

APPEAL NO. 002013

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 August 9, 2000. The issues at the CCH were whether the respondent (claimant) sustained a compensable mental trauma injury on or about _____; whether he reported this injury to his employer within 30 days after the date of injury, and, if not, whether he had good cause for the failure to give such notice; whether he timely filed a claim for compensation within one year of the date of his injury; and whether he had disability from his injury for the period from October 29, 1998, through June 24, 1999.

The hearing officer found favorably for the claimant on all issues. On the notice issue, the hearing officer held that although the claimant was injured by events that occurred on _____, he was unaware that he had a mental trauma or psychiatric injury and as a result had good cause for the failure to give notice of injury within 30 days. The hearing officer found that the claimant notified his employer of his _____ injury on _____. The hearing officer further found that although the claimant did not file a claim for compensation until 13 months after he learned of his mental trauma injury, and did not have good cause for this failure, the failure to file the claim was excused pursuant to Section 409.008 because the employer did not report the injury to the appellant (carrier) until October 19, 1999. While the hearing officer found disability from October 29, 1998, through November 3, 1999, he noted that temporary income benefits (TIBs) could only be paid through June 24, 1999, which was 401 weeks after the date of injury.

The carrier has appealed only the findings on notice to the employer and timely filing of a claim for compensation. The determination of an _____, mental trauma injury is not appealed. The carrier asserts that it is implausible that the claimant did not know or should not have known that he had a psychological injury well before October 28, 1998. The carrier asserts that the great weight and preponderance of the evidence are against the hearing officer's fact findings on the notice and claims filing issues. The claimant responds by reciting evidence favorable to the decision and notes that while there are conflicts, these were the responsibility of the hearing officer to resolve. The claimant states that the decision should be affirmed.

DECISION

We affirm as reformed.

The claimant testified that he worked for (employer) for a number of years, and in 1987 was promoted to general manager of his own store in central Texas. In _____, a shocking occurrence involving a shooting of several people took place at one of the employer's stores. The claimant said he was called that evening and told he had to report to the site of the shooting at 9:00 a.m. the next morning along with another manager, Mr. S, and hourly employees of his own choice. The claimant reported on _____. His testimony of what he encountered was vivid.

The claimant encountered a scene where numerous law enforcement officials and forensic specialists were on site. According to the claimant, although bodies of victims had been removed, there were chalk outlines of where they had been lying. Destruction to property was also extensive. Shockingly, residual blood and tissue had not been cleaned up and this was, in fact, what the claimant, Mr. S and the hourly workers were expected to do. The stench of decomposition was in the air. The claimant said that part of the scene was so bad that he and Mr. S did not feel right asking the hourly workers to clean that area, and they did it themselves. He said that Mr. S became physically ill and vomited. The claimant said he felt that way himself. Moreover, the claimant learned within 30 minutes of entering the building that a friend of his had been one of the victims. The claimant said that they were offered no protective clothing, and that night he threw away the clothes he wore to cleanup.

The claimant said that at one point during the three-day cleaning operation, he noticed some civilian-appearing people milling around the area, and found out that they were crisis counselors. Although not mentioned in the hearing officer's decision, the claimant testified that his supervisor, Mr. A, came up to him and asked if he had spoken to the crisis counselors. At that point, the claimant said he had not, but he might have to. The claimant said that Mr. A's response was along the lines of discouragement, pointing out that he, the claimant, had a lot of work to do and would not be able to spare the time to meet with the counselors. The claimant indicated that he did not meet with the counselors because of this conversation. However, when asked if this meant he knew he had a psychological reaction to his duties, the claimant minimized this, stating that he wished to meet with the counselors primarily to take a break.

However, the claimant testified (and there was no contrary evidence offered) that he missed the next two or three days of work after the cleanup because he felt ill. He said that the scene was heavy on his mind and heart, and he attended the funeral of his friend. However, asked if he appreciated within that time that he had a mental trauma, he said that he did not because he did not believe that such things happened to people like him.

According to the claimant, he returned to work and felt that he had recovered from the incident and come through it. But within five or six months after the cleanup, he said, he began to have nightmares, sleep difficulties, and "intrusive thoughts" in which his mind returned to the scene. He said that the recollection of the smell was especially powerful. The claimant said that such episodes lasted from 15 minutes to three hours, three to five times a week. He also said that such scenes had continued through the date of the CCH. Nonetheless, the claimant also testified that he did not realize he had a "serious problem" and, because he was not a doctor, he did not appreciate this as psychological injury.

The claimant continued to work and was even promoted to higher positions within the employer's hierarchy. Pursuant to one promotion, he was interviewed by an industrial psychologist, Dr. D, in July 1998. Dr. D concluded that the claimant was viewed by others as "a rock" and was a trusted confidant of others in the employer's company. Dr. D also commented that being innovative and open to new experiences might not come easily to

the claimant. His analytical thinking skills, likelihood to challenge the status quo, and self-awareness were rated as fair. There is no mention in this report of any of the problems that the claimant said he was experiencing. The claimant said that over these years, he had two or three conversations with Mr. S about the fact that both were having similar recurrent thoughts about the store cleanup, and sleeplessness, but Mr. S said he had not sought any counseling for this.

On Monday, October 28, 1998, the claimant sustained what may be characterized as a second trauma, described by his board certified psychiatrist, Dr. G, as the "triggering event," when he came to work to find out that a close coworker and friend had committed suicide. He said he began to get worse and was depressed throughout the course of the day, and made mental lists of people at the company that he would like to kill. This made him realize that he had a problem, and that night the claimant checked himself into a psychiatric hospital, where he said he was quickly diagnosed by Dr. G upon intake as having post-traumatic stress disorder (PTSD). However, the claimant also agreed that he did not recall much of that evening. A nursing intake assessment records him being on the scene when people were killed at the store and noted that he "witnessed multiple shootings." An assessment completed by Dr. SN, on October 28, 1998, states that the claimant told him he had PTSD relating back to the 1991 cleanup. Although a formal assessment by Dr. G was dated October 29, she testified that she had also seen the claimant on the 28th. A medication order is dated October 28 and faintly shows Dr. G's name as attending physician.

The claimant said that he was visited in the hospital within a few days by Mr. F, a company vice president. He advised Mr. F that he would like to file a workers' compensation claim. There was no evidence of exactly what was said but the claimant recalled that Mr. F told him this would be "too complicated" and he should file under regular health insurance. He was put on extended medical leave.

Dr. G and psychologist Ms. M treated the claimant over the course of his 19-day inpatient hospitalization and then outpatient therapy. He was diagnosed with major depressive disorder as well as PTSD, with homicidal and suicidal ideations. The medical evidence from Dr. G is emphatic in relating his mental trauma to the _____ event. Dr. G testified that while there was overlap and interrelationship between his diagnoses, the PTSD related primarily to the 1991 cleanup, and the depression was triggered by the coworker's suicide. (It was also noted that the employer's president had committed suicide two years before, but this was not as profoundly disturbing to the claimant.) Although there was some early notation that the claimant attributed PTSD to his military days, the claimant testified that his military service did not involve any traumatic or combat events and he denied suffering any emotional effects from such service.

The record indicates that Mr. F asked a psychologist, Dr. H, to evaluate the claimant for the employer. Dr. H reported that the claimant's difficulty started with the 1991 cleanup operation and that he had sleep problems and anxiety when he ate at a restaurant in the town. Dr. H concluded that the claimant showed no psychological limitations on a gradual

return to work. By July 1999, Dr. G had released the claimant to part-time work, but correspondence from Mr. F to Dr. G at the end of August 1999 indicates that the employer was unwilling to let him return until concerns about the safety of other employees was addressed. Mr. F wrote to the claimant on October 18, 1999, telling him that his old position was no longer available; that there were no corporate positions available, but only a restaurant manager position; and that unless the claimant was willing to take employment at less than what he had been paid in October 1998, the employer had "no options" to assist him to return to work. Mr. F indicated in this letter that he had "filed a workers' compensation claim on your behalf as you requested." The claimant responded to this letter by pointing out that he had not declined to accept a restaurant manager position as Mr. F said. Dr. G wrote to Mr. F on November 3, 1999, to assure him that the claimant did not present a threat, but apparently the claimant was not brought back to work, as outlined in Mr. F's letter.

On or about October 26, 1999, the employer filed an Employer's First Report of Injury or Illness (TWCC-1). This listed the date of injury as October 28, 1998, but the nature of injury, part of body affected, and how the injury occurred were all listed as unknown. The carrier disputed this, stating that it first received written notice of the injury on October 19, 1999. The carrier contended that there was no specific time or place or work-related cause for the injury. On November 2, 1999, the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), contending his date of injury was _____, at 9:00 a.m. He said that his injury was depression and PTSD and was caused by "not enough space--exposure to many things over a period of time. Will explain." The claimant filed a duplicate claim on November 29, 1999, but the cause of the injury was left blank. This was date-stamped by the carrier on December 8, 1999. During an interview with the adjuster on October 21, 1999, the claimant indicated that his problems began with the 1991 store cleanup, but the adjuster refocused the interview on the 1998 suicide.

The record indicates that a benefit review conference was held on February 2, 2000, on the _____, date of injury. The claimant was represented by an attorney. The benefit review officer recommended that there was no mental trauma injury on that date. The claimant said he was terminated in February 2000 for failure to return from medical leave. The claimant testified that he and his attorney sat down and realized that _____, was the incorrect date of injury, and he filed an amended claim for compensation on April 25, 2000, asserting the _____, date of injury.

As we have stated many times, the hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The Appeals Panel will

not act as a second-tier fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The hearing officer found that the claimant notified his manager on _____, that he had a mental trauma injury due to his _____ work. He found good cause in the failure of the claimant to report an injury within 30 days from the claimant's lack of knowledge of a psychological "injury." He further found that although the claimant's TWCC-41 was filed more than a year after _____, the employer failed to file a TWCC-1 until October 29, 1999, and that this, in effect, "tolled" the time period for the claimant's filing a claim for compensation until that date. We note at the outset that the hearing officer did not apparently consider that timely notice (or actual knowledge) was given to the employer back in _____ when the claimant indicated to Mr. A that he might need counseling, and then was subsequently absent for two or three days.

The carrier contends that the hearing officer's finding that the claimant did not know he had an injury for nearly seven years is against the claimant's testimony and the great weight and preponderance of the evidence. We acknowledge that the passage of time between the traumatic event and the claimant's appreciation of a problem appears extremely long and, at first blush, may appear to be hard to explain. Nevertheless, all the evidence detailed in this decision could have persuaded the hearing officer that the claimant, as a layperson of only fair self-analytical ability and with a high level of responsibility, would not have perceived his disturbances and flashbacks as "injury," especially as his ability to function at work and be promoted was not impeded.

The evidence is not as crystal clear as it could be that Mr. F was actually informed by the claimant that he wished to file a claim for his _____ injury, but, in the absence of cross-examination asking the claimant in more detail about his conversation with Mr. F, the hearing officer could draw this inference. Moreover, the interview with the adjuster, as well as Dr. H's report to Mr. F in June 1999, certainly put the employer and the carrier on notice of the _____ incident as a causative factor in the claimant's loss of time. Section 409.005 requires an employer to file a Notice of Injury when an injury results in the absence of the employee for more than a day, and Section 409.008 provides that the failure of the employer or the carrier to file a report under Section 409.005 will toll the period for filing a claim for compensation. The one-year period will not start, under this section, until the TWCC-1 is filed. We agree that under the facts here the hearing officer properly applied the tolling provisions of the 1989 Act in his resolution of the claims filing issue.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust; In re King's Estate, 150 Tex. 662, 244 S.W.2d 660

(1951); or that the hearing officer abused his discretion in finding good cause for the claimant's failure to give timely notice.

The decision and order of the hearing officer is affirmed as reformed.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge