreme stress & loss of self-esteem & unworthiness." After retaining counsel and after a benefit review conference in her case was held on March 16, 1993, the claimant amended her NICC alleging an injury date of (date of injury). The claimant testified that her mental trauma injury arose on (date of injury), when she was told by Mr. S to sit at the front desk, where all persons entering the premises must enter, when Mr. S believed that a disgruntled ex-employee might show up to kill him. The claimant testified that the reason the ex-employee was disgruntled was that Mr. S had laid the employee off while the employee's wife was ill with cancer so the company's group insurance plan, which was a self-insurance plan, would not have to cover the medical bills of the employee's wife. The claimant testified that while the ex-employee never showed up the incident placed her under a great deal of stress.

Since the incident of (date of injury), the claimant has been hospitalized twice related to chronic stress. Her medical records show that her difficulties with stress predated (date of injury), and show that a number of factors, including her job, had contributed to her long term stress problems.

The hearing officer found that the evidence failed to establish that the claimant suffered a compensable mental trauma injury on (date of injury), while in the course and scope of her employment. Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, we cannot find that the determination of the hearing officer that the claimant did not suffer a compensable mental trauma injury on (date of injury), is against the great weight and preponderance of the evidence. The medical records deal almost entirely with other factors causing her stress and relate her stress to incidents taking place on other dates. In this regard the evidence is similar to that in Texas Workers' Compensation Commission Appeal No. 93364, decided June 24, 1993.

Since we uphold the finding of the hearing officer that the claimant failed to prove an injury in the course and scope of employment on the date alleged, the questions of timely notice to the employer and the filing of the NICC within a year become moot. We note there was evidence of good cause for the claimant's not notifying the employer of an injury until August 5, 1991, in that claimant testified she was uncertain as to the cause of her condition until around this time. *See* Texas Workers' Compensation Commission Appeal No. 92269, decided August 5, 1992. We also understand that the claimant may amend the notice of injury *see generally* Johnson v. American General Insurance Company, 464 S.W.2d 83

(Tex. 1971); but that there are limits on how removed the amended notice may be from the original. *See* Solomon v. Massachusetts Bonding and Insurance Company, 347 S.W.2d 17 (Tex. Civ. App.-San Antonio 1961, writ ref'd).

The decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge