

APPEAL NO. 950011
FILED FEBRUARY 15, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 29, 1994, to determine whether the claimant timely reported an injury to his employer and, if not, whether good cause existed for failure to report timely; whether the claimant sustained a mental trauma injury on _____; and whether the claimant sustained disability. The hearing officer determined that the claimant had good cause for his failure to timely notify his employer of his alleged injury; however, he also determined that the claimant did not sustain a mental trauma injury in the course and scope of his employment on _____, and that the claimant did not have disability. In his appeal the claimant basically cites to evidence which he says supports his position, and contends that the hearing officer overlooked certain evidence. The carrier in its response objects to the claimant's appeal because he failed to serve a copy on carrier. We have held, however, that the failure to serve the other party does not affect the timeliness of the appeal but rather extends the time for response. Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. The carrier also contends that the claimant's appeal does not sufficiently rebut each issue upon which review is sought. We find that claimant's appeal clearly requests this panel's review based upon the sufficiency of the evidence to support the hearing officer's decision. See, e.g., Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. However, the claimant attaches to his appeal numerous documents, the majority of which are in the record below but some which are not. The Appeals Panel is limited in its consideration of evidentiary matters to the record developed at the hearing. Section 410.203(a)(1). We further note there is no indication that these items, which predate the hearing, were unknown or unavailable and it also does not appear that they would have caused a different result. See Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992.

DECISION

Affirmed.

The claimant, who was 67 years of age at the time of the hearing, had been a groundskeeper for four years at an apartment complex owned by (employer). On a date which he recalled as September 2, 1993, claimant said he observed his supervisor, (Mr. E), and another employee, (Mr. C), remove a tire from a vehicle which had been stolen and abandoned on the grounds of the complex. Because he believed this was wrong, the following day he went into the office and reported the incident to (Ms. P), the assistant manager. After he left he said Ms. P spoke to Mr. E, who then came out to the area where claimant was working and told claimant not to talk to Ms. P about anything else; claimant said Mr. E was angry and upset, and told him, "If you do, you'll wish you hadn't." Claimant acknowledged that Mr. E did not strike or attempt to strike him, but that he was afraid because Mr. E was younger than he and "capable of doing anything."

From that point forward, claimant said he became increasingly nervous and afraid, both for himself and for his family, although he did not tell his wife or other family members what was troubling him. He continued working but he became withdrawn and anxious, his hands shook, and he lost a significant amount of weight. Claimant's wife, Ms. P, Mr. E, Mr. C, and the property manager, (Ms. S), all recalled the change in claimant's demeanor and appearance over the ensuing months.

Mr. E recalled the incident involving the car; both he and Mr. C testified that the car had been abandoned on employer's property, that the police were called and the owner located, and that the owner told Mr. C he could have the spare tire because the rim was bent and he would be getting a new one. Ms. P stated that the claimant was upset; that he felt that what Mr. E had done was wrong, and that he (claimant) was a part of it. Ms. P further said she spoke with Mr. E, who told her the whole incident was a misunderstanding and that he would talk to claimant. Conversely, Mr. E testified that no single event prompted his telling claimant not to talk to Ms. P, although he said he had had a recurrent problem with claimant "running to [Ms. P]" every time he had a concern, rather than talking with Mr. E, his direct supervisor, or Ms. S, who was Mr. E's supervisor. Mr. E also denied that he spoke to claimant in an angry or threatening way. Claimant's wife, who said she saw Mr. E talk with her husband, characterized Mr. E as looking angry and not speaking calmly; she said she could not hear everything that was being said other than Mr. E saying to claimant, "I'm your boss."

Ms. P also recalled concerns claimant had had regarding the fact that he was being given added job duties, and Ms. S testified that she had heard complaints from Mr. E about things claimant did not want to do. Ms. P also said claimant spoke to her of his concerns that Mr. E and a friend of his who was seeking a job were trying to get rid of him. She could not recall when the latter event happened, but thought it was after the September incident.

According to claimant's wife, in November 1993 claimant was seen by his regular doctor, who thought he might have a kidney infection. The same month, claimant went to the emergency room at (Healthcare Provider) because, she said, he was nervous and did not want to go to work but would not say why; medical records from this visit are not in evidence. Claimant stopped working on May 4, 1994, and in June began treating with a psychiatrist, (Dr. W). In a July 21, 1994, letter Dr. W wrote that claimant was hospitalized in (Healthcare Provider) for treatment of severe depression and that "A review of the history of the present illness indicates that this episode of depression began last Fall in connection with problems [claimant] was having at work." On September 1st he wrote that he wanted to clarify that claimant's condition started in _____, "when a man at his job verbally abused [claimant] and severely traumatized him." Carrier's claims specialist wrote Dr. W, noting that he had earlier stated that one specific incident did not cause

claimant's problems, and that it was a result of a series of events. In response, Dr. W, in a letter dated October 19th, denied that his responses had been contradictory, and stated:

. . . it surprises me that it makes any difference to your company whether it was a single stress or a series of stresses. Apparently, it was both. Apparently, there were a series of stresses and problems at his job punctuated by one really big one . . . There were a series of traumas, with one major one.

Claimant was also seen by (Dr. D), who wrote on September 21, 1994, that the claimant had major depression which he believed was causally linked to the incident with Mr. E, stating that "[w]hile this is an unusual situation, in going over the records provided by various physicians as well as talking with the patient's daughter and the patient's wife, I believe that the incident in question did cause this depressive reaction." He recommended further psychotherapy as well as neurological investigation to address claimant's hand tremors, which he said were drug induced.

On October 3rd claimant was seen by carrier's doctor, (Dr. G), a psychiatrist who examined the claimant, spoke with his wife and daughter, and reviewed his medical records. Dr. G concluded in his report that the September 1993 incident was not the sole producing cause of claimant's condition. Reciting claimant's history of no prior psychiatric or nervous problems, as well as claimant's prior outgoing personality as attested to by his wife and daughter, Dr. G stated:

When you take all of these factors into consideration, it is very difficult for me to believe that this type of person could suddenly become so fragile and sink into a deep paranoid depression because of a verbal exchange . . . [Claimant] definitely has some emotional problems. [Dr. W], who is certainly a very reputable physician, diagnosed [claimant] as having a "major depressive episode, single episode, with psychosis, severe," which I certainly would not disagree with. However, I do disagree with the causation being related to the _____, event . . . It is my opinion that he also has some form of an organic illness; he certainly showed organicity during my examination . . . [I]t would be my recommendation that he needs a good neurological workup to rule out things like multi-infarct dementia, tumor, pseudodementia, organic personality syndrome or organic mood syndrome.

It has long been held in Texas that mental trauma can produce a compensable 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). Further, the Texas Supreme Court has held that damage or harm caused by repetitious mental traumatic

activity does not constitute an occupational disease for purposes of compensability under the workers' compensation statutes. Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979). *And see* Aetna Casualty & Surety Company v. Burris, 600 S.W.2d 402 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.), in which the court held that where the evidence demonstrated repetitious mental trauma activities, the diseases or infirmities complained of (which included headaches, hypertension, chest pains, and depression) were ordinary diseases of life to which the general public is exposed and thus were not compensable.

The carrier's argument at the hearing was that the claimant's injury was not compensable, both because it resulted from a series of events, and because it arose out of a legitimate personnel action. The hearing officer in reaching his decision relied upon the first argument, finding in essence that the claimant's mental trauma injury was not the result of a single incident or event occurring on _____. Where the sufficiency of the evidence to support a hearing officer's decision is called into question, it is this panel's responsibility to consider, analyze, and weigh all the evidence to see if the record reflects evidence of probative value and force supporting the fact finder's decision. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st. Dist.] 1988, no writ).

The evidence in this case included the claimant's own testimony that he was traumatized by Mr. E's threatening actions on _____, and that that incident caused the ensuing problems which included nervousness, depression, and weight loss. (That the claimant suffered from these problems does not appear subject to question, as all witnesses attested to the change in claimant's physical and mental state, and all medical reports document a mental disorder.) The claimant also contended that no previous events caused him stress. Claimant's wife's testimony corroborated his. Mr. E testified that he did not speak to the claimant in an angry or threatening way. Ms. P testified that claimant was concerned that he was being required to perform additional duties, and also mentioned a concern by claimant that he could be forced out of his job. As to the medical evidence, Dr. D firmly believed that claimant's depression was caused solely by the _____ incident; Dr. W appeared to believe that claimant suffered a series of stresses which culminated in the confrontation with Mr. E; and Dr. G disagreed that a single incident as described by the claimant could result in such severe problems, and he recommended further testing to rule out organic problems.

The foregoing evidence is conflicting. However, the 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Where there are conflicts or inconsistencies in the evidence it is the hearing officer's job to reconcile them. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ)]. (We note at this point that, although his summary of the evidence was brief, the hearing officer stated that he considered all the evidence in the record.) The hearing officer may believe all, part, or

none of any witness's testimony or any other evidence. Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). This includes medical evidence as well as lay testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's decision will be overturned only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We believe that the record below, even with its conflicting evidence, contained sufficient evidence to allow the hearing officer to reach the determination which was made in this case; that is, that the claimant's mental trauma injury was not compensable under the 1989 Act but rather constituted an ordinary disease of life, and we therefore find no error in the determination.

Finally, we find no error in the hearing officer's refusal to find disability, as the 1989 Act states that a claimant can have disability (defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage") only where a compensable injury is found. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge