APPEAL NO. 93572

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 14, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue to be decided at the CCH was: Did the claimant sustain an injury in the course and scope of her employment on (date of injury). The hearing officer determined that the appellant, claimant herein, did not prove by a preponderance of the evidence that she sustained an injury in the course and scope of her employment on (date of injury).

Claimant contends that the hearing officer erred in several findings and a conclusion, and requests that we review the evidence and render a decision in her favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Finding that the hearing officer's decision was so against the great weight and preponderance of the evidence as to be manifestly unjust, we reverse the decision and render a new decision.

Claimant, a 41-year-old lady, was employed as a secretary/bookkeeper for the employer, on (date of injury). The employer operates a retail tire and automotive repair facility. Claimant testified that on (date of injury), (all dates are 1992 unless otherwise noted), her supervisor, (DM), had collected a check from a customer, that claimant had picked up the check from the counter to enter it in the bank deposit books when DM jumped out of his chair, took the check out of her hand, twisted her arm, and shoved her against the wall. In the process, she stumbled or fell against her chair. Claimant testified that after assaulting her, DM, as he was leaving the room, threw a Coke at her. Claimant testified the assault caused injuries to her head, neck, left upper extremity and severe mental trauma. Claimant states she left work at the end of her shift on June 16th and has not returned to work since that time because of the effects of her injury.

Claimant filed civil and criminal charges against DM. The CCH had originally been scheduled for October 6, 1992, but was rescheduled to allow resolution of the criminal charges against DM. Claimant stated that DM pleaded guilty to an assault charge but conceded she did not have first-hand knowledge of that fact and that he may have pleaded no contest.

The incident was witnessed by a customer in the store. Claimant was able to obtain the name of the customer and offered the customer's statement into evidence. The statement is quoted as follows:

> This is a written statement stating that on the day in question. The manager at (employer) had a small disagreement with the secretary. He had bought a

> coke and said something to the secretary and he got mad at her and grabbed her by her arm. She could not move she was pent (sic) in between a chair and the manager. I could not understand why he got so upset. He threw his coke into the trash and stormed out of the door. And at that time the secretary asked me for my name and phone number.

Carrier presented several transcribed sworn statements. In DM's statement, he identifies himself as an assistant manager at employer's store, that the store manager is his brother, (JM) and categorically denies "pushing" or "roughing up" claimant. DM theorizes (in his statement) that claimant was upset because "she wasn't going to have a job" describing a business reorganization (which will be discussed later). DM, in the statement, said claimant made a derogatory remark about a sale he had made and he "pulled the check back out of her [claimant's] hand." DM stated he was aware of the customer in the store and that as he left, he threw his Coke in the trash can or may have bumped the trash can which "kind of made a little noise." DM denies making any physical contact with claimant.

JM submitted a sworn statement and stated that he was claimant's supervisor, and that claimant and DM "picked at each other a little bit." JM also stated the circumstances whereby claimant was going to lose her job. JM stated he did not see the incident but that DM said he "had had a little sqwabble (sic) with [claimant] over this and she wouldn't take care of the check situation. . . ." JM stated that DM and claimant had picked at each other and that he "had chastised both of them on occasions . . . ." JM stated "[a]ccording to [DM], he never touched her. He grabbed the check out of her hand, she stepped back, and became entangled or whatever with the waste can and stumbled around like a lady would in high heeled shoes after that."

Carrier also submitted a signed unsworn statement from (FR) who is identified as manager of "(employer). Note: [employer] is a branch of (employer)" FR states that employer had previously been known as Wheeler Tire & Alignment and that when (employer). leased employer, claimant ". . . was told prior to the transfer of ownership (in April 1992) that her position would be eliminated . . . ." FR states "[i]n late May [claimant] gave notice to her supervisor that she would be leaving and going to (state) to live. She would like to work until June 26th if it could be arranged. [Claimant's] resignation was accepted . . . ." FR then states on June 15th (an inconsistent date which should perhaps be June 16th), claimant notified her supervisor and someone at the parent corporation "that her (state) plans had fallen through and she would like to stay at [employer] indefinitely. She was told that such was impossible as the job was being eliminated as planned. The claim of injury took place in less than 30 minutes after she was told that her job was definitely being discontinued." Claimant denies this sequence of events or that the conversation took place. Claimant concedes she, at one point, had made plans to go to (state) and that those plans did not work out.

Carrier submitted sworn statements from other employees of the employer, but none had seen the incident in question. Carrier also submitted a deposition of DM's youth pastor attesting to DM's good reputation.

An initial medical evaluation dated June 17th by (Dr. F) gives a history of claimant being shoved and that an assistant manager had "twisted her arm." The examination "does reveal an area of contusion on the medial aspect of the left arm, as it borders near the wrist." Dr. F's diagnosis is "1. Acute Cervical Strain; 2. Acute Left Shoulder Elbow and Wrist Sprain." A subsequent psychological evaluation by (Dr. C), dated 7-25-1992, has a diagnosis of "(DSM-III-R) - 316.00" with a treatment plan that claimant is to be ". . . seen on a weekly basis to assess the severity of the psychological involvement and begin cognitive treatment to reduce the level of depression." Dr. C finds stressors as "[t]he patient is unemployed, she has her children at home, a dependent boarder. She is currently dating a married man." Claimant disputes these comments by saying that her children are in the military, not at home, and that when she found out the man she was seeing was married, she "dumped him." Claimant denies this caused her stress.

The hearing officer, in pertinent part, made the following determinations:

## FINDINGS OF FACT

No. 3: The Claimant and her supervisor, [DM], had a disagreement on (date of injury).

No. 4: The disagreement was due to personal animosity and the supervisor's words and actions were not directed at the Claimant as an employee or because of her employment.

No. 5: The Claimant's supervisor did not twist her arm on (date of injury).

No. 6: The Claimant did not suffer damage or harm to the physical structure of her body during, or as a result of, the disagreement with her supervisor on (date of injury).

No. 7: The Claimant did not suffer a mental trauma injury during, or as a result of, the disagreement with her supervisor on (date of injury).

## CONCLUSION OF LAW

No. 2: The Claimant did not prove, by a preponderance of the evidence, that she sustained an injury in the course and scope of her employment on (date of injury).

The claimant disagreed with Findings of Fact Nos. 4 through 7 and Conclusion of Law No. 2, reiterating much of the evidence in her favor and asking the Appeals Panel to review the evidence. Claimant also, as part of her appeal, submits a Deferred Adjudication Probation Order involving DM and a charge of assault presumably stemming from the June 16th incident.

Carrier correctly points out that the Appeals Panel is limited in its review to the record developed at the CCH and the written requests for review. Article 8308-6.24(a). In that the evidence submitted by claimant was not part of the record below, we will not consider it on appeal. We note to carrier that the Texas Rules of Civil Evidence do not apply to the workers' compensation dispute resolution process. Article 83008-6.34(e).

Reference the hearing officer's finding that claimant's and DM's "disagreement was due to personal animosity and the supervisor's words and action were not directed at claimant as an employee or because of her employment," we reach a different conclusion. We would note that the evidence was that claimant and DM had in the past "picked at each other a little bit." There was absolutely no evidence of any off duty personal relationship between claimant and DM, and it appears from both the testimony of claimant and DM that the precipitating factor the day of the incident was the customer's check. JM, in his statement, recites DM told him that he had a little squabble with claimant about the check. Carrier cites Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991, and Texas Workers' Compensation Commission Appeal No. 92112, decided May 4, 1992. We believe both those cases are distinguishable from the instant case. Appeal No. 91070, *supra*, involved a situation where the claimant in that case called another employee "dickhead," the employee, who was on stilts, asked the claimant to stop it, and the claimant told the employee to come down off the stilts. A fight eventually resulted. In that case we held the exception in Article 8308-3.02(4) which holds the carrier is not liable if "the injury arose out of an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment" applied. Similarly Appeal No. 92112 involved a confrontation between two employees regarding a cartoon. One employee complained the other employee was calling him "names" and terminology to the effect that one commented to the other that he would "whip his Mexican ass" and terms such as "white cracker" were used. This too culminated in a fight and ultimately a shooting. The injury was held not compensable pursuant to Section 3.02(4).

Carrier also cites (Mr K) v. Liberty Mutual Insurance Co., 572 S.W.2d 766 (Tex. Civ. App.-Waco 1978, no writ) and Shutters v. Dominos Pizza, Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ). (Mr K) is distinguishable from the instant case in that there had been off duty animosity between (Mr K) and the other employee and that (Mr K) was the aggressor. Shutters is not a workers' compensation case but rather a case where an employee brought an action against a co-employee and employer for alleged sexual assault. The injured party specifically alleged that her injury was not sustained in the course of her employment and that her injuries resulted from intentional acts of an assailant for reasons personal to her. In the instant case, we do not know what JM meant when he stated DM and claimant were "picking at each other" but all the evidence would indicate that the incident on June 16th was precipitated by the customer's check rather than personal animosity involving insults, name calling and a subsequent fight. The "picking at each other" could have just as easily as not, been about work or the extension of credit to customers. JM's statement indicated that when DM later handed him the check DM said "I had had a little sqwabble (sic) with [claimant] over this (meaning the check) . . . they had a little squabble about the check." Notwithstanding the hearing officer's flat statement that the disagreement was due to personal animosity, our review of the evidence indicates the only cause of the disagreement on June 16th was the customer's check that claimant was supposed to post. As the only evidence in the record indicates that the disagreement was solely over the check, we view the disagreement as involving claimant's employment. There is no evidence of insults and name calling as in Appeal Nos. 91070 and 92112, *supra*. A further distinction might be made that the employees in the cited cases were coworkers while in the instant case it involved a nominal supervisor to employee relationship.

The hearing officer further found that DM did not twist claimant's arm and that claimant did not suffer damage or harm to the physical structure of her body (i.e. an injury as defined in Article 8308-1.03(27)). Claimant states she did suffer an injury when DM grabbed her arm, twisted it and pushed her against the wall. DM denies touching claimant. Based only on this testimony, claimant may not have sustained her burden, even though her testimony was subject to cross-examination while DM's testimony in the form of a sworn statement could not be cross-examined. However, claimant's version is supported, at least to some extent, by a customer who was an eye witness and who stated that DM "grabbed her by her arm." Allowing that claimant's version, and memory, may have been more lurid, an unbiased eye witness clearly indicates claimant was "grabbed" by the arm. Carrier emphasizes it was only a "small disagreement" according to the customer, but we note, small or not, it nonetheless culminated in a "grabbed" arm. Claimant's and customer's version is further supported by Dr. F's objective medical finding of a contusion to claimant's left arm the following day. We would further note that, regardless of the outcome, the local prosecutor agreed to charge DM with assault and DM either pleaded "no contest" or guilty. All of this is overwhelming evidence that even if claimant's arm had not been twisted as she claims, there was a physical grabbing, which resulted in objective medical evidence of a contusion and a prosecutor obviously believed it serious enough to charge DM with assault. If nothing else, the contusion standing alone, without evidence of twisting, constitutes sufficient damage or harm to the physical structure of the body to constitute an injury. No evidence of any intervening event between the work incident and the diagnosed contusion was offered by way of explanation that the injury was caused by anything other than the "grabbing."

We recognize and affirm the concept that the hearing officer is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence in accordance with Article 8308-6.34(e). We also recognize that claimant may have exaggerated or mischaracterized some of the evidence, but the fact remains that both claimant and the neutral witness stated DM grabbed claimant's arm, contrary to DM's testimony, and this contention is supported by the contusion. Carrier argues that the customer's statement ". . .is completely devoid of any information relative to whether or not the disagreement was in any way related to work." Carrier submits evidence which suggests that claimant may have had other motivations for filing a claim, but that does not negate the overwhelming, unbiased and objective evidence of a grabbing and an injury. Certainly there is <u>no</u> evidence that the disagreement was not work related, having to do with the check that claimant was supposed to post.

The carrier repeatedly refers to its Exhibit Nos. 6, 7, 8, 9, 10 and 11 as "factually and legally" rebutting claimant's claims. We note No. 6 is FR's statement, to which we have previously referred, No. 7 is DM's statement, No. 8 is JM's statement, Nos. 9 and 10 are statements of individuals who had no first-hand knowledge of the incident, testifying on DM's reputation, or what they heard from someone else. Exhibit No. 11 is the character reference for DM from DM's youth pastor. Consequently, there is little in those exhibits which has not been discussed or which rebuts claimant's allegations.

Claimant contends she suffered mental trauma as a result of the June 16th incident. The hearing officer finds, however, that claimant did not suffer a mental trauma injury as a result of the "disagreement" with DM. Claimant, on appeal, asks us to refer to Dr. F's report "prescribing Valium" and "the findings of (Dr. C)." We note nothing in Dr. F's report which would indicate any mental trauma injury and the only medication mentioned is "Naprosyn 500mg one three times daily." Dr. C's report is inconclusive at best, in that Dr. C records claimant's "social situation" and mentions other "stressors." We understand that claimant disputed the stressors but did concede a man she was dating was married and that when she found out she "dumped him." There is very little in Dr. C's report which provides causation between the June 16th work incident and claimant's condition. The Texas Supreme Court has held that mental trauma can produce a compensable injury if it arises in the course and scope of employment and is traceable to a definite time, place and cause. <u>Bailey v. American General Insurance Company</u>, 154 Tex. 430, 279 S.W.2d 315 (1955); <u>Olson v. Hartford Accident and Indemnity Company</u>, 477 S.W.2d 859 (Tex. 1972); <u>Transportation Insurance Company v. Maksyn</u>, 580 S.W.2d 334 (Tex. 1979). Certainly a definite time, place and cause is identified but there is little or no evidence beyond claimant's lay testimony to show her mental trauma was incurred in the course and scope of employment. The medical evidence does not support claimant's contentions and although claimant's testimony would establish a causal connection between the incident and claimant's present mental condition, the hearing officer's finding that claimant did not suffer a mental trauma injury is also supported by some evidence. On this point, we cannot find that the great weight and preponderance of the evidence does not support the hearing officer's finding.

Having reviewed all the evidence in the case before us, both in support of and contrary to the hearing officer's conclusion that claimant did not prove, by a preponderance of the evidence, that she suffered a compensable injury to her left arm on (date of injury), we are of the opinion that such conclusion is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Accordingly, we affirm the hearing officer's Finding of Fact No. 7, finding that the claimant did not suffer a mental trauma injury during, or as a result of, the disagreement with her supervisor on (date of injury). We reverse and render on the other contested determinations, finding that claimant was assaulted by DM when he grabbed or twisted claimant's arm on June 16th, and that claimant sustained an injury to her left arm and wrist in the course and scope of her employment on (date of injury). In accordance with Articles 8308-4.21 and 4.61, claimant is entitled to health care and income benefits due for the injury to claimant's left wrist and arm.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge