APPEAL NO. 94785

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 17, 1994, a contested case hearing (CCH) was held. The issues to be resolved were:

1. Did CLAIMANT sustain a compensable injury?
2. Did CLAIMANT report an injury to his employer on or before the 30th day of the injury; and, if not, did he have good cause for failure to timely report the injury?

The hearing officer determined that the claimant sustained a mental trauma injury in the course and scope of his employment on (alleged date of injury) (all dates will be 1993, unless otherwise noted), and that claimant notified his supervisor immediately after the injury occurred.

Appellant is the State of Texas. Claimant was employed by the (State of Texas), an agency of the State of Texas and for purposes of this decision referred to as the employer. The State of Texas, a self-insured governmental entity was represented by the (Carrier) of the State of Texas and for purposes of this decision will be referred to as the carrier. The carrier contends that the hearing officer erred in allowing the claimant to amend his Notice of Injury and Claim for Compensation (NICC) on the date of the CCH and that the hearing officer erred in finding that the claimant suffered a compensable mental trauma injury. Respondent, claimant herein, did not file a response.

DECISION

Finding the evidence insufficient to support the decision and order of the hearing officer, the decision and order are reversed and we render a new decision that claimant did not sustain a compensable mental trauma injury.

The hearing was brief and the medical evidence regarding claimant's condition was sparse. Claimant testified that he was employed by a public service agency as an "eligibility specialist" whose duties included interviewing clients who were applying for welfare benefits and food stamps. Claimant testified at some length about his prior work history and superior evaluations. Claimant stated that prior to his employment with the employer, he suffered from diabetes and unspecified "stomach disorders." Claimant testified at length about events that occurred on (alleged date of injury) and the hearing officer has summarized that testimony in her statement of evidence. We find that recitation fairly and accurately recites claimant's testimony and accept it for purposes of this decision. Succinctly, it was claimant's testimony that (alleged date of injury) was a very hot day, the office air conditioning was not working and it was a generally hectic day working in poor

conditions. Claimant was to interview a client who turned out to be particularly difficult and who was accompanied by a rowdy and unruly child. Claimant testified that he told the child to listen to his mother and the client apparently misunderstood what was said, or meant, and became very "irate." According to claimant, the client threatened claimant's job, and that her husband would be waiting for claimant after work. Claimant testified that he considered this a personal threat and that after he finished the two hour interview with the client, he went to the restroom and became ill. Claimant said he reported the event to his supervisor and the supervisor gave him the telephone number for the employee assistance program (EAP) which assists employees with wellness care. EAP referred claimant to a psychologist, Dr. RZA, who in turn referred claimant to a psychiatrist, Dr. ARC. Claimant testified that prior to that time he had never consulted a mental health specialist.

A report from Dr. RZA, the psychologist, dated (alleged date of injury) indicates that claimant was assessed on (alleged date of injury), and "[i]t is the recommendation of the counseling staff that [claimant] not be permitted to return to work at [the employer] until evaluation by [Dr. ARC]." No diagnosis or opinion was offered why this referral was being made or the causation of claimant's problem requiring the referral. In a "Certification of Illness/Injury" dated October 29th, Dr. ARC certified the "Date of Onset of Illness or Injury" to be "(Date of Onset of Illness or Injury date)" and the "[d]ate on which employee was first unable to work due to this illness or injury: (the day after alleged date of injury)." The diagnosis was "[d]ysthymia, late onset ETOH" with a prognosis "Guarded." No opinion was offered regarding causation nor was there any mention of an (month of alleged date of injury) incident. A medical report dated September 28th, only certified claimant "is unable to return to work indefinitely." A report from Dr. ARC dated December 7th, states that claimant continues under the doctor's care "putting him back to work will only jeopardize his prognosis" and confirming a diagnosis of "[d]ysthymia and Panic Disorder." In her most comprehensive report, dated March 10, 1994, Dr. ARC stated in its entirety:

> [Claimant] has been under my medical psychiatric care since (Date of Onset of Illness or Injury date). He suffers from a mood disorder which has been addressed through antidepressant medication as well as individual psychotherapy. The main stressers have been identified as difficulties and pressure at work, which have reportedly continued despite the fact that he has been on medical convalescent leave. In fact, he was just recently terminated from his employment. This event has led to further stress preoccupations affecting the outcome of his therapy adversely.
>
> It is my professional observation that the ongoing stressful situation at work has led to exacerbation of symptoms, which have hindered the capacity of this gentleman's functioning. These stressers have also affected his capacity for industrial and social adaptability.

No mention in this report is made of any (month of alleged date of injury) incident or precipitating event.

Carrier's cross-examination referred to an interview with an adjustor concerning a multitude of problems claimant may have had, but were generally denied by claimant. Claimant did admit that certain "problems" started _____, and his work with "antagonistic clients," an ever increasing workload, "more regulations" which resulted in a greater workload created "problems with the office." Claimant referred to "people leaving" (apparently meaning staff) which resulted in an "increasing workload." Claimant testified that he began seeing Dr. W, apparently a general practitioner, in his HMO in 1991 for his diabetes. A report dated December 28th, from Dr. W stated:

> [Claimant] is a patient of mine since the date of 12-30-91. I have seen him on numerous occasions since that first time and a recurring theme of his visits has been his dissatisfaction with his work. He has claimed to be frustrated by the unprofessional attitude of his coworkers, the ignorance of his superiors to the waste in his office's operation, and the abuse of the benefits provided by tax payers' dollars to increasingly demanding and ungrateful clients. The lack of a workable resolution for these multiple problems causes [claimant] great distress and for this reason, during our last discussion by phone, I recommended he seek counseling to help him cope with these feelings of anxiety and frustration. I understand that he has now sought counseling through his employer sponsored program. I am glad for this as he also suffers Non-Insulin Dependent Diabetes Mellitus and Gastritis symptoms, both of which can be exacerbated by emotional stress.

Based on the evidence presented, the hearing officer determined that claimant sustained a compensable mental trauma injury as a result of the (alleged date of injury) incident at work "which has exacerbated his pre-existing diabetes and gastritis." The hearing officer apparently relied heavily on Texas Workers' Compensation Commission Appeal No. 92189, decided June 25, 1992, quoting from that decision.

Carrier appeals on two grounds; the first being that the hearing officer erred in allowing the claimant to amend his "NICC" on the date of the CCH without giving the carrier prior notice, and referred to "[t]he original E-1 cited the date of injury to be approximately _____." We note "the original E-1" was not in evidence and when the amended "NICC" was offered, carrier specifically stated it had no objection and the document was admitted without objection. In fact, the only reference at the CCH that there might have at one time been a different date of injury was in carrier's closing argument where in passing carrier stated that "since the December [1993] BRC [carrier] was satisfied that the date of injury was _____" however, no objection was raised to the amended date of injury. Had carrier wished to preserve an objection to an amended date of injury as an issue on appeal, it should have timely objected to the introduction of the amended "NICC." Similarly, there was no objection by carrier to any of the medical reports offered by claimant and the hearing officer admitted them without objection. Not having objected to

the exhibits, carrier's objection was not preserved on appeal and the Appeals Panel has frequently stated that it does not consider issues raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 931028, decided December 23, 1993 and cases cited therein; Texas Workers' Compensation Commission Appeal No. 94425, decided May 18, 1994. Consequently carrier's contention of error on this point is without merit.

Carrier's second contention of error is that the hearing officer erred in finding the claimant suffered a compensable mental trauma because the mental trauma was not "tied to a specific time, place and event." The 1989 Act defines "injury" to mean damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm. Section 401.001(26). The act also provides that it is the express intent of the legislature that nothing in the act shall be construed to limit or expand recovery in cases of mental trauma injuries. Section 408.006(a). (The "legitimate personnel action" exception in Section 408.006(b) is not applicable in this case.) The Texas Supreme Court has held that mental trauma can produce a compensable injury, even without any underlying physical injury, if it arises in the course and scope of employment and is traceable to a definite time, place, and cause. Bailey v. American General Insurance Company, 279 S.W.2d 315 (Tex. 1955), and Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972). On the other hand, it has been held that damage or harm caused by a repetitious mental traumatic activity, as distinguished from a physical activity, cannot constitute an occupational disease. Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979).

In this case, claimant attempts to relate his mental trauma injury to a specific time, place and cause, namely the encounter with the difficult client and unruly child on (alleged date of injury). However, it was also necessary for him to establish a causal relationship between the event causing the alleged injury and the ultimate condition. Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex. 1948). Claimant testified that the encounter caused him to become ill, he notified his supervisor, who gave him the EAP telephone number and he was seen by a psychologist who took him off work and referred him to a psychiatrist whom he saw for the first time almost a month after the incident. Nowhere in any of the medical reports is any mention made of the (month of alleged date of injury) incident. Rather Dr. ARC refers to "difficulties and pressures at work" and Dr. W indicates a "recurring theme" in claimant's visits before (month of alleged date of injury) has been "his dissatisfaction with his work." Both claimant's testimony and Dr. W's December report refer to "antagonistic clients" and "increasingly demanding and ungrateful clients." While the client and her unruly child on (alleged date of injury), may have been difficult, based on claimant's testimony and Dr. W's report, apparently dealing with antagonistic, demanding and ungrateful clients was the normal course of claimant's duties. It would appear from the testimony, that claimant routinely worked in hot and hectic working conditions with antagonistic and demanding clients which may very well have been stressful, but nonetheless does not constitute a compensable injury. Claimant's

ombudsman in the closing statement appeared to recognize that the "welfare system" in which claimant worked was very stressful and the client (with her child) just appeared to be "the straw that broke the camel's back."

It is clear that the existence of an injury may be established through the testimony of a claimant alone, and that indeed the finder of fact can believe a claimant's testimony over expert medical testimony. Fireman's Fund Insurance Company v. Martinez, 387 S.W.2d 443 (Tex. Civ. App.-Austin 1965, writ ref'd n.r.e.). However, it has also been held that when a subject is one of such scientific or technical nature that a fact finder could not have or be able to form opinions of their own based on the evidence presented, only the testimony of experts skilled in the subject has any probative value. The cause, progression, and aggravation of a disease has been characterized as such a subject. Houston General Insurance Company v. Pegues 514 S.W. 2d 492 (Tex. App.-Texarkana 1974, writ ref'd n.r.e.) Even in cases in which expert testimony or causation is considered unnecessary, the lay testimony must prove at least that the injury in reasonable probability caused the claimed result. Griffin v. Texas Employers' Insurance Association, 450 S.W.2d 59 (Tex. 1970). In this case no medical report mentions the (alleged date of injury) incident and the reports only mention pressure and stress of the job in general. As mentioned above, such repetitive and continued mental stress over a period of time does not constitute a mental trauma injury. Nor does one event, among many similar events constitute a causal connection where there is a complete lack of medical evidence establishing such a link.

Claimant cited, and the hearing officer relied, on Appeal 92189, *supra*. As noted by the hearing officer, the injured employee in that case had a "continuously stressful and acrimonious" relationship with her supervisor which culminated when her supervisor "berated her loudly, with the use of foul language and admonished her in threatening tones . . . ." The hearing officer in that case determined that incident caused claimant's collapse and subsequent hospitalization for a heart condition. The key distinction between that case and the instant case is the fact that in Appeal No. 92189, the employer's district manager (the supervisor's supervisor) was "very critical" of the supervisor's conduct, the fact that the supervisor "is no longer employed by the employer's headquarters" and that there was evidence that the employer's standards of supervision had been violated. In Appeal No. 92189, the supervisor had violated the employer's policies in berating the employee. In the instant case, while the client and child were unruly and difficult, if we read claimant's testimony and the medical reports correctly, that incident was no different than claimant's encounters with other antagonistic, demanding and ungrateful clients.

Claimant testified that there were problems with the office including antagonistic clients, "more workload, more regulations" which resulted in more workload starting "_____." Carrier contends that claimant has had an ongoing problem since 1991, referring to Dr. W's report. Both the hearing officer and carrier refer to the stress as "exacerbating" claimant's diabetes and "stomach problems." There is no direct evidence

that the (month of alleged date of injury) incident as opposed to stress in general, aggravated claimant's diabetes and stomach problems. However, we read claimant's position to be that a specific event on (alleged date of injury) caused a mental trauma which is the compensable injury, not that claimant's present condition is due to an exacerbation of diabetes and a stomach condition. The hearing officer, in her discussion concedes that claimant "was working in a stressful environment" but that the "incident on (alleged date of injury), was beyond the normal course of CLAIMANT'S work . . . ." We find the great weight and preponderance of the evidence to be that the incident on (alleged date of injury), although discussed in detail, to constitute only another situation of working in a hot, hectic, stressful environment with what claimant perceived to be antagonistic, demanding and ungrateful clients with a uncontrolled, unruly child. We do not believe that incident to be so unusual or so beyond the normal course of claimant's work to make it such an unexpected injury-causing event as to be compensable. In Maksyn, *supra*, the claimant was a long-time employee of a publishing company who had succumbed to the pressure, mental strain, overwork, and exhaustion from his duties which culminated in hypertension, nervousness, vertigo, anxiety depression, and disability to perform his work. The court stated that the Texas Legislature drew its line for compensability for occupational disease by limiting coverage to those cases in which physical activities cause harm or injury and by denying coverage when mental activities cause the harm or injury, and that the legislature very well reasoned that physical activities are identifiable and traceable whereas such factors as worry, anxiety, tension, pressure, and overwork are not. *See also* Texas Workers' Compensation Commission Appeal No. 92210, decided June 29, 1992. We view claimant's incident on (alleged date of injury) to be but another event in a stressful work situation.

Whether claimant had reported an injury was not an appealed issue. Claimant testified that he reported the (alleged date of injury) incident to his supervisor and the hearing officer's determination on that point has not been appealed and therefore, we need not address it further.

Determining that the hearing officer's decision and order are against the great weight and preponderance of the evidence, we reverse that decision and order and render a new decision that the claimant's mental trauma resulted from ongoing continued stress from his job and does not constitute a compensable mental trauma injury.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge