APPEAL NO. 93571

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On June 15, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues to be determined at the CCH were: 1) whether claimant sustained a compensable injury within the course and scope of her employment with (employer herein) on or about (date of injury); 2) whether claimant engaged in horseplay which was a producing cause of her alleged injury; and, 3) whether claimant had sustained any disability as a result of her alleged injury. The hearing officer determined that claimant sustained a compensable mental trauma injury, which was not caused by horseplay, and which has caused claimant to experience disability since January 17, 1993.

Appellant, carrier herein, contends both factual and legal errors by the hearing officer on a number of findings and conclusions which are contrary to its position and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Contrary to carrier's characterization that the hearing officer's rendition of the statement of evidence is "selective," after review of the transcript and exhibits, we find the statement of evidence (as distinguished from the discussion) to be fair and accurate and we adopt it for our opinion. By this we do not mean to imply that the hearing officer's discussion portion is unfair or inaccurate, but merely that it contains the hearing officer's own opinions and analysis rather than being strictly factual in nature.

Much of this case turns on the credibility of the witnesses, and as such, it is necessary to recite at least some of the testimony. Claimant was a nurse employed by the employer hospital. Claimant testified that she had worked at the employer's facility in 1989 before going to M and again upon her return, since January 1992. Claimant testified she usually worked the 7:00 a.m. to 7:00 p.m. weekend shift and that she also worked with another nurse doing some overflow home health nursing that the other nurse was unable to handle. Claimant testified that on (date of injury), after getting to work, she began to set up for her medication rounds at around 9:00 a.m. At some point (Dr. E), a general practitioner who had been in practice since 1945, came on the scene. Exactly where claimant was standing and exactly who initiated the greeting is disputed. Nevertheless, the parties are in agreement that "good mornings" were exchanged and claimant and Dr. E engaged in a friendly mutual hug witnessed by at least one other person. It is claimant's unrefuted testimony that such mutual friendly hugs were not uncommon and not prohibited by employer. It is apparently undisputed, as both parties make reference to it, that during the hug Dr. E said "Boy, you sure are a big one. You would sure warm up a -- skinny little guy

like me on a cold day like this." Claimant's reply was "Well, they grow them big in Texas." Claimant stated that in retrospect this was a "stupid comment." Dr. E's comment had made her very uncomfortable, claimant stated and she gave Dr. E "a grandfatherly peck on the cheek" to try to end it ". . .and just pushed him away." Claimant stated she did not inform Dr. E that she considered his comment to be inappropriate.

Claimant stated she continued her medication rounds and some minutes later (estimated at 10 to 20) Dr. E again approached her from behind ". . .put his right arm behind the small of my back. . . left arm on my waist. . . reached up and took a full handhold of my breast and squeezed it." Claimant states she was not a participant in the second encounter and had her hands on the medications. Claimant testified she was stunned, pushed Dr. E away and that he then put his hands in his pockets and walked away. Claimant testified the first person she told was a coworker, (BD). Claimant states that BD indicated that Dr. E's behavior did not surprise her and that Dr. E would have them and some other nurses ". . .all in bed together with him if he thought he could." BD adamantly denies making this statement and disputes the circumstances of her conversation with claimant, but concedes that claimant did tell her of Dr. E's action. Claimant states she continued working and around 3:30 p.m., when a new shift came in, told another coworker nurse, (AF), about the incident. Claimant stated she went home, talked to her husband about the incident, became increasingly upset and called AF at the hospital for advice. According to claimant AF told claimant to report the incident, which she did telephonically to a supervisor, (BM). BM made notes of the call and those notes are in evidence.

Claimant testified that she was not scheduled to work again at employer's facility until January 17, 1993, however, in the meantime she worked on two home health jobs on January 12th and 14th. Claimant testified she called in on January 17th, reported she was ill, explained the situation and was excused from work. Claimant was referred by the employer to an employee assistance program where she was counseled by (JS), a certified social worker. In a report dated February 2, 1993, JS reported claimant's social history as including being sexually molested at age 4 and raped at age 16. Claimant testified at the CCH that she had not missed school due to those events and had handled them on her own. Claimant was diagnosed by JS as having "adjustment reaction with mixed emotional features; . . .borderline personality disorder." The treatment plan was to stabilize claimant and then refer her to a mental health provider.

At some point claimant saw (Dr. G), a board certified psychiatrist. By memo of March 24, 1993, Dr. G stated it was in claimant's best interest not to work for employer ". . .due to the amount of stress and emotions involved in the circumstances." Claimant testified that working at any nursing job causes her to have panic attacks. Dr. G states in a deposition upon written questions that claimant ". . .developed symptoms of anxiety and depression, which in my opinion are causally related to the experience stated" (the groping incident) and further that claimant "is unable to work due to symptoms of depression and

anxiety. This patient has developed those symptoms due to stress resulting from the incident of 1/10/93." Carrier offered no expert medical testimony of its own.

BD was called to testify by carrier and stated that she had witnessed the first mutual hug and that she had overheard claimant tell Dr. E "everything is peachy." BD testified that claimant had initiated the initial mutual hug. BD, as noted previously, denied that she told claimant that Dr. E's action didn't surprise her. BD described the initial hug as friendly, not romantic or sexual in any way. BD did not witness the second encounter.

Dr. E testified that claimant had put her arms out to hug him, and that he had hugged her back, that he often gives "hello hugs" and that it is not unusual to hug people upon arriving at work. Dr. E emphatically denied having touched claimant in the manner she described in the second encounter.

The hearing officer in pertinent part determined:

FINDINGS OF FACT

5.On (date of injury), Claimant and [Dr. E] engaged in a mutual friendly hug at the nurse's station.

6.Appropriately (sic) fifteen minutes after the occurrence of the hug described in the preceding Finding of Fact, [Dr. E] hugged Claimant and fondled her breast while Claimant was dispensing medication to patients of Doctors Hospital.

7.The hug described in the preceding Finding of Fact did not constitute horseplay.

8.Claimant was not a voluntary participant in the hug described in Finding of Fact #6.

9.As a result of the event described in Finding of Fact #6, Claimant sustained a mental trauma injury.

10.Since January 17, 1993, Claimant has been unable to obtain and retain employment at wages equivalent to the wage Claimant earned prior to (date of injury).

CONCLUSIONS OF LAW

3.Claimant sustained a mental trauma injury within the course and scope of her employment with Doctors Hospital on (date of injury).

4.Claimant was not engaged in horseplay which was a producing cause of the mental

trauma injury Claimant sustained within the course and scope of her employment on (date of injury).

5.Claimant has had disability since January 17, 1993.

Carrier disputes the hearing officer's Findings of Fact Nos. 5, 6, 7, 8, 9 and 10, and Conclusions of Law Nos. 3, 4 and 5, quoted above. Whether claimant sustained a compensable mental trauma injury revolves principally around the credibility of the witnesses. Carrier complains that the hearing officer failed to mention that the first mutual hug was initiated by claimant, as if this were fact. Claimant simply testified it was a mutual hug and it is carrier's witnesses that say the hug was initiated by claimant. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). Who initiated the initial hug, whether Dr. E's comments were offensive to claimant, the inferences of the kiss on the cheek and whether Dr. E grabbed claimant's breast at the second encounter are strictly factual determinations to be made by the trier of fact, who is the hearing officer. When reviewing findings on factual sufficiency, the challenged findings will be upheld unless the Appeals Panel determines that the evidence is so weak or that the findings are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ); Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) The hearing officer clearly found, as she stated, that claimant was more credible than Dr. E. The hearing officer had the opportunity to hear the witnesses and observe their demeanor, and in doing so, found claimant more credible. Carrier points out that there are some minor inconsistencies in claimant's testimony and that claimant's testimony in some instances is contradicted by carrier's witnesses. We note that it is within the province of the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Carrier comments that claimant ". . .had ample reason to fabricate or exaggerate the events. . . ." However, this is speculation and the hearing officer had all the facts carrier advances available to her in making her decision.

Carrier, in regards to the second issue of whether claimant's conduct constitutes "horseplay," contends that the "hug and kiss" constitutes horseplay and that claimant had willingly engaged in the horseplay and consequently had deviated from her course of employment. Initially we would note that it is undisputed that greeting "hello hugs" were "not uncommon" and apparently, if not actually condoned by employer, were not prohibited. However, Article 8308-3.02(3) states, in part, an insurance carrier is not liable for compensation if: "(3) the employee's horseplay was a producing cause of the injury." We have held that horseplay turns on factual determinations. *See* Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993; Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. In Appeal

93013, *supra*, we reviewed a number of horseplay cases and cited United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex. App.-Amarillo 1982, no writ) for the proposition that whether or not an employee was a voluntary participant in horseplay at the time of the injury is a question for the trier of fact. We, as does the hearing officer, question whether such widely accepted, "not uncommon" greeting hugs even constitute horseplay, but even if it did that conduct was abandoned, or had been concluded after the first encounter. Claimant, in unrefuted testimony, stated that she had returned to dispensing medication when Dr. E returned and fondled her breast. The hearing officer found, and there is sufficient evidence to support that finding, that fondling claimant's breast without her consent or voluntary participation did not constitute horseplay. In Appeal No. 93013, *supra*, we cited Texas Workers' Compensation Commission Appeal No. 92536, decided November 16, 1992, where "benefits were upheld where the evidence supported, and the hearing officer found, that the claimant (in that case) was a victim of someone else's horseplay and was not a voluntary participant in the horseplay." That principle would apply here and supports the hearing officer's finding in this case. It is claimant's testimony she was at the medication cart in the process of dispensing medication when Dr. E approached her from behind and squeezed her breast, and consequently she was not a voluntary participant in that encounter.

Carrier further contends that the fondling in this case, if it occurred at all, was not such "a shocking, frightening or life threatening event" as to induce mental trauma in the absence of a physical injury. Carrier emphasizes that claimant "had embraced (Dr. E), engaged in sexual banter, and kissed him on the check (sic) all in front of witnesses." Carrier's argument would seem to be, that having engaged in a mutual hug, having ones breast grabbed would not be sufficiently stressful to ". . .rise to the category of traumatic events which are recognized as resulting in compensable mental trauma." The hearing officer comments on this argument as being ". . .at best, inaccurate, since the incident was sufficiently traumatic to claimant that she sought psychiatric help. At worst, carrier's argument is offensive and insulting, and it is rejected. . . ." Without further comment on the hearing officer's statement, we note that claimant has sought psychiatric help, that Dr. G has stated that the subject incident is causally related to claimant's anxiety and depression, and that claimant's contentions also appear to be supported to some extent by JS, the social worker. Carrier submits no expert medical testimony of its own relying instead on a theory that claimant's present anxiety and depression are in someway related to claimant's ". . .prior sexual assaults as a young child and later as a teenager. . . ." Carrier goes on to state "[f]urther it is ludicrous to think that (Dr. G) is treating (claimant's) alleged mental trauma as a result of her encounter with (Dr. E) while ignoring the earlier sexual assaults." Carrier seems to think that treatment of the prior sexual assaults would be a defense in this mental trauma claim. Claimant, at the CCH, dismissed this argument by stating ". . .as you know, an aggravation of a pre-existing condition is compensable." We have on a number of occasions held that, under case law, an injury includes an aggravation of a pre-existing condition, whether or not that condition was job related. Texas Workers' Compensation

Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992. To defeat a claim for compensation because of a pre-existing condition, the carrier must show that the prior condition was the sole cause of the workers present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992. Here, obviously claimant was functioning appropriately before the fondling and this incident was the precipitating event for claimant's current condition.

The Texas Supreme Court has held that mental trauma can produce a compensable accidental injury, even without an 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, 154 Tex. 430, 279 S.W.2d 315 (1955); Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972); Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979). Claimant has testified, and if believed as the hearing officer obviously did, that on employer's premises, while dispensing medication in furtherance of employer's business, her breast was fondled by one of her employers, and that this so shocked her as to cause her to be depressed and anxious. Under these circumstances, the mental trauma is traceable to a definite time and place. Dr. G provides expert medical testimony that establishes the incident in question to be the cause of claimant's depression and anxiety. On the issue of causation there is no evidence to the contrary.

The last issue was whether claimant sustained disability. Disability is defined in Article 8308-1.03(16) as the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Dr. G renders his expert medical opinion that this incident caused claimant's anxiety and depression and that claimant is unable to work due to the symptoms of depression and anxiety. Claimant also testified being in the workplace causes her "panic attacks." There is no evidence to the contrary. Carrier speculates that claimant should be able to perform nursing duties when she is not at risk of confronting Dr. E. However, carrier offers no evidence to support its speculation or to refute claimant's testimony as supported by Dr. G's report. The evidence is sufficient to support the determinations of the hearing officer that claimant sustained a compensable mental trauma injury within the course and scope of her employment.

Carrier also contends that "[s]ince the hearing officer had previously granted leave of (claimant) to obtain (Dr. G's) testimony on the issues of disability as noted above, (Carrier) should have been granted leave to cross-examine (Dr. G) on these issues." Carrier contends this constituted error sufficient to reverse the case. The hearing officer addressed carrier's complaint by noting:

> Since Carrier's counsel objected to the introduction of the deposition on written questions of [Dr. G], stating that Carrier was denied the opportunity to cross-examine [Dr. G], some discussion of this matter is appropriate. On May 14, 1993, Carrier's counsel forwarded to the Commission a request to take the deposition on written questions of [JS], a counselor whom Claimant had consulted, and to propound written cross questions to [Dr. G], Claimant's treating psychiatrist. Since (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(e)(3)) Rule 142.13(e)(3) of the Rules of the Texas Workers' Compensation Commission requires that requests for written deposition must state why the testimony is needed, and since Carrier's request did not state why the testimony was required of either of [JS] or [Dr. G], the request was denied by order dated May 18, 1993. The Contested Case Hearing was conducted on June 15, 1993, and in the time between May 18, 1993 and June 15, 1993, Carrier made no effort to remedy the deficiency in its request to depose [JS] and [Dr. G]. Since Carrier not only failed to properly request the written depositions, but failed to make amended deposition requests when advised how the initial requests were inadequate, Carrier should not now be heard to complain that it was denied the opportunity to cross-examine [Dr. G].

We might believe that the hearing officer was overly technical in requiring carrier to state why the testimony of Dr. G and JS was needed, when the reason being to defend an issue of disability, was or should have been, obviously clear. However, the hearing officer's point that carrier made no effort to remedy the deficiency in its request to depose JS and Dr. G, or failed to make amended deposition requests when advised how the initial requests were inadequate, is well taken. We find the hearing officer did not abuse her discretion and the error, if any, was not reasonably calculated to cause, and probably did not cause rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

Finding there is sufficient evidence to support the hearing officer's determinations and there being no reversible error, there is no sound basis to overturn the decision. We do not find the decision to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660, (Tex 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986)

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

I do not believe the circumstances and factual setting in this case measure up to the legal requirements for a compensable mental trauma injury. The 1989 Act provides in Article 8308-4.02(a) that: "[i]t is the express intent of the legislature that nothing in this Act shall be construed to limit or expand recovery in causes of mental trauma injuries." That article goes on to specifically exclude legitimate personnel actions, a matter not involved in this case. I have, however, difficulty in sustaining recovery for mental trauma under the circumstances in this case because I believe to do so would be an unwarranted and unjustified extension of prior case decision law in this area.

At the outset, it is clear that sexual harassment is not acceptable, particularly so in the workplace. Indeed this is increasing a topic at training and employee indoctrination programs and is specifically prohibited in both private industry and in governmental employment settings. Sexual harassment is offensive, no doubt; potentially actionable in civil and criminal proceedings; and the appropriate subject of disciplinary actions. The

majority opinion would find it compensable under the workers' compensation law even under the somewhat benign setting of this case.

The claimant, a nurse with apparently some degree of experience, engaged in familiar banter with an elderly, (some 48 years of practice) doctor which involved a hug, somewhat suggestive remarks and a retort, a peck of a kiss and a subsequently grasp of claimant's breast. The claimant apparently completed her work without incident and was not due back on duty for a week but did work several home care jobs in the meantime. She called in sick the next time she was due to work and has not worked since. Although she did not report the matter at the time of the incident, she did later that evening after talking it over with her husband. She was referred to a social worker by her employer and sometime later saw a psychiatrist (report dated in March 1993) who initially indicated she should not return to her place of employment because of stress and emotions involved in the circumstances. The psychiatrist subsequently related symptoms of anxiety and depression to the incident and indicated the claimant was not able to perform her job duties "because of her on-the-job injury."

In my opinion, the circumstances present in this case do not measure up to a factual settings similar to the Bailey case cited in the majority opinion, where a neurosis was suffered by a steel worker who watched a coworker fall to his death from a collapsed scaffold and was held to be compensable. The present case is not a situation of such a shocking, frightening or life threatening event that would give rise to a compensable injury. *See* Williams v. Texas Employers' Insurance Association, 633 S.W.2d 94 (Tex. App.-El Paso 1983, writ ref'd n.r.e.). I would reverse and hold that applying the law to the particular facts and circumstances of this case, the injury claimed does not give rise to a compensable mental trauma injury under the 1989 Act.

Stark O. Sanders, Jr.
Chief Appeals Judge