APPEAL NO. 93794
FILED OCTOBER 20, 1993

On June 23, 1993, a contested case hearing was held in Fort Worth, Texas, with [hearing officer] presiding as the hearing officer. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.). The issues at the hearing were: 1) whether the respondent (claimant) sustained a compensable mental trauma injury in the course and scope of her employment on [Date of Injury]; 2) whether the claimant gave timely notice of such injury to her employer; and 3) whether the claimant has had disability as the result of the injury. The hearing officer determined that the claimant sustained a mental trauma injury in the course and scope of her employment on [Date of Injury]; that the claimant gave timely notice of her injury to her employer; that the employer had actual knowledge of the injury; and that the claimant has had disability as a result of her mental trauma injury from [Date of Injury], through June 23, 1993, the date of the hearing. The hearing officer ordered the appellant (carrier) to pay income and medical benefits in accordance with his decision and the provisions of the 1989 Act and Rules of the Texas Workers' Compensation Commission (Commission). The carrier does not appeal the hearing officer's determination that the claimant sustained a mental trauma injury in the course and scope of her employment. The carrier disputes the hearing officer's determinations regarding timely notice of injury, actual knowledge of the injury by the employer, and disability. The carrier requests that the decision of the hearing officer be reversed and a decision rendered in its favor. The claimant responds that the hearing officer's decision is supported by the evidence and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

(Company B) is a subsidiary of (Company A). (Company C) is an unincorporated association controlled by Company A. The parties stipulated that on [Date of Injury], the claimant was employed by Company A. Companies B and C share an office building.

The claimant filed two claims for compensation. One claim, the compensability of which was in issue at the hearing, was for a mental trauma injury resulting from a sexual assault by the president of Company B, (JS) on [Date of Injury]. The other claim was for carpal tunnel syndrome (CTS) with a date of injury of November 27, 1992. The compensability of the CTS claim was not an issue at the hearing. The claimant's last day of work was on or about December 3, 1992.

The hearing officer determined that the claimant sustained a mental trauma injury in the course and scope of her employment on [Date of Injury]. The claimant testified that on [Date of Injury], she worked as JS's administrative assistant. The claimant further testified that while at work on that date, JS grabbed her on the hips and pushed his body against her body and, when she pushed him away, JS said he would "attack" her later. The claimant has been diagnosed as having post-traumatic stress disorder as a result of this incident. The carrier has not appealed the hearing officer's determination that the claimant sustained a compensable mental trauma injury on [Date of Injury]. The carrier appeals the hearing officer's determinations that the claimant gave timely notice of injury to her employer and that the claimant has been unable to obtain and retain employment at her preinjury wage as a result of the mental trauma injury sustained on [Date of Injury].

NOTICE OF INJURY

Section 409.001 provides that an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs, and that the notice may be given to the employer or to an employee of the employer who holds a supervisory or management position. Section 409.002 provides that failure to notify an employer as required by Section 409.001 relieves the employer and the employer's insurance carrier of liability unless (1) the employer, a person eligible to receive notice under Section 409.001(b), or the employer's insurance carrier has actual knowledge of the employee's injury; (2) the Commission determines that good cause exists for failure to provide notice in a timely manner; or (3) the employer or the employer's insurance carrier does not contest the claim.

Although the parties stipulated that the claimant was employed by Company A, the claimant and (LH), who is the President of Company C and by contract the marketing manager or director of Company B, testified that the claimant was hired by Company B to be the administrative assistant to JS, the president of Company B. LH testified that employees of Company B would report injuries to him when JS was not available. The claimant testified that on November 24, 1992, she told LH that she had been sexually harassed and assaulted by JS and "described to him what happened." LH testified that a few days after November 21st the claimant reported to him that on November 21st JS had "grabbed her and roughed her up." He said that when the claimant reported the incident to him she was very distressed, crying, and was at her "breaking point" as far as being able to tolerate the pressure that was being put on her by JS. LH further testified that a few days after the incident was reported to him, he advised JS to leave the claimant alone. Since the parties stipulated that the claimant was an employee of Company A, we need not decide whether the claimant's

conversation with LH was notice to Company B or whether LH's conversation with JS would constitute notice of injury to Company B.

In regard to notice of injury to Company A, the claimant said that on December 10, 1992, she reported her "stress" claim to l (BG), who is the corporate risk administrator for Company A. In a letter to the claimant dated December 14, 1992, BG stated that she had submitted to the carrier the claimant's claim related to her right wrist. BG then added "However, from our conversation of 12/10/92, I understand you claim an unrelated workers' compensation injury." BG also stated in the letter that she had enclosed a workers' compensation claim form for the claimant to complete and return. In a Notice of Refused/Disputed Claim (TWCC-21) dated February 6, 1993, the carrier disputed the claimant's "mental trauma" from an alleged incident occurring on [Date of Injury]; indicated that the nature of injury claimed was "stress;" and further indicated that the carrier's first written notice of the injury was received on December 18, 1992. Having reviewed the record we are satisfied that there is sufficient evidence to support the hearing officer's conclusion that the claimant gave timely notice of injury to Company A. It could reasonably be inferred from the evidence that the "unrelated workers' compensation injury" mentioned in BG's letter of December 14, 1992, was the "stress" claim the claimant said she reported to BG on December 10, 1992, which was within 30 days of the date of injury. The conclusion is buttressed by the fact that the carrier had notice of the mental trauma claim by December 18, 1992, also within 30 days of the date of injury. Although it appears from the findings of fact that the hearing officer based his determination of timely notice on the claimant's report to LH, it has been held that a judgment of a trial court must be affirmed if it can be sustained on any reasonable theory supported by the evidence authorized by law. Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980); Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ dism'd).

Having determined that the evidence sufficiently supports the hearing officer's determination that timely notice of injury was given to the employer, it is unnecessary to determine the correctness of the hearing officer's conclusion that the employer had "actual knowledge" of the injury because under Section 409.002 proof of the employer's "actual knowledge" of the injury is not required when timely notice of injury is given to the employer by the employee or person acting on the employee's behalf. Thus, the hearing officer's conclusion on the employer's "actual knowledge" of the injury may be disregarded as unnecessary to the hearing officer's decision. *See* Texas Indemnity Insurance Company v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940).

DISABILITY

Section 401.011(16) defines "disability" as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

The claimant testified that as a result of the work-related incident of November 21st she became "panic stricken" and "mentally disabled," and that the "stress" has affected her "horribly." She added that she is "very in duress." When the claimant was asked "from this particular injury, when were you first disabled," the claimant responded "from the stress - I would say that day. . . ." The claimant was also asked whether she was off work because of her carpal tunnel syndrome to which she replied "[a]nd also the fact that I have stress because they have offered me part-time -- they have tried to get me to go back to work part-time and I told them because of the stress I can't." The claimant further testified that she is not "physically or mentally" able to go back to work. The claimant acknowledged that she has been paid temporary income benefits (TIBS) for her carpal tunnel claim.

A coworker testified that the claimant was on the verge of a "breakdown" when the claimant called her on November 21st and told her about the incident with JS that day. The claimant's mother testified that since the incident of November 21st the claimant has been confused, fearful, paranoid and severely depressed. The claimant's

fiance testified that since the incident of November 21st the claimant has been a "totally different person," and that she fears for her life and is afraid to go back to work.

In a medical report for a date of visit of November 27, 1992, (Dr. P) diagnosed carpal tunnel syndrome and wrote that the claimant could return to limited duty on December 7, 1992. In a letter dated December 16, 1992, Company A wrote to Dr. P setting forth requirements of several modified work positions it intended to offer to the claimant and requested Dr. P's opinion on whether the work accommodated the claimant's physical restrictions. Dr. P responded that one of the positions offered was acceptable. As previously noted, the claimant said she was unable to accept the position because of her "stress" related condition. The claimant had carpal tunnel surgery sometime in December 1992. On December 27, 1992, Dr. P referred the claimant to (Dr. K), a psychologist, to help her "deal with her stress problems relating to her work." In a letter to the Commission dated March 11, 1993, Dr. K stated that JS's behavior toward the claimant on November 21st pushed the claimant "emotionally over the edge." Dr. P diagnosed "Post-Traumatic Stress Disorder (P.T.S.D.), Major Depression, Single Episode." In a letter to the Commission dated June 21, 1993, Dr. K said that his letter of March 11, 1993, "is still diagnostically current, reliable and valid."

Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's determination that the claimant has had disability through June 23, 1993, as a result of her mental trauma injury of [Date of Injury], and we further conclude that that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The carrier cites no authority for its proposition that a claimant "cannot be disabled from two different injuries at the same time." The evidence supports a finding of disability from the mental trauma injury. Disability resulting from the carpal tunnel injury was not an issue at the hearing. However, it is clear that the hearing officer did in fact consider the effect of the carpal tunnel injury on the claimant's ability to obtain and retain employment at preinjury wages because Finding of Fact No. 9 states:

Although the claimant also sustained a work-related carpal tunnel injury which manifested itself during the week subsequent to the [Date of Injury], incident mentioned above, the claimant has been unable to obtain and retain work at her preinjury wage as a result of the mental trauma injury she sustained on that date.

Finding of Fact No. 9 is supported by the claimant's testimony that she was unable to accept the modified work offered to her because of her stress related condition, not because of her carpal tunnel injury.

We do agree with the carrier's contention that it is not liable to pay TIBS twice for two different injuries for the same time period. Pursuant to Section 408.103 the amount of a TIB is equal to 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage (with special provision for low income workers and subject to minimum and maximum amounts). As stated in Section 4.23 of Montford, A Guide to Workers' Compensation Reform, "TIBS are designed to assist the employee with respect to a "shortfall", so to speak, in the employee's wages due to a compensable injury (i.e., to replace those lost wages) during rehabilitation or until the employee reaches maximum medical improvement." In the instant case the hearing officer did not order the carrier to pay the claimant TIBS twice for two injuries for the same time period. Instead, the hearing officer decided that the claimant was entitled to TIBS from December 4, 1992, until disability ends or maximum medical improvement is reached, and that TIBS which have accrued but are not yet paid will be paid in a lump sum, with interest. Thus, under the hearing officer's order, TIBS which have been paid need not be paid again for the same period.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Appeals Judge

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Joe Sebasta
Appeals Judge