APPEAL NO. 950475
FILED MAY 11, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). It is one of two decisions resulting from a consolidated hearing held on two dates of injury and two carriers for the same employer. The hearing was held in five sessions over several months, on September 12, October 12, and October 13, 1994, and on January 18 and 19, 1995, with [hearing officer], hearing officer, presiding. The substance of claimant's claim was that while employed in maintenance work by (employer), he sustained a mental trauma injury on [date of injury], due to the electrocution death of his immediate coworker and friend. The carrier on this date was American National Fire Insurance Company (Carrier). A second decision against a successor carrier was the subject of Texas Workers' Compensation Commission Appeal No. 950463, decided May 3, 1995.

The issues for the hearing officer to determine were whether claimant sustained a mental trauma injury on [date of injury]; the correct date of injury; whether claimant gave timely notice to his employer of his injury, and, if not, whether he had good cause; whether claimant's "filing requirement was extended because of employer's or carrier's failure to file a written report of injury when the employer or carrier had been given notice, or had actual knowledge of an injury"; and whether claimant had disability (the inability to obtain and retain employment equivalent to his preinjury wage) due to the injury.

The decision of the hearing officer had to be corrected with respect to several dates by an order nunc pro tunc issued March 13, 1995. As corrected by this order, the decision of the hearing officer may be summarized as follows: that claimant had not proven that he sustained a post-traumatic stress disorder (PTSD) or other mental trauma injury on [date of injury], and that claimant suffered from mental illness "as an ordinary disease of life"; that claimant had not given timely notice of his injury to his employer within thirty days of [date of injury], had no good cause, and that no one in a supervisory or management capacity for the employer had actual knowledge of the injury claimed by claimant prior to October 15, 1992; that the claimant had not timely filed a claim within one year with the Texas Workers' Compensation Commission (Commission) and had no good cause; and that limitations were not tolled in accordance with Section 409.008. The hearing officer also found that claimant's inability to work after [date of injury], was due to "something other than" any injury he sustained while working for the employer.

The claimant has filed two documents within the 15-day deadline for appealing the decisions of the hearing officer, and both will be considered. Documents filed after the 15-day deadline for filing an appeal are untimely as appeals and have not been

considered. *See* Section 410.202. The claimant asserts that the overwhelming medical evidence proves that he sustained a mental trauma injury on [date of injury]. The claimant argues that he should not have been allowed to participate in the contested case hearing due to his heavy sedation and mental state. He states that the private health insurer acknowledged his PTSD as of February 13, 1993, and points to medical treatment notes reflecting the same diagnosis. He argues that his performance declined after the incident. Claimant argues that the employer should not have been permitted to have both its attorney and another employee of the employer who was going to be a witness present in the hearing. He complains about the quality of assistance by the ombudsman. Claimant argues that the evidence shows that the employer was aware of the injury, and that it failed to report it. He argues he was incapable of conducting himself with reasonable prudence as an ordinary person would have. He charges there were numerous other irregularities, and argues that it was unnecessary for the hearing officer to appoint another doctor to examine him, and then deny his request for a continuance.

The carrier responds that the decision should be affirmed, and that claimant had a preexisting mental condition that was ongoing, and that his reaction to his coworker's death was merely a continued symptom of his underlying disease. The carrier notes that no good cause was shown for giving notice of injury nearly 15 months after the accident. The carrier argues why the decision should be affirmed.

DECISION

We reverse the hearing officer's determination that claimant did not sustain a compensable mental trauma injury on [date of injury], and that he had mental illness as an ordinary disease of life, and render a decision that claimant sustained a mental trauma injury on that date. We affirm the hearing officer's determination that Carrier is discharged from liability because claimant did not give timely notice to his employer, did not have good cause, and that the employer did not have actual knowledge that claimant had a work-related injury. We affirm the hearing officer's determination that the limitations period for filing a claim was not tolled in this case. We affirm the holding that claimant did not have disability, noting that there was no proof that the claimant lost wages for the period of time that he was out of work immediately following the [date of injury], injury, and further that there is sufficient evidence to support the decision for the period after claimant left work.

FACTS

(1) THE FATAL ACCIDENT OF [DATE OF INJURY]

Claimant worked for the employer since 1988 in facilities maintenance. Claimant's wife also worked for the company. In late 1991, he had been promoted on a trial basis to the manager of the department, because the manager at the time left the company. Claimant worked under the supervision of [Ms. J], and later [Ms. HF]. Ms. J was the human resources manager for the employer but had been asked to lend assistance and oversight when claimant became facilities manager.

The facts of the accident leading to claimant's trauma were undisputed. As of [date of injury], the other employee of the department was [Mr. H], a close friend of claimant who was also engaged to his wife's sister. Claimant said on the morning of that day, Ms. HF asked that a lighting problem in her office be repaired. Claimant said he was up on the ladder attempting to resolve the problem and Mr. H came along and tapped his calf and said he'd do it. Claimant said that when Mr. H tried to disconnect a wire nut, sparks flew, and claimant knew he had been electrocuted. He carried Mr. H down from a ladder, although Mr. H said to him, "Let me fall." He stated that he laid Mr. H, who was unconscious at this point, down on the ground and began CPR, until the paramedics came. Claimant said Mr. H died in his arms.

Claimant said within 30 minutes he was talking about the incident with [Mr. G], the company vice president. He stated he was crying and extremely upset, and Mr. G was very concerned, and urged him to take time off and asked if he had a clergyman or therapist he could see. Mr. G testified and agreed that claimant was very upset, and that he told claimant to take time off and that he was concerned about his well-being. He agreed further that when claimant returned to work, he was still upset by Mr. H's death. The record indicated that claimant was off work from the date of the accident through September 28, 1992.

The transcribed statement of Ms. J indicated that when she saw claimant after the incident, he was sitting there saying nothing. She stated that the Employee Assistance Program (EAP) services were offered to claimant. Ms. J stated that the employer found out around 11:00 a.m. that Mr. H had died.

(2) FACTS UNDERLYING ISSUES OF NOTICE TO EMPLOYER

Mr. G indicated that leave time with pay was offered to employees under its bereavement policy, and claimant's time off was consistent with this. Mr. G indicated that during the leave he contacted claimant's wife, asking if there was something they could do to get claimant back into the routine at work. Mr. G stated:

> We were obviously concerned that . . . [claimant] would be put in an environment that would be most conducive to him getting back to--- or getting over, recovering from, you know, the trauma of the accident.

Thus, when the claimant returned, he met with Mr. G and was reassigned to another department to pack goods to be shipped. Mr. G described the meeting with claimant thusly:

> Well, we talked about positions that [claimant] could do within the company that back into the same situation or to be reminded of the accident . . . something probably similar to when a person has a workmen's compensation injury and its recommended and suggested they come back to light-duty work. It was in that light we thought about positions.

Claimant began counselling in October 1992 through the employer's EAP, which witness [Ms. W], the human resources director since August 1993, said did the utilization review of counselling through [Counseling Center]. A letter from Ms. J, dated September 29, 1992, to [Counseling Center], memorializes an agreement that employer would cover all mental health claims through October 29, 1992, with [Counseling Center] being responsible for utilization management of medical necessity for treatment thereafter. Ms. W testified that while the employer might process payment, it would not have received [Counseling Center]'s records or been aware of the details of claimant's diagnoses, due to confidentiality of the EAP counselling. Claimant stated that counselling occurred once a month[1] with a psychiatrist, [Dr. W], and weekly with a licensed psychosociate, [Mr. T], M.S., who was in the same practice. Claimant and other witnesses confirmed that he did not ever go back to facilities maintenance, but was assigned to two other departments after the packing job, performing work he had not done before. Both claimant and Ms. W testified that claimant expressed frustration with the fact that he was moved around so much. Mr. G, Ms. J, and Ms. W testified that they were aware of performance problems with claimant's ability to do the tasks he was assigned. However, claimant did not expressly attribute such performance declines to the accident or any medication until December 2, 1993, his last day with the employer. [Ms. M], who supervised claimant in his second placement for approximately six months, stated in an interview with the adjuster that claimant said he was having trouble concentrating due to the difficulties with Mr. H's death.

There was considerable testimony about claimant's performance on the job before and after [date of injury]. Ms. J stated that she would not say there were

[1] Dr. W's records indicate that he saw claimant once every month for "medical management", and that Mr. T did the primary consultation with claimant.

problems, but there were frustrations. When asked for specifics, she recounted one incident in which furniture was not restored in an "organized manner" to a room that had been painted, that a door lock on the employer's company house had not been correctly installed, and that Mr. H had not correctly installed another door at a time when claimant was on vacation. Ms. J's transcribed statement indicates that claimant did not have administrative abilities.

A memo about claimant by Ms. J apparently generated around March 1992 cited not only areas of improvement but several areas of strength. A memo written by Ms. HF on July 17, 1992, cites deficiencies in performance of both claimant and Mr. H. However, Ms. HF notes that claimant has a positive attitude, a valuable knowledge of the building, and could perform satisfactorily with additional training. A fair review of formal performance evaluations prior to the accident does not indicate that claimant received less than a "competent" overall score. In April 1991, claimant's evaluation included marks in the "commendable" and "distinguished" categories. The record, through written evaluations and statements of various coworkers, indicate that claimant was regarded as personable, nice, and well-liked, both before and after the accident.

A transcribed interview with [Mr. GB], Operations Manager for the employer, stated his awareness that claimant had problems on accuracy of orders in the shipping department.

Mr. GB stated that while claimant did not say he was unable to do his job as a result of such problems, that he indicated that recovery from Mr. H's death was a matter he was working through with counselling. Mr. GB said that had it been him personally, it would be hard for him to come back to the same place each day and be reminded of the incident.

Finally, claimant was transferred to the personal computer (PC) division of the employer and his supervisor there, [Mr. C], stated that claimant never appeared able to comprehend software, as opposed to hardware, and made critical mistakes. Complaints about claimant's performance culminated in a poor performance review by Mr. C on December 2, 1993, coupled with the recommendation that he not remain in the PC department. Mr. C agreed that he realized claimant was undergoing counselling for emotional problems relating to Mr. H's death, but claimant never stated that he was having work performance problems related to this or his medication until the date of his unfavorable evaluation. Claimant and Ms. W agreed that since claimant was not going to be able to return to the PC area, that Ms. W would work up a "severance" package for claimant to consider (which the company considered equivalent to a voluntary termination or layoff arrangement), or that claimant also had an option of going to

another department for less pay. Claimant was urged to take the next day off to consider his options.

Claimant said he had a regularly scheduled appointment with Dr. W on December 9th, and at that time was told he was getting worse and taken off work. There was testimony from Ms. W that claimant's wife said the unfavorable evaluation had set him back a year on his therapy. Claimant stated that December 9, 1993, was the first awareness he had from his doctor that he had a diagnosis of PTSD, although he also stated that Mr. T had earlier discussed the possibility with him.

Claimant, after this, asserted a worker's compensation claim. There is somewhat conflicting evidence as to why the employer completed a TWCC-1 with a December 2, 1993, date of injury. Claimant denied he told the woman completing the form, [Ms. L], that the date of injury was anything other than [date of injury]. Ms. L had no recollection of what claimant told her but stated it would be reflected on notes she gave to Ms. W. Ms. W said she personally completed the TWCC-1 because the company had never had a "mental trauma" injury claimed before and "we weren't sure how to do it." Undisputed was that claimant filed a claim for compensation with the Commission dated December 13, 1993, stating that his date of injury was [date of injury]. While Ms. W stated that claimant told her on December 14th that his date of injury was December 2, 1993, however, the employer filed a revised TWCC-1 at the end of December 1993, accompanied by a letter from claimant asserting that the December 2nd date of injury was in error and the correct date was [date of injury].

[Dr. B] testified at the third session of the hearing that claimant would have known he had mental disorders as a result of Mr. H's death somewhere in the middle of 1993.

(3) FACTS UNDERLYING THE OCCURRENCE OF A COMPENSABLE MENTAL TRAUMA INJURY, AND DISABILITY

Claimant did not deny that he had been treated in the past for both depression, and on the occasion for bereavement. Claimant stated that prior to 1982, he did not have emotional problems or counselling. In 1982, a close childhood friend of claimant's died and he sought bereavement counselling from a [Dr. T]. He said this lasted two months and he received medication. He stated that another friend died in 1984 but no counseling resulted. In 1985, apparently in relationship to marital problems stemming from an affair he had, claimant said he was hospitalized in a psychiatric hospital for two weeks following an apparent overdose of Benadryl and alcohol. Claimant said he and his wife had been going through marriage counselling. There was no evidence, nor did claimant testify, that he had any treatment between the 1985 incident and late 1990.

Claimant said he was treated by his family doctor, [Dr. D], beginning October 1990, for depression and what claimant described as work-related stress and panic attacks, and that Dr. D prescribed Prozac and other antidepressant medication. Claimant was referred to psychiatrist [Dr. P] for treatment[2].

Dr. P's records indicated he first saw claimant on November 25, 1991. Dr. P recited that claimant had seen Dr. D over the previous year-and-a-half relating to depression. Dr. P's records show the following dates of consultation after his initial interview: December 9, 1991 and January 23, February 19, April 9, and May 18, 1992. In summary, Dr. P's notes reflect the following:

-11/25/91: Dr. P noted treatment by Dr. D, that claimant has taken Prozac for 12 months, and that he has had panic attacks for a month, along with a sense of impending doom and decreased appetite. Noted that claimant considers he works for a generous company. Prozac and Desynel prescribed.

-12/09/91: Claimant related that smoking was a problem, sleeping better w/medication. Mood - still moderately depressed. Continued panic attacks. Dr. P added Xantax to medications.

-1/23/92: (rescheduled from cancelled Dec. 30th appt): Panic still there, stress at work increased. Still anxious. Is decreasing smoking. Dr. P noted depression with a "situational component." Mood noted as mildly depressed with a "blunted" affect. Dr. P increased Prozac and Xantax dosages.

-2/19/92: Claimant reports rage outbursts; mood mildly depressed, blunted affect (controlled and reserved). Sleeping well. Progress noted as unchanged. Prozac discontinued, Zoloft prescribed.

-Two March appointments cancelled due to work obligations.

-4/9/92: Sleeping well, temper easier to control. Has not smoked in 3-1/2 weeks. Mood noted as mildly depressed and improved.

-5/18/92: "Asking existential questions - midlife crisis?" appeared in Dr. P's entry. Claimant feels inner frustration, sleeping well, no thoughts of violence

[2] We note that claimant's exhibit 1 was submitted and described as Dr. D's records. In fact, they are treatment notes of Dr. P.

> although somewhat more irritable, mildly depressed. Impression of claimant recorded by Dr. P as "stable."

Claimant said he did not go to Dr. P after May 18th because he felt much improved. A scheduled appointment in June was cancelled. In a March 2, 1994, letter, Dr. P said that claimant's diagnosis at the time of his earlier treatment was "major depressive disorder, recurrent, moderate with significant components of anxiety features." There are no records of any treatment by any doctor between May 18th and the day after Mr. H's electrocution. None of Dr. P's records described claimant as having PTSD, nor were any records with this diagnosis produced for the time period prior to the electrocution.

Claimant stated he saw Dr. P the day after Mr. H's death, and thereafter until early October 1992, when he was advised he had to go through the employer's EAP program,[3] and he was thereafter treated by Dr. W and Mr. T. Dr. P's records clearly identify Mr. H's death as a disturbing event to claimant, and that he thereafter had sleep difficulties, suicidal thoughts, guilt, nightmares and "moderate" depression relating to the incident. Dr. P also noted that claimant's affect was blunted. Dr. P doubled claimant's Zoloft dosage on the day after the accident and maintained it at the higher level. Xantax and Desynel were also prescribed. Dr. P recorded a statement from claimant's wife to the effect that claimant had wept after the death of his friend in 1982 and "lost it." Dr. P's September 21st notes indicated that claimant had thoughts of trading places with Mr. H.

Dr. P's March 2, 1994, letter opined that claimant's depression and anxiety were exacerbated by Mr. H's electrocution. He said that prior to this, claimant was much improved, stabilized, and functioning well. Dr. P characterized claimant as significantly depressed after the accident. Dr. P stated that he last saw claimant on October 5, 1992, at which time he appeared moderately depressed. Dr. P's notes of that date reflect that claimant was angry and found it tough to go to work, and that he felt the employer's attitude toward him had changed.

On October 15, 1992, Dr. W did claimant's intake interview. A reference is made to a "history" of psychiatric problems, prescription of Prozac by family doctor in 1990 and subsequent referral to Dr. P, and claimant's description of himself as a weekend alcoholic who quit drinking in 1988. Dr. W stated that the "most significant part of his history" was Mr. H's electrocution. Dr. W stated that claimant had numerous signs of

[3] This was essentially undisputed, and corroborated by Ms. J's transcribed statement, although witnesses for the employer denied that a specific referral was made to Dr. W or that the employer was involved with claimant's treatment other than to process payment.

depression that were "clearly exacerbated", including sleep disturbance, anhedonia (loss of pleasure), guilt, gloom, helplessness, and other symptoms. Suicidal ideation was noted, although not acute at that time. The diagnostic impression was major depression, recurrent, acute exacerbation. Dr. W switched claimant from Zoloft back to Prozac.

On October 23, 1992, Dr. W saw claimant and then referred him to Mr. T, a licensed psychosociate (no Ph.D. degree) in the same practice, for weekly psychotherapy. Claimant's Prozac dosage was increased.

From Dr. W's records, it appears that he saw claimant also on March 4, June 3, August 5, October 5, and December 9, 1993. Dr. W noted as follows:

> -3/4/93: Increased Prozac has worked better. Noted that claimant had been seeing Mr. T since referral but he has no notes from Mr. T on that.
>
> -6/3/93: Claimant feels intimidated by "legal goings on" at work, fears his testimony in a pending lawsuit would be beneficial to plaintiff rather than company and fears for his job.[4]
>
> -8/05/93: notation that court case weighing on claimant was settled out of court.
>
> -10/5/93: Claimant somewhat dysphoric, visits changed to every three months.
>
> -12/9/93: Noted that claimant was laid off; now has partial disability, not able to function at full level.

Dr. W increased claimant's Prozac dosage on December 27, 1993, February 21, 1994, and March 7, 1994. Dr. W noted that claimant was being treated for PTSD, with a projected disability period of 12 months. Dr. W subsequently referred claimant to [Dr. B], a psychiatrist in the same practice.

Dr. W's deposition on written questions, given August 30, 1994, stated that suicidal tendencies were not a major concern in his treatment of claimant, that claimant's condition of acute exacerbation of a major depressive disorder preceded his PTSD (although both were really treated simultaneously), that claimant's "weekend alcoholism" prior to 1988 was in the history only and not causally related to PTSD or exacerbation of depression, and that the effect of claimant's preexisting depression would amount to 25% to 35% of a factor of claimant's condition after [date of injury], with the rest attributable to the accident.

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[4] Claimant testified that Mr. H's family had filed a wrongful death lawsuit in which he was called upon as a witness.

Regarding Mr. T's treatment, some of his notes are included in materials identified as Dr. W's records. Those notes vary in typeface:

-2/18/93 (transcribed 3-2-93): Recurrent nightmares noted, feelings of anguish and guilt related to repeated discussions about Mr. H's death at work. Claimant encouraged not to put his feelings aside.

-6-3-93: Mr. T described symptoms as consistent w/PTSD; claimant's repetitive thought patterns and advice for ending those was noted; difficulty in sleeping; blame of workplace for ongoing difficulty in dealing with loss; claimant has helplessness, hopelessness, wants to be left alone.

A series of Mr. T's notes from January to June 1994 are typed in a uniform typeface. Very briefly described, these notes indicated some discord relating to claimant's father becoming increasingly involved in his case. The notes documented claimant's continuing depression.

Mr. T's testimony at the hearing was very brief and did not go into his opinions about claimant's mental state. Mr. T stated that he kept notes during his therapy session or wrote them post-session, that he did not necessarily dictate his notes right after the session, that the gap between treatment and dictation "could" be up to two months, and that once he dictated his notes he discarded the originals. This testimony was brought out when Mr. T was asked about answers to his deposition on written questions in which Mr. T indicated that notes for his treatment of claimant from December 1992 through November 1993 were dictated in 1994, although prior to August 5, 1994. The questions inquire as to whether the notes were "transcribed" prior to August 1994, and if not, when they were dictated. Mr. T stated that he initially diagnosed PTSD on December 14, 1992, and that he had talked to claimant at that time about leaving work entirely. On August 5, 1994, Mr. T wrote a "To Whom It May Concern" letter stating that claimant was treated for major depressive disorder with PTSD being added as a component of the original problem.

None of Dr. P's, Dr. W's, or Mr. T's records indicated a current problem with alcohol, or that claimant was drinking at all, and claimant testified that he had no alcoholic beverages since 1988, and had never been treated for alcoholism.

Claimant stated that another friend died in October 1993 but he did not seek counseling relating to this. Claimant said that the difference between the other deaths in his life and Mr. H's was that he was there when Mr. H's fatal injury occurred.

[Counseling Center] "Treatment Plan Update" forms summarize claimant's complaints in a "summary of activity" portion of the form. On March 19, 1993,

complaints of anxiety, guilt, depression, and problems sleeping related to Mr. H's death are recorded. Nightmares are listed as a symptom on the form dated September 21, 1993. A "Treatment Plan Update", showing authorization of treatment by Mr. T for a period from 2-18-93 through 4-18-93, recorded a diagnosis of PTSD.

In July 1994, Dr. W referred claimant to Dr. B because he felt him to be more experienced in the treatment of PTSD. Dr. B testified personally at the third session of the hearing, having been subpoenaed by one of the carriers, and by telephone at the fifth session. Dr. B had tested claimant after his treatment began, using a scale developed by the National Center for PTSD referred to as a "CAPS" scale [Clinician-Administered PTSD Scale]. He found that claimant had PTSD based upon this scale, and testified that while an aspect of PTSD was delayed manifestation of the disorder, often after several months beyond the traumatic event, claimant's PTSD had probably been there from [date of injury]. Dr. B stated that he did not believe Dr. W had used the CAPS scale to test claimant. He testified that claimant's condition could have progressed to the point in December 1993 where he could not work.

Dr. B stated that while PTSD did not always accompany Major Depressive Disorder, the latter almost always accompanied PTSD. Dr. B stated that, based upon reasonable medical probability, claimant had sustained a mental trauma injury as a result of Mr. H's death, and that it was also in such probability a new injury. He stated that his opinion was unchanged by review of claimant's earlier treatment records or the knowledge that he had been previously treated for depression by Dr. P. He pinpointed [date of injury], as the stressor. He agreed that other matters going on in claimant's life during the course of his treatment would have a bearing on his current symptoms. Dr. B stated that Mr. T had the capacity to make diagnoses and investigate symptoms.

Asked about claimant's ability to participate in the hearing, Dr. B stated that he felt claimant's medications would not interfere at all with such participation. He stated that if a client had not had a drink in eight years, there would probably be no bearing from any previous drinking on his condition. Dr. B's review of his colleagues' records indicated to him that claimant had significant impairment from working as of December 2, 1993. However, Dr. B speculated both at the third session of the hearing, and again during the fifth session, that claimant could go back to work. Dr. B felt that going back to work for the same employer would revive PTSD.

[Dr. C], a psychiatrist, reviewed claimant's records for the Carrier. He did not examine the claimant. On July 11, 1994, Dr. C wrote a five page letter to Carrier's attorney. Dr. C stated that claimant had a "well documented history of alcohol dependency, major depressive disorder, and panic attacks." The specific records cited in Dr. C's report are those of Dr. P, Dr. W, and Mr. T. There are no documents

specifically cited in support of the conclusion that claimant had a "clearly established alcohol dependency" in remission. The letter speculated that it was "suspicious" that Dr. W did not diagnose PTSD until after December 2, 1993, although Dr. C acknowledged that Mr. T had earlier "mentioned" a diagnosis of PTSD. Dr. C stated that the documented signs and symptoms after [date of injury], were consistent with Major Depressive Disorder.

On September 30, 1994, after the first session of the contested case hearing (where records from Dr. B were exchanged for the first time), Dr. C wrote another letter which set forth a brief description of the diagnostic standards for PTSD. These are:

-a psychologically distressing event outside the range of usual human experience. [Dr. C appears to agree that the death of Mr. H was such an event.]

-recurrent and distressing recollections of the event, recurring dreams of the event, sudden feelings as if it were recurring, or intense psychological distress and exposure to events that symbolize or resemble an aspect of the traumatic event.

-persistent avoidance of stimuli associated with the trauma, manifested by three of the following: feelings of detachment, restricted range of "affect", diminishing interest in important activities, avoiding thoughts of or activities associated with the trauma, and inability to recall important events surrounding it.

-Increased arousal indicated by two of the following, lasting at least a month: sleep difficulties, irritability or outbursts of anger, difficulty concentrating, exaggerated startle response, hypervigilancy, reactivity to events that symbolize an aspect of the traumatic event.

Dr. C opined that he found "similarity" in claimant's symptoms described both before and after Mr. H's death. Dr. C also described the symptoms of a major depressive disorder. Dr. C concluded: "It remains my feeling that the stress of losing his friend possibly worsened a pre-existing depressive disorder that he had." [Emphasis added.] Dr. P took issue again with the PTSD diagnosis. On October 6, 1994, Dr. C wrote that an August 5, 1994, letter from Mr. T did not alter his opinion. His major area of disagreement is that Mr. T's letter does not document signs or symptoms specific to PTSD.

On October 20, 1994, Dr. C wrote that he had reviewed Dr. B's July 7, 1994, CAPS evaluation of claimant and that it documented the claimant as manifesting

symptoms which were "indeed specific and related to the diagnosis of PTSD." Dr. C noted that claimant's mental status exam was consistent as well. However, Dr. C cited some reasons why he opined that the document was written with an "intent to establish" the diagnosis of PTSD.

Dr. B, asked to comment on Dr. C's opinions, questioned the appropriateness of attempting to diagnose claimant's condition from a review of records, although he confirmed that he had been asked at times to render opinions based on records. Dr. B disagreed with Dr. C, and stated that he believed there was plenty of reason not to assume, as did Dr. C, that claimant's response to Mr. H's death was a recurrence of a prior illness.

On October 31, 1994, between the third and fourth sessions of the contested case hearing, the Commission received a letter from Dr. B, written October 22nd, requesting that claimant (who had not testified at that point, in some measure due to the lengthy testimony of other witnesses including Dr. B) be permitted to answer questions in a written format. Five weeks later, on December 7, 1994, the hearing officer *sua sponte* ordered claimant to submit to an examination by a Commission-appointed psychiatrist, [Dr. G]. The order recited Dr. B's letter as the reason, but further asked Dr. G to render his opinion "as to claimant's history, diagnosis, and prognosis in relation to the claimed dates of injury . . . as well as claimant's inability to work at any time since [date of injury], and the cause thereof."

Dr. G rendered a written opinion January 9, 1995; his letterhead indicated he was a "forensic psychiatrist." Dr. G observed that claimant had thinly veiled anger. Dr. G stated that claimant was able to talk about Mr. H's death (as of December 19, 1994, the date of his examination) without anxiety or remorse. However, Dr. G conceded that after two years in therapy, claimant should be having little difficulty in relating the event. Dr. G reviewed the records and concluded from Dr. P's records that claimant "abused alcohol." He stated that he concurred with Dr. P's note on September 16, 1992, that claimant had "adjustment disorder with depression vs. simple grief." Dr. G said he saw no signs of depression at the time of his examination. He stated that claimant's emotional response was somewhat blunted, which he attributed to medication. He found no evidence of problems with concentration. Dr. G concluded that claimant assumed a passive role in his relationship with his father and wife. Dr. G makes other observations:

-I found him to be very immature for his age, very spoiled, and very dependent.

-In my opinion, the benefit of him receiving workers' compensation benefits, long-term disability benefits, and Social Security benefits could result in a

considerable monthly income for the rest of his life, which is not at all stressful.

-Perhaps he should go back to working at a job similar to the one he loved so much at [retailer].

Yet another opinion was rendered by Dr. C on December 20, 1994. Dr. C noted that claimant had a grief reaction that temporarily worsened "his symptoms." Most of Dr. C's letter listed the records he reviewed. Dr. C opined that the PTSD diagnosis came in response to the "discovery" that claimant had a preexisting illness, and indicated he believed this was connected to claimant's entitlements for benefits.

Dr. G's written opinion was made available to the Commission and the parties shortly before the fourth and fifth sessions of the hearing. The claimant moved for continuance at this point to allow Dr. B to respond, and to seek the assistance of an attorney. The hearing officer denied the continuance, and although it is not clear was apparently of the belief that no party had the right to seek a response to the report of a Commission-appointed doctor who was not a designated doctor. The morning of the fifth session, the hearing officer reversed himself only to the extent of stating that an attempt would be made to reach Dr. B by telephone to allow a response. Dr. B, who it became apparent did not have Dr. G's letter in front of him and had not been expecting the call, stated from his recollection of the letter that claimant's thinly veiled anger or lack of remorse would not be significant in ruling out a PTSD. He stated that he believed that a "forensic" psychiatrist was one who gave testimony. Dr. B indicated that the aspect of claimant's dependency, as noted by Dr. G, had not come up in his dealings with claimant. Recalling that, Dr. G had indicated he had an interest in the outcome of the case, Dr. B stated that he had no interest in the claimant's case greater than the truth.

Dr. B stated that Dr. G's only clinical observations of claimant, the lack of anxiety and his anger, were not confirmatory of the nonexistence of PTSD, and could indeed be part of PTSD.

Ms. J testified that she was not of the impression, either before or after the accident, that claimant had mental problems that affected the performance of his job. She stated that his demeanor was such that he would be the same whether he was having a good day or a bad day, and did not let his problems show. The impressions of other coworkers have been summarized above; from testimony or transcripts in evidence, it was apparent that there were some people who knew that claimant had received some counselling prior to the accident, but several others who did not know that.

As to claimant's capabilities at the time of the fourth session of the hearing, when he testified, claimant said that in his daily schedule he was able to do a full range of daily and family activities and that he participated in recreational activities. He had not sought employment since December 2, 1993. He indicated he still had nightmares and bad headaches. He said he had lost weight after the accident but that this had stabilized.

WHETHER THE HEARING OFFICER ERRED IN FINDING THAT CLAIMANT DID NOT SUSTAIN A MENTAL TRAUMA INJURY ON [DATE OF INJURY]

We will note, at the outset, that there are no medical opinions characterizing claimant's mental problems, either before or after the incident, as an "ordinary disease of life." Neither was this argument advanced by the carriers, who argued instead that claimant had preexisting mental problems such that the [date of injury], incident did not constitute a new injury. In any case, we regard the claim here as one for accidental injury, not an occupational disease. *See* City of Garland v. Vasquez, 734 S.W.2d 92 (Tex. App.-Dallas 1987, writ ref'd n.r.e.); Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979). We cannot endorse the concept that mental illness is per se an "ordinary disease of life."

We believe that the great weight and preponderance of the evidence proves that claimant sustained a mental trauma injury on [date of injury]. We note in this regard that the burden was not necessarily on claimant to demonstrate that he sustained an entirely new condition, or that he specifically sustained PTSD on [date of injury]. It appears that the parties became somewhat deflected in proving or disproving the accuracy of that diagnosis, and the focus was somewhat removed from the occurrences of [date of injury]. The aggravation of a preexisting condition, including an underlying emotional condition, is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ); Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992. A carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. The evidence developed in this case concerning the extent of claimant's preinjury treatment falls short of establishing a preexisting mental illness of such extent that the reaction to Mr. H's death could be viewed merely as a continuation of that illness.

Further, the definition of "injury" includes those diseases which naturally result form the initial damage or harm; although much was made by Dr. C about the late

diagnosis of PTSD, the late manifestation of a PTSD would not necessarily be outside the scope of the definition of injury.

The compensability of "bystander" mental trauma in the case of a fatal injury to another was resolved in the case of Bailey v. American General Insurance Co., 279 S.W.2d 315 (Tex. 1955). Along with the analysis of "injury" discussed in that case, the Texas Supreme Court further noted that such a mental trauma should be considered within the definition of injury to further legislative intent to protect the employer who had "exercised the foresight to qualify under the terms of the Act and procured compensation insurance for the protection of both the employer and the employee" from defending an action at common law. Id. at 322.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Under the circumstances here, considering the medical and lay testimony given relating to claimant's mental status both before and after the death of his coworker, it is manifestly unjust to characterize claimant's reaction to Mr. H's death as either a reflection of a continued mental illness or an ordinarily disease of life. We believe that the dramatic event and claimant's subsequent depression goes beyond a simple response to continuing mental stimuli. *Compare* Texas Workers' Compensation Commission Appeal No. 94785, decided July 29, 1994. Mr. H's death was the traumatic event that was missing in the Maksyn case (cited above), in which the court held that Maksyn was experiencing continuing stress. Mr. H's death did not compare, as pointed out by claimant and underscored by Mr. GB's statement, to news about the death of a friend received over the telephone; this is especially true here given Mr. H's relationship to claimant. We note also that claimant had started the job that Mr. H was finishing when he was fatally injured. We believe that the record clearly indicated that claimant's reaction was beyond the "normal grieving process" and could reasonably be expected to be enhanced.

Furthermore, despite retrospective medical opinions noting that claimant had an "extensive" preinjury mental illness, the records actually indicate that claimant's preinjury treatment encompassed two months of bereavement and depression counselling in 1982; marriage counselling and a two-week involuntary hospitalization from a suicide attempt relating to claimant's extramarital affair; counselling for depression by Dr. D, the family doctor, beginning in 1990, the frequency of which was not established; and for the period from late November 1991 through May 1992, six visits with Dr. P, in which a clear trajectory of improvement is documented and from which his parting condition was a "mild" depression. There is an absence in claimant's

preinjury work evaluations, or statements of coworkers, of any manifestation of such "extensive" mental illness at the work place. We do not find the record as a whole consistent with the hearing officer's observation (and apparent reliance on) a "well established history of treatment for mental problems" or a "great deal of counselling from professional sources", such that claimant's reaction to Mr. H's death could be fairly characterized as merely a continuation, rather than a worsening, of any preexisting emotional distresses.

The record established that following [date of injury], claimant's frequency of treatment increased, his medication was greatly increased, he was reassigned away from the area of the fatal accident, and his work performance became problematical to a greater degree His treating doctor identified Mr. H's death as the primary cause of that treatment. The opinions disputing the occurrence of a mental trauma appear to rely on the perception that PTSD was belatedly diagnosed, and that diagnosis occurred when Dr. W and Dr. B discovered the extent of claimant's prior treatment. However, we note that Dr. W documented at his intake interview a history of claimant's prior treatment. Consequently, Dr. C's assessment that such was a belatedly discovery, and the PTSD diagnosis was responsive to it, appears to be without foundation.

Although we do not regard a finding of a compensable mental trauma injury as dependent on the accuracy of a diagnosis of PTSD, when there was considerable evidence of an aggravation and enhancement of a claimant's preexisting emotional problems, we note that symptoms corresponding to those in the literature in the record concerning PTSD, and to Dr. C's enumeration of PTSD symptoms, were documented in Dr. W and Mr. T's notes prior to that diagnosis. Even were one to conclude there was ambiguity in the date Mr. T's notes were transcribed, [Counseling Center]'s treatment plan made in early 1993 also indicated the presence of symptoms consistent with PTSD, including a diagnosis of such. As payment for claimant's care appears to have been made all along, speculation that claimant's PTSD is "suspicious" appears to be no more than that.

The hearing officer's decision may reflect the problem with interpreting medical evidence from the most recent (and most legible) records backwards. For example, the claimant's self assessment during Dr. W's intake that he was a "weekend alcoholic" appears to have literally mushroomed as records were reviewed by subsequent doctors, although drinking was not a factor at all in any actual treatment of claimant. A review of the record indicates that doctors brought in to later evaluate claimant's treatment records intertwined their analysis of claimant's mental trauma with an appraisal of the claimant's current ability to work. We observe that the occurrence of an injury, and disability, are two separate issues.

When the medical records are read from the earliest contemporaneous notes forward, the dramatic change in claimant's mental state after [date of injury], is pronounced. Dr. P's treatment records indicated that claimant moved from a moderate to a mild depression by May 1992, and that no active treatment was thereafter sought until after the accidental death. Whether or not documented to Dr. C's satisfaction, claimant in fact manifested the symptoms which Dr. C stated as indicative of PTSD. Although he was moved from the precise work location where the death occurred, he continued to be involved in the pending litigation from Mr. H's death activity, clearly "symbolic" of the accident. We note that Dr. G (the doctor upon whom the hearing officer seems to have primarily relied) stated that he agreed with Dr. P that claimant's condition the day after the accident was an adjustment disorder with depression as opposed to simple grief. We believe that Dr. G's assessment, documenting some aspects of claimant's mental state on December 19, 1994, over two years after Mr. H's death, is not essentially contrary to the evidence that claimant sustained a mental trauma injury on [date of injury], whatever the precise diagnosis. There is other evidence in the record, including [Counseling Center] records that Dr. G likely did not have, to outweigh the impressions of both Dr. C and Dr. G that a diagnosis of PTSD arose after claimant filed his worker's compensation claim.

WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT THE EMPLOYER DID NOT HAVE ACTUAL KNOWLEDGE OF INJURY, THAT THERE WAS NO GOOD CAUSE FOR LATE REPORTING, OR THAT LIMITATIONS HAD NOT BEEN TOLLED FOR FILING A CLAIM FOR COMPENSATION

Section 409.001(a)(1) requires that the injured employee give notice of a specific injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of an injury and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex.App.-El Paso 1989, writ denied). Claimant did not expressly give notice of injury prior to December 10 or 14, 1993.

The need for notice can be dispensed with where there is actual knowledge of an injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532 (Tex. 1980). Actual knowledge could be found if the trier of fact believed that the employer had facts that would lead a reasonable person to conclude that a compensable injury had been sustained by the claimant in an accident which the supervisor witness. *See* Miller v. Texas Employers Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). In the Miller case, the court noted that a question of actual knowledge was presented where a five foot fall from a truck bed was witnessed, that the

employee fell on his back, and that he thereafter began to slow down in performance of his work in the 30-day period thereafter.

In the case here, while the testimony of Mr. G set forth in this decision establishes an appreciation from common knowledge that claimant would be in grief due to Mr. H's death, we cannot say that this would equate to knowledge that claimant had a mental trauma injury as such. There was evidence that claimant's evaluations after Mr. H's death yielded more performance problems, but unlike the claimant in the Miller case, claimant here was reassigned to different jobs and was, to some extent, on a learning curve. Claimant himself did not contend until December 1993 that his performance was affected.

Belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Good cause must continue up to the time that notice was actually given. The existence of good cause does not necessarily depend on when a diagnosis is rendered, but when a reasonably prudent person would have appreciated that his condition was serious. Texas Workers' Compensation Commission Appeal No. 94521, decided June 13, 1994. In this case, even Dr. B testified that this would have been sometime in mid-1993. The hearing officer could further believe that claimant knew and appreciated that he had an injury based upon the frequency of his counseling and increase in his medication following [date of injury].

As to the claimant's contention on appeal that he could not have acted as a reasonably prudent person, we do not find support for this in either the medical or lay testimonial evidence.

An employer is required to report a work-related injury after at least one day of lost time. See Section 409.005(a)(1). The employer did not file a TWCC-1 until December 1993, but this was after it knew that claimant had an injury based upon his report. Claimant did not file his claim within one year as required by Section 409.003.

As there is no good cause in the record to excuse claimant's delayed notice to the employer, likewise we cannot disagree with the hearing officer's similar analysis for good cause in the delayed claim. Tolling under Section 409.008 would not apply because the employer did not fail to file a report of injury when required.

We affirm the decision that the carrier is discharged from liability due to lack of timely notice to the employer and failure to file a timely claim for compensation within one year after [date of injury].

WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT CLAIMANT DID NOT HAVE DISABILITY RELATING TO HIS [DATE OF INJURY], MENTAL TRAUMA INJURY

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101 (a). 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 hearing officer has made the factual finding that claimant's inability to obtain and retain employment was due to other causes. We affirm this determination, as not against the great weight and preponderance of the evidence, but a supportable resolution of conflicting evidence. The decision is supported by the fact that claimant actually worked for fifteen months following Mr. H's death, that his decision to leave the company was responsive to his bad evaluation, that he was able to perform a broad range of normal daily and recreational activities after he left work, and that Dr. B indicated that he believed that claimant could return to employment (even if not for the same employer). The time period immediately after Mr. H's death did not result in a loss of pay, and claimant did not lose his job at this point (i.e., the ability to obtain and retain), so disability would not exist for the period from September 15-28, 1992.

PROCEDURAL MATTERS

We interpret claimant's concern in his appeal about the appointment of Dr. G so far into the hearing, coupled with the denial of a continuance, as a contention that there was an abuse of discretion by the hearing officer. Our opinion on the occurrence of an injury makes an express decision on these points somewhat moot, we would observe that the power of the Commission to appoint a doctor under Section 408.004(a) appears to contemplate that information is required in order to resolve a matter where a compensable injury has already been determined. We further note that there was ample evidence for the hearing officer to weigh without Dr. G's opinion. However, if there was an abuse of discretion, it is harmless error in light of our reversal on this point.

Regarding the denial of a continuance, Dr. G's examination and report (as well as the authority of the Commission to appoint him) arguably injected a new element not present when claimant made his decision to proceed without an attorney. Nevertheless, Dr. G had been appointed by the Commission on December 7th, about six weeks before the fourth session, and the hearing officer may well have determined that there was sufficient time in that interval to have sought advice of counsel. Dr. B was given some opportunity to respond and did so.

Concerning the involvement of the ombudsman, there is nothing in the record of the case to support the claimant's expressed dissatisfaction on appeal. We note that

the questions and answers took a smoother course when the ombudsman became primarily involved, and pertinent objections were made. Any advice given that is not within the transcripts cannot be considered one way or another by us.

The parties invoked the rule of sequestration as to witnesses. Ms. W was named as one such witness. The employer, who was not a party, also had present an attorney as an observer. The claimant asked that Ms. W be excluded; the hearing officer stated that the employer had a right to have both a representative and its attorney present as an observer, and did not exclude her. We find no reversible error that the hearing officer allowed the corporate entity employer to designate Ms. W as its representative, and also allowed the attorney to observe. *See*, *by analogy*, Texas Rules of Civil Procedure Rule 267.

As to the general contention made that there has been confusion in labelling of exhibits or omission of them, we would note that the record indicates that multipage exhibits were tendered. Exhibits referred to in the testimony are attached to the transcript. We have already noted that Dr. P's records were referred to as Dr. D's, but they were so described in claimant's presentation of that exhibit. Without a more specific identification in his appeal of which exhibits claimant believes were omitted or mislabeled, we cannot begin to address, one way or another, if errors exist.

Regarding claimant's argument on appeal that he should not have been required to participate, we note that claimant agreed prior to both the first and second sessions of the hearings that he was able to participate. The second session was ended early when he became tired. Claimant's treating psychiatrist testified at the third hearing that he did not believe claimant's mental trauma or medication would preclude him from participating in the hearing. At the fourth session of the hearing, claimant presented himself as a witness and did not decline to testify. We therefore cannot agree that there was error.

For the reasons cited above, we reverse and render a decision that claimant sustained a mental trauma injury on [date of injury], that his preexisting mental illness was not an ordinary disease of life, and that his preexisting condition was aggravated by his coworker's traumatic death; we affirm the decision that claimant did not have disability relating to his injury. We affirm the decision that claimant failed to file a timely claim for compensation and failed to give timely notice of injury to his employer, and that no exceptions apply. The order of the hearing officer that the carrier is discharged from liability for the claim is affirmed.

Susan M. Kelley

Appeals Judge

CONCURRING OPINION:

I concur in the result in this case and commend Judge Kelley for her work on this complex case. However, I respectfully point out that I do not think it was improper for the hearing officer to appoint a disinterested doctor to help resolve the issue of whether the claimant was injured in the course and scope of his employment when medical evidence is required to resolve the disputed issue and the hearing officer has medical evidence from doctors who treated the claimant indicating that the claimant's mental condition was caused by a specific event at work and doctors hired by the carrier indicating that it was not. I do not necessarily disagree with Judge Kelley's interpretation of Section 408.004. However, Section 410.163(b) provides in part "[a] hearing officer shall ensure the presentation of the rights of the parties and the full development of facts required for the determinations to be made." Rule 142.2 states that the hearing officer is authorized to do certain things including issue orders; request additional evidence; and take any other action as authorized by law, or as may facilitate the orderly conduct and disposition of the hearing. Section 401.011(15) states "[d]esignated doctor means a doctor appointed by mutual agreement of the parties or by the commission to recommend a resolution of a dispute as to the medical condition of an injured employee." Sections 408.122 and 408.125 provide special status to reports of designated doctors concerning maximum medical improvement (MMI) and impairment rating (IR). We have held that the part of a report of a designated doctor concerning extent of injury is not entitled to presumptive weight, but is evidence on the extent of the injury. Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993. In my view the Commission and a hearing officer may appoint a designated doctor to assist in resolving a dispute as to the medical condition of an injured employee and should do so in appropriate cases; however, the report of the designated doctor is entitled to special status only on issues of MMI and IR.

Tommy W. Lueders
Appeals Judge

CONCURRING AND DISSENTING OPINION:

I concur with the opinion of Judge Kelley that the carrier is relieved of liability in this case due to the claimant's failure to give timely notice of injury to the employer and his failure to timely file a claim for compensation. Sections 409.002 and 409.004. I also concur with Judge Kelley's opinion with respect to the issues of exceptions for untimely notice and claim filing, and disability. In addition, I concur with Judge Kelley's opinion

that the claimant has not demonstrated reversible error with regard to procedural matters he has appealed.

I respectfully dissent with the opinion of Judge Kelley that the great weight and preponderance of the evidence proves that the claimant sustained a mental trauma injury on [date of injury]. In my opinion the hearing officer's decision that the claimant did not sustain a mental trauma injury on [date of injury], is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, and thus it should be affirmed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Dr. G opined that while claimant experienced some depression following his friend's death, such was situational and short-lived and did not cause PTSD. While there is much conflicting medical evidence in regard to whether the claimant sustained a mental trauma injury on [date of injury], the conflicts in the evidence were for the hearing officer to resolve as the finder of fact. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995.

Robert W. Potts
Appeals Judge