APPEAL NO. 001543

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 7, 2000. The hearing officer determined that the respondent (claimant) did not sustain a mental trauma injury in the course and scope of employment; that she timely reported the claimed injury; that the appellant (self-insured) waived the right to dispute the compensability of the claimed injury thereby making it compensable as a matter of law; and that the claimant had disability. The self-insured appeals the timely notice and waiver findings, contending both factual and legal insufficiency. The claimant replies that the decision and order of the hearing officer should be affirmed. The determination that the claimant did not sustain a mental trauma injury in the course and scope of her employment has not been appealed and has become final. Section 410.169. *See also* Texas Workers' Compensation Commission Appeal No. 92311, decided August 24, 1992.

DECISION

Affirmed.

The claimant worked as a registered nurse for the self-insured. On _____, while removing a suture from an HIV+ patient, she said she felt a twitch on her face and thought she had been exposed to the virus. She noted no blood or other body fluids on her face or any broken skin. By the day after the incident, she was developing a fear of such exposure, which seriously disrupted her life and ability to function in public or around people. Five successive tests through the following August for the presence of the virus were negative. Dr. T, a neuropsychologist, diagnosed "Specific Phobia: Fear of Contracting HIV."

Section 409.001 requires an injured employee to report the injury to a supervisor or manager by the 30th day after it occurs. Failure to do so without good cause and in the absence of actual knowledge of the injury by the employer relieves the employer/self-insured of liability for benefits. The claimant testified that on May 17, 1999, she went to the employee health office and talked with Ms. M, a nurse, who, according to the claimant, tried to assure her that she did not have an exposure to the virus. Notes of this visit by Ms. M in the claimant's health records record that the claimant told her about the sensation when removing the suture and that Ms. M "instructed no actual exposure."

In a written chronology prepared by the clamant and admitted into evidence, the claimant wrote that on May 20, 1999, she completed an incident report (commonly referred to throughout the CCH as a "variance report") and gave it to Ms. J, her supervisor, and that she "explained" to Ms. J "what had happened." On the report itself, which was also in evidence, the claimant wrote "While removing a suture from a HIV+ client, I felt a 'sensation' to my face. I did not see anything pop up or 'fly' up. Did not see anything on face when looked in mirror, skin intact. Do not really feel as though there was an expose.

Spoke with employee health nurse on 5/17/99." Ms. J co-signed this report on May 20, 1999, and testified that the claimant went into "detail" and was "concerned" about it.

Whether and, if so, when an injured employee reports an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. In Finding of Fact No. 10, the hearing officer found: "Within thirty days of _____, or on or before June 15, 1999, Claimant advised Employer, through its Employee Health Department, that she had sustained a mental trauma injury due to her employment with employer." The self-insured appeals the determination of timely notice to the employer, contending that it is contrary to the great weight of the evidence.

First, we observe that a generic finding like Finding of Fact No. 10 of notice within 30 days of the injury is a disservice to the parties and to any reviewing authority because it lacks supporting findings of fact or rationale and, arguably, eliminates the notion of burden of proof. In any case, we infer from the discussion of notice in the Decision and Order that the hearing office appears to conclude that the "variance report," quoted above, constituted the required notice to the employer. Even under the most liberal of constructions of the notice provisions of the 1989 Act, we cannot conclude that this report is notice of the claimed injury in this case, which is a mental trauma injury, not a viral insult to the body of the claimant. We perceive nowhere in the notice any indication, as the hearing officer suggests, that this notice conveyed a sense that the claimant was, in the hearing officer's words, "unreasonably distressed" over the incident. Indeed, we question whether being “unreasonably distressed” can be equated with a mental trauma injury. Perhaps the hearing officer is grafting onto this report the additional testimony of the claimant that she also told Ms. J[1] that she, the claimant, was "concerned" about it.[2] Normally, we would reverse the findings of notice to the employer or actual knowledge by the employer for further specific findings of what the notice consisted of, to which manager or supervisor it was given, and when it was given. We do not do so in this case because no purpose would be served in light of our affirmance of the determination that the self-insured waived the right to dispute the compensability of the claimed mental trauma injury.

Separate and distinct from the requirement that an injured employee give the employer timely notice of the injury is the requirement for the carrier, in this case the self-insured employer, to contest the compensability of a claimed injury within 60 days of receiving written notice of the injury. Section 409.021(c). Notice of the injury can take any

[1]If the hearing officer meant anyone other than Ms. J in the employee health department, we are still presented with the question of whether that person was a supervisor or manager to whom notice could be properly given.

[2]We have the same concerns with regard to the equally general Finding of Fact No. 11 that the employer had actual knowledge of the claimed mental trauma injury. Because there were no witnesses to the incident with the patient and it was unclear what conduct the claimant demonstrated to the employer within 30 days of the date of injury to suggest a mental trauma injury, the so-called "actual knowledge" could only come from the claimant's reporting of a mental trauma injury.

written form but to be effective must fairly inform the carrier of the name of the claimant and employer, the approximate date of the injury, "and facts showing compensability." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1). Medical progress notes in possession of the self-insured reflect an entry for a _____, visit, which states: "Incident on _____-refer to report. Would not consider this as exposure. Employee very distraught over occurrence. I have given her reassurances as to no risk. Sensation was on intact skin on chin." The signature of the person who wrote this was undecipherable. A progress note of July 15 or 19, 1999 (the date is unclear), further describes the claimant as "very anxious" and "very obcessional [sic]." In Finding of Fact No. 13, the hearing officer found: "Self-insured possessed its first written notice of injury as to Claimant's allegedly compensable injury of _____, or about _____, more than sixty days prior to December 10, 1999."[3]

In its appeal, the self-insured stated that the progress notes do not reflect a reported injury and that later actions of the claimant were inconsistent with a claim of a mental trauma injury. It particularly cites requests for personal leaves of absence which do not reference mental trauma as the cause of the request, but lists the reason as "personal" and a client information sheet for a mental health examination in which she checked the "other" block and left blank the "employment" block in answer to the question what her condition was related to.[4]

Whether written notice fairly informs a carrier of a claimed injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). In her discussion, the hearing officer refers collectively to the progress notes on May 17, 1999; June 24, 1999; July 15 or 19, 1999; July 24, 1999; and October 27, 1999, as conveying "information that Claimant has sustained an overwhelming, irrational, fear of contracting HIV due to the alleged work-related event of _____," thereby providing effective written notice of a mental trauma injury. She then states that the self-insured received notice "by late June of 1999," thus seemingly excluding the July 15 or 19, 1999, note as relevant to when notice was received." Although somewhat ambiguous, we believe the hearing officer, despite her reference to "late June," considered also the July 15 or 19, 1999, note as evidence that the self-insured had written notice of the claimed mental trauma injury no later than the end of July 1999, thus making its dispute untimely.

The words "very distraught," "very anxious," and "very obsessional," either separately or together, are clearly subject to varying inferences. The hearing officer found

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[3]The parties agreed that this was the date the self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the compensability of the claimed mental trauma injury.

[4]We note, however, that treatment notes of this visit expressly refer to the HIV incident.

they conveyed "an overwhelming, irrational, fear of contracting HIV," such as to "fairly inform" the self insured of a claim of a mental trauma injury. Though another hearing officer may have found otherwise, under our standard of review, we find this evidence sufficient to support this hearing officer's finding of written notice in the progress notes. Because the self-insured did not dispute the compensability of the claimed mental trauma injury withing 60 days of this notice, it waived their right to do so and the injury became compensable as a matter of law.

Finally, the carrier relies on the decision in Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), for the proposition that where there is no injury the failure to timely dispute compensability does not create a compensable injury. We have held that Williamson applies only where there is no underlying injury. In this case, there was evidence of a mental or psychological injury, that is , a diagnosed phobia. Thus, Williamson provides no relief to the self-insured.[5]

For the foregoing reasons, we affirm the decision and order of the hearing officer

Alan C. Ernst
Appeals Judge

CONCUR IN THE RESULT

I concur in the result. Even though different fact finders could draw different conclusions concerning written notice to the self-insured from the medical records and from what the self-insured recorded that the claimant told persons working for the self-insured, the hearing officer's determination that the self-insured waived the right to contest compensability is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

In addition, it is my opinion that the claimant appealed the determination that she did not sustain a mental trauma injury in the course and scope of her employment.

The claimant was assisted by an ombudsman at the hearing and was pro se on appeal. Her response was timely filed to be an appeal. The response contains:

[5]We also find no merit in the self-insured's reliance on GTE Southwest, Inc. v. Bruce, 998 S.W. 2d 605 (Tex. 1999) for the proposition that when the claimant does not prove a mental trauma injury from a specific event, there can be no recovery. That case repeated existing case law in Texas that mental trauma caused by a series of events is not compensable. In this case, the claimed mental trauma was attributed to the single incident of experiencing a sensation on the face while removing a suture from an HIV+ patient.

The evidence presented at the hearing shows and supports the claim of true psychological injury. Claimant never absolutely sure there was never an exposure. Claimant did not consistently maintain that there was no exposure, and hence no injury, that occurred on _____.

* * * * *

Claimant did not maintain that there was never an injury. Claimant was told that the incident was considered a "non-exposure and that no one was obligated to assist in helping Claimant transfer to another area of hospital that did not have so much direct client contact. Claimant testified that she tried several times to get a transfer, even requesting clerical positions. Evidence presented at the hearing supports her testimony. Injury is psychological with the whole scope of the injury unknown at this time. The severity and the manifestations of this psychological injury progressed with time. Understanding of the injury was just beginning after Claimant saw Dr. T. Diagnoses were made and therapy began. Medication management would also be required due to the progression and severity of the diagnosed psychological injury.

No one can be 100% sure that Claimant was not exposed to the body fluids of the HIV+ client on _____ (Fact Five). As testified by Claimant, just because nothing was seen does not mean that nothing was not there. Claimant did sustain an injury within the course and scope of her employment with Employer on _____. The injury being Mental Trauma-diagnosed OCD(HIV), Psychological injury, paranoia, anxiety, depression. Evidence and exhibits presented fully and honestly support this claim. A mental injury WAS proven due to a particular physical event. As a matter of facts presented, Self-Insured rightfully should be charged with providing benefits to claimant.

III

I agree with Conclusion of Law Number 1. Because I sustained a work related injury on _____.

I agree with Conclusion of Law Number 2. Because I live in _____.

I disagree with Conclusion of Law Number 3. Because I did sustain an injury within the course and scope of my employment with Employer on _____. [Dr. T] stated that he indicated not work related on the billing forms so that he would receive payment.

PRAYER: Claimant respectfully asks that the Honorable Appeals Panel support and uphold the decision of the Hearing Officer. Claimant did timely

> report the claim and that Self-Insured waived its right to contest the claim. Claimant repectfully [sic] asks that the Honorabe [sic] Appeals Panel support the decision of the Hearing Officer that Self-Insured is liable for benefits to Claimant.

In Texas Workers' Compensation Commission Appeal No. 982188, decided October 29, 1998, the Appeals Panel wrote:

> The Appeals Panel has held on numerous occasions that the dispute resolution process is not governed by strict rules of pleading. [Citations omitted.] To hold otherwise would largely defeat the remedial purposes of the 1989 Act, which presumes a significant number of injured workers would appear pro se or with the assistance of a non-lawyer ombudsman.
>
> Section 410.202(c) states that an appeal "must clearly and concisely rebut or support the decision of the hearing officer on each issue on which review is sought." In his original appeal of the hearing officer's initial decision and order, the claimant disagreed with the evidence that supported various findings of fact of the hearing officer, rather than specifically with the findings themselves. He also disagreed with the pertinent conclusions of law. This appeal met the requirements of Section 410.202(c) and contained sufficient information to fairly apprize the carrier of the matters appealed.

In my opinion, the response of the claimant indicates that she agrees with the conclusion of law and decision that the self-insured is liable for benefits. She states that she agrees with the determinations that she timely reported the injury to the self-insured and that the self-insured waived the right to contest the claim. Similar to what occurred in Appeal No. 982188, the claimant in the case before us stated that she did sustain an injury in the course and scope of her employment on _____, and mentioned evidence that supports that position. In my opinion, she agreed with the conclusion of law and decision that the carrier is liable for benefits (i.e., that she sustained a compensable injury) and she disagreed with the determination that she did not sustain an injury in the course and scope of her employment.[1]

In my opinion, the hearing officer did not properly apply the provisions of Section 408.006 and the case law interpreting the prior workers' compensation law concerning mental trauma injuries. For example, *see* Bailey v. American General Insurance Co., 154 Tex. 430, 279 S.W.2d 315 in which the court held that a claimant who was not physically touched by an object sustained a mental trauma injury from witnessing the death of a

[1]In a recent decision a claimant used the form for responding to an appeal rather than the form to request review, the carrier did not object to the use of the wrong form and provided a response as it would have if the proper form had been used, the use of the wrong form was not mentioned in the decision of the Appeals Panel, and the case was handled as an appeal by the claimant. The substance of a document submitted by an unrepresented party is more important than the title of the document.

coworker and friend. *See also* Texas Workers' Compensation Commission Appeal No. 941403, decided December 2, 1994, when a hearing officer's determination that a claimant sustained a mental trauma injury when he found a hangman's noose dangling over his desk and later heard someone say that his days were numbered after having reported alleged drug action. I would reverse the determination that the claimant did not sustain a mental trauma injury in the course and scope of her employment on _____, and remand for the hearing officer to make findings of fact and a conclusion of law to resolve the disputed issue of whether the claimant sustained a mental trauma injury in the course and scope of her employment.

_____
Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

With due respect to my colleagues, I dissent. In my opinion, Appeals Panel No. 76 should affirm the hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment on _____; should reverse the determinations that the claimant timely reported her mental trauma injury of _____, and that the self-insured waived its right to dispute the compensability of the alleged injury of _____, and that the claimant had disability since May 30, 1999; and should render a new decision that the claimant did not timely report the claimed injury, that the self-insured did not waive its right to contest the compensability of the claimed injury, and that the claimant did not have disability.

Concerning the timely notice issue, the majority opinion recognizes that the hearing officer's findings of fact on timely notice and actual knowledge (Findings of Fact Nos. 10 and 11) are highly problematical and acknowledges that "normally, we would reverse [Findings of Fact Nos. 10 and 11] for further specific findings" but that such reversal action will not be undertaken in this case because "no purpose would be served in light of our affirmance of the determination that the self-insured waived the right to dispute the compensability of the claimed mental trauma injury." In my opinion, it is error not to reverse these findings and either remand for additional, specific finding or render that timely notice of the claimed mental trauma injury was not given. The Appeals Panel early on recognized that the benefits dispute resolution provisions in the 1989 Act envision an "issue driven" system. In the likely event that the self-insured requests judicial review of the majority opinion and in the possible event that the fact finder upon judicial review should determine that there was not a waiver by the self-insured, then the issue of the adequacy of the timely notice and factual knowledge findings and the sufficiency of the evidence to support would still be unresolved. The Appeals Panel is charged with the duty to resolve these appellate issues at this time and the majority brazenly fail to do so. Section 410.204(a) provides, in part, that "[a]n appeals panel shall issue a decision that

determines each issue on which review was requested." In Texas Workers' Compensation Commission Appeal No. 931079, decided January 11, 1994, the Appeals Panel affirmed the hearing officer's determinations that the claimant did not sustain a compensable injury and did not have disability but nonetheless went on to review the evidence in support of the hearing officer's further determination that the claimant failed to provide timely notice of the injury. The Appeals Panel then reversed and rendered a decision that the claimant had indeed given timely notice. The majority's failure to resolve the appealed notice issue at this level works an injustice upon the self-insured.

Concerning the waiver issue, it is my opinion that the hearing officer's Finding of Fact No. 13 is against the great weight of the evidence. Finding of Fact No. 13 states that the "t]he Self-Insured possessed its first written notice of injury as to Claimant's allegedly compensable injury of _____ on or about _____, more than sixty days prior to December 10, 1999." The entry dated _____, in Self-Insured's Exhibit No. 1 states as follows: "Incident on _____ - refer to report. Would not consider this an exposure. Employee very distraught over occurrence. I have given her reasons as to no risk. Sensation was on intact skin on chin. [Emphasis supplied.]" In my opinion, it is so against the great weight of the evidence as to be manifestly unjust to determine that this entry with the mere words "very distraught" met the requirements of Rule 124.1 and provided the self-insured with written notice of a mental trauma injury. Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The majority seem to recognize this as well for in their discussion of the notice issue, the majority "question whether being `unreasonably distressed' can be equated with a mental trauma injury."

Despite the reference in Finding of Fact No. 13 to the _____, entry on the Self-Insured's Exhibit No. 1, the majority, apparently recognizing the weakness of the words "very distraught" as written notice of a mental trauma injury then go on to seize upon certain verbiage in the "Discussion" portion of the hearing officer's Decision and Order to expand Finding of Fact No. 13. They would add the words "very anxious" and "very obcessional [sic]" from the July 15, 1999, entry on Exhibit No. 1 in order to expand the plain, limited language of Finding of Fact No .13 and to bolster their opinion that Finding of Fact No. 13 is sufficiently supported by the evidence. However, even were this expansion of Finding of Fact No 13 permissible, in my opinion, the additional adjectives bootstrapped into the finding still do not constitute written notice of a mental trauma injury. There are undoubtedly a large number of adjectives that may be found in the dictionary and used to describe an employee's appearance or conduct. To subject carriers (or self-insured employers) to the risk of waiver by failing to interpret such words in a writing as notice of a mental trauma injury is harsh and arbitrary.

Finally, I respectfully disagree with the contention of Judge Lueders in his separate concurring opinion that the claimant's response constitutes a request for review of the hearing officer's determination that she did not sustain an injury within the course and scope of her employment on _____. Not only is the typewritten document filed by the claimant entitled "Claimant's Response to Carrier's Request for Review," but she states

the following in her first paragraph: “I disagree with the carrier’s reasons for appealing the decision and order of the hearing officer. The carrier stated that the hearing officer was wrong (erred) in the following Findings of Fact. It is my position that the hearing officer did not err.” Although the claimant states she disagrees with Conclusion of Law No. 3, she asks in her prayer for relief that the Appeals Panel “support and uphold the decision of the Hearing Officer.” While I agree with Judge Lueders that the Appeals Panel is not bound by formal rules of pleading, and while there may well be some ambiguity in the claimant’s response, it is apparent to me that the claimant intended to file a response, not an appeal. I do not believe that the Appeals Panel should sift through the verbiage of this particular response trying to find a way to construe it as an appeal.

Philip F. O’Neill
Appeals Judge