APPEAL NO. 94975

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 28, 1994, a contested case hearing (CCH) was held. The issues to be resolved were:

1. Did the Claimant sustain a compensable mental trauma injury on or about (alleged date if injury)?

2. Did the Claimant report an injury to the Employer on or before the 30th day after the injury, and if not, does good cause exist for failure to report the injury timely?

3. Did the Claimant timely file a claim for compensation with the Commission [Texas Workers' Compensation Commission] within one year of the injury as required by Section 409.003 of the Texas Labor Code, and if not, does good cause exist for failing to timely file a claim?

4. Did the Claimant have disability resulting from the injury sustained on (alleged date if injury)?

The hearing officer determined that claimant had not suffered a mental trauma injury on or about (alleged date if injury), that claimant failed to report her alleged injury within 30 days and did not have good cause for failure to do so, that claimant did timely file her claim with the Commission and that claimant did not have disability because she had not sustained a compensable mental trauma injury.

Appellant/Cross-respondent, claimant herein, contends that the hearing officer erred in a number of her determinations, that claimant had suffered a compensable mental trauma injury which had its "first distinct manifestation . . . in fact January 31, 1994, not _____," and that claimant "did show good cause for delay due to the fact . . . she was not diagnosed as suffering from Post-traumatic Stress Disorder (PTSD) - Delayed Onset until January 31, 1994." Claimant requests that we reverse the hearing officer's decision in her favor. Respondent/cross-appellant, self-insured herein, appeals the hearing officer's determination regarding an "injury" as defined by the 1989 Act and the use of a "knew or should have known" date of injury in _____. Both parties filed timely responses to the other's appeal urging affirmance of determinations in their favor.

DECISION

The decision and order of the hearing officer are affirmed, as reformed, in part, and we reverse and render in part.

Claimant did not testify at the CCH however the basic background facts are

relatively undisputed. Claimant was employed as a cook in the self-insured's jail. At approximately 10:20 a.m. on (alleged date if injury), while claimant was preparing lunch, a trustee who was working in the kitchen took a butcher knife, went down a hall some distance away and stabbed another inmate to death. The evidence and testimony of the deputy who was claimant's supervisor was that claimant did not see the murder but could possibly have heard the victim's screams for the "two or three minutes" of fighting that preceded the victim's death. The deputy's testimony was that claimant may have had a brief glance at the victim as he was being wheeled past the kitchen on his way out of the building. The deputy testified that claimant never complained of fear for her safety, or any injuries from the incident but continued in the performance of her duties in the same manner as before until January 1994.

Claimant offered the testimony of Mr. L who is a licensed professional counselor, with a masters degree in counseling. Mr. L testified he has treated a number of PTSD patients. Mr. L testified that claimant has PTSD including paranoia, depression, sleeplessness, nightmares and flashbacks. Mr. L first saw claimant on March 21, 1994, on a referral from claimant's attorney. In that claimant did not testify, the events after the (alleged date if injury), incident are not clearly developed. According to Mr. L, claimant went through a separation, subsequent divorce and custody battle, apparently in latter 1991, 1992 and early 1993. However, Mr. L testified that he did not consider this as a significant factor in reaching his conclusion regarding the cause of claimant's PTSD. A May 27, 1994, medical report (discussed in more detail later) indicates that claimant "initially consulted a physician approximately one year ago [meaning _____] because of recurrent nightmares following [the] murder. These nightmares focused on the murder and the person who committed the `heinous act.'" Claimant, apparently at that time, had "daily crying spells for over a year, weight fluctuation, loss of appetite and episodic suicidal ideation." Claimant apparently consulted a doctor in _____, who is not identified but may have been Dr. C, a family practitioner, who in a note dated April 15, 1994, stated that claimant ". . . has been under my care and on medication for stress reaction since August 1993. She never could identify to me the source." Dr. C referred claimant to Dr. OM, a Ph.D. and licensed professional counselor. In a note dated March 7, 1994, Dr. OM is of the opinion claimant is suffering from "Post Traumatic Stress Syndrome (DSM III-R 309.89)." In a report dated March 15, 1994, Dr. OM lists claimant's symptoms to include: "insomnia, despair, flashbacks of the traumatic event, agitation, and preoccupation." In Dr. OM's opinion, "the cause of [claimant's] inability to work occurred at the work place." Subsequent reports dated April 27, 1994, and June 8, 1994, expand on claimant's symptoms and the June 8th report to claimant's attorney discussed causation as follows:

> Your summary states that the Hearing Officer [actually benefit review officer] was unable to render a decision in [claimant's] favor because there was a significant delay of time between her filing a claim and the date of the injury. Your summary indicated that unless good cause could be shown to justify

such a delay, then under the Texas Labor Code [claimant's] claim would not be viable.

You have received from me a treatment report in which I state [claimant's] diagnosis which is Post-traumatic Stress Disorder (DSM III-R 309.89). I have included the pages from the diagnostic manual that a provider uses as a guide when making this diagnosis. There is as you will see an attachment to this diagnosis known as "Delayed Onset." More often than not, a delay in the symptoms and/or the recognition of how these symptoms are related to the traumatic event occurs. There is no outside period of time in which the onset of symptoms invalidates the diagnosis. There is a minimum of six months.

Dr. A, a psychiatrist, apparently saw claimant as a medical examination order (MEO) doctor for the self-insured. By report dated May 27, 1994, Dr. A recounted a history of problems beginning about a year earlier (mentioned earlier in this opinion) and rendered an opinion that:

After reviewing the above facts as presented and evaluating the patient, I believe her symptoms are related to the on-the-job incident. Unfortunately, I also see her as having had a psychotic decompensation. This is most likely related to and precipitated by the incident. She is at the present time psychotic and I believe at some risk for self-injury.

The hearing officer, in the discussion portion of her decision, analyzes why she does not find the claimant sustained a compensable mental trauma injury. A portion of that paragraph states:

In order to be compensable, a mental trauma injury must be traceable to a specific event. In the current case, Claimant's contention that the specific event is the killing of the inmate on (alleged date if injury), is plausible. However, by the testimony of Claimant's witnesses, it was established that it was not the event of (alleged date if injury), standing alone that caused Claimant's condition. Rather, the evidence established that Claimant's condition was the result of a combination of ongoing stress and fear together with the incident of (alleged date if injury). Specifically, the medical evidence shows that Claimant's ongoing employment in a situation where she felt unsafe was a cumulative stressor which together with the incident of (alleged date if injury), led to Claimant's symptoms. Further, the evidence shows that the health care provider failed to factor in the non-work-related factors of Claimant's divorce and custody battle that may have influenced her condition. Therefore, it cannot be concluded that Claimant's post-traumatic stress disorder is the result of a single incident that occurred on (alleged date

if injury).

Clearly from this discussion the hearing officer believed a number of factors contributed to claimant's PTSD. Having assessed the evidence as not establishing a compensable mental trauma injury, for the reasons stated, the hearing officer then interjects a new, different theory, not advanced by the parties, being that "[i]f it were established that Claimant suffered a compensable mental trauma injury, the date of the injury would [be] . . . under Section 408.007 of the Act . . . ." Section 408.007 deals with the date of injury for an occupational disease, although claimant, throughout, was claiming a specific event injury on (alleged date if injury), with good cause for not reporting the injury or filing a claim within the allotted time frame. Instead of engaging in an analysis, and making determinations on good cause for not timely giving notice and filing her claim, the hearing officer proceeded to discuss occupational (to include repetitive mental trauma) diseases. The hearing officer should have stressed an analysis of what constitutes good cause. Nevertheless, the hearing officer made the following pertinent determinations:

FINDINGS OF FACT

4. Claimant is currently suffering from a mental disorder known as post-traumatic stress disorder.

5. Claimant's post-traumatic stress disorder is not the result of a single incident occurring on (alleged date if injury), in the course and scope of employment.

6. Claimant's post-traumatic stress disorder is not a compensable mental trauma injury under the Act.

7. Claimant's date of injury, which is the most appropriately determined using the test for occupational diseases which are also latent conditions, is the date she knew or should have known that her mental disorder may have been the result of an incident occurring at work. That date was _____.

8. Claimant reported her alleged mental trauma injury in January 1994, which is not within 30 days of the date of the injury and Claimant did not act as a reasonably prudent person when she failed to report her alleged injury within 30 days.

9. Claimant filed her claim with the Workers' Compensation Commission in March of 1994, which is less than one year from the _____, date of injury.

CONCLUSIONS OF LAW

2. Claimant did not suffer a mental trauma injury in the course and scope of employment on or about (alleged date if injury).

3. Claimant failed to report her alleged injury within 30 days and did not have good cause for failure to do so.

4. Claimant did timely file her claim with the Texas Workers' Compensation Commission.

Claimant appeals Findings of Fact Nos. 5 through 8 (and Finding of Fact No. 10 and Conclusion of Law No. 5 dealing with disability, which is dependent on a determination of compensability) and Conclusions of Law Nos. 2 through 4 quoted above. Self-insured appeals Findings of Fact Nos. 7 and 9 and Conclusion of Law No. 4. Both parties cite Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972) as controlling. Claimant cites Bailey v. American General Insurance Company, 279 S.W.2d 315 (Tex. 1955), as authority for her position and self-insured seeks to distinguish Bailey, *supra*, by citing Duncan v. Employers Casualty Company, 823 S.W.2d 722 (Tex. App.-El Paso 1992, no writ).

Under the 1989 Act, as under previous law, some mental trauma injuries without an underlying physical injury may be compensable and nothing in the 1989 Act limits or expands recovery which would have been available under prior law. *See* Section 408.006(a) (Section 408.006(b) dealing with legitimate personnel actions is not applicable here.) In that the 1989 Act neither limits or expands mental trauma injuries (except for personnel actions) most Texas cases interpreting those injuries are probably still applicable. The Texas Supreme Court has held that mental trauma can produce a compensable accidental injury, even without an underlying physical injury, if it is traceable to a definite time, place and cause. Bailey, *supra*; Olson, *supra*; Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979). Claimant alleges the incident of the "horrific" murder on (alleged date if injury) is such a definite time, place and cause, pointing out that in Bailey an employee suffered traumatic neurosis from fright when a scaffold collapsed resulting in a coworker falling to his death. Self-insured points out that the injured worker in Bailey was standing on the same scaffold as the coworker who fell to his death and states that after 1971, the "Texas courts have found few mental cases to be compensable . . . ." In Duncan, *supra*, the Court required that the injury must have occurred within the course of claimant's employment, must have been an "accidental injury" and must have been traceable to a definite time, place and cause. The Court cited Maksyn for the proposition that to be compensable there must be an "ascertainable single event, though caused by mental stimuli" and that repetitious mental traumatic activity cannot cause a compensable mental trauma injury. Claimant contends that the "contemporaneous witnessing of a horrific murder . . . would constitute [such] an unusual event . . ." to meet the court's requirements. Self-insured points out that claimant's

"vicarious involvement" in the jail incident on (alleged date if injury), ". . . was simply too far removed from the type of exposure required to meet the burden of showing that it was a psychology [sic] distressing event . . ." which would have produced a compensable mental trauma injury.

The hearing officer found, and is supported by nearly all the medical reports, that claimant is suffering from a mental disorder known as PTSD (Finding of Fact No. 4). The hearing officer's determination is supported by ample evidence. The hearing officer further found, as quoted in her discussion, that claimant's PTSD was not the result of the single incident on (alleged date if injury) and therefore is not a compensable mental trauma injury under the 1989 Act, medical reports to the contrary notwithstanding. The hearing officer is the sole judge of the relevancy and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). Whether claimant's PTSD was the result of the single incident on (alleged date if injury) or a cumulation of incidents was a factual determination which the hearing officer discussed, finding that the (alleged date if injury) event, standing alone, was not the cause of the PTSD but that there were other non-work-related factors which "influenced" claimant's condition. The hearing officer was free to accept or reject the evidence in the medical reports. The opinion evidence of expert medical witnesses is but evidentiary, and is never binding on the trier of fact and the opinions of a medical expert are not conclusive even when they stand uncontradicted by other medical evidence. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). While a different fact finder may have reached a different conclusion, there is sufficient evidence to support the hearing officer's determination on this point.

In having determined that claimant did not sustain a compensable mental trauma injury, the other issues become academic; however, the hearing officer should nonetheless have addressed the timely reporting to the employer and timely filing of the claim from the stand point of whether good cause existed for the lack of timely reporting or filing. Claimant throughout, from the benefit review conference through appeal has contended that the single event on (alleged date if injury) caused her PTSD-Delayed Onset and that she had good cause for not timely reporting or filing because she "didn't know what her problem was." That comment may have led the hearing officer to discuss the date of injury of a "typically latent condition" to be the date that claimant knew or should have known that her condition may be the result of an incident arising at work, citing Section 408.007. We believe the "knew or should have known" test for a date of injury is limited to occupational diseases including repetitive trauma injuries. Section 401.011(34) and (36). Claimant, in her appeal, specifically rejects that she is claiming a repetitive trauma injury by referring to the medical reports of Dr. OM which related claimant's PTSD - Delayed Onset, directly back to a single specific cause, namely, the (alleged date if injury) incident at the jail and cites Appeals Panel decisions dealing with "good cause for delay." We agree that not knowing what is causing one's symptoms, or not knowing that those symptoms may be work-related, may, in some circumstances, constitute good cause for failing to timely report

an injury and failure to timely file a claim. Whether good cause exists is ordinarily a factual determination. Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993. The test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 92426, decided October 1, 1992. We are mindful that it is the claimant's contention that she was, in 1993, incapable of acting as "a normal and prudent person." Baca v. Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.) citing the Texas Supreme Court, indicates that a mistake (or in the instant case lack of any knowledge) as to the injury may constitute good cause. However, whether the conduct of claimant is reasonable is ordinarily a question of fact. In the instant case, the hearing officer determined, by interpolating Dr. A's May 27, 1994, report that claimant knew or should have known the "horrific" event of (alleged date if injury), was related to her symptoms of nightmare and daily crying in _____, and that claimant failed to report her claimed injury within 30 days of that date. Even if one were to use Dr. C's report that claimant had been under his care and on medication for stress reaction since August 1993, claimant's notice of injury in January 1994 would not have been timely filed. It was not necessary that claimant be aware of precise terminology of "PTSD - Delayed Onset" per DSM III-R Diagnostic Code 309.89 to give notice of injury. It was sufficient that claimant knew she was having problems and the hearing officer found a prudent person would have associated those problems with the horrific event of (alleged date if injury). The appellate standard of review of a hearing officer's determination regarding good cause is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993. In determining whether there is an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). We conclude that the hearing officer did not do so.

Regarding the hearing officer's determination that claimant filed her claim with the Commission in March 1994, which the hearing officer said was "less than one year from the _____ date of injury," we have earlier pointed out that the date of injury was (alleged date if injury), and the issue to be decided was whether there was good cause for failure to file her claim in a timely manner. Section 409.004(1). The hearing officer determined that because claimant was essentially asymptomatic until _____, there was "good cause for failing to file prior to that time . . . ." Accepting claimant had good cause for failing to file her claim within one year of (alleged date if injury), the Appeals Panel and case law have held that good cause must continue to the date when the injured worker actually files the claim. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland Mutual Ins. Co. v. Alvarez, 803 S.W.2d 841, 943 (Tex. Civ. App.-Corpus Christi 1991, no writ). An injured worker owes a duty of continuing diligence in the prosecution of his claim, and that claimant must prove that the good cause exception continued up to the date of filing. Texas Casualty Insurance Company v. Beasley, 391 S.W.2d 33, 34 (Tex. 1965). Even if a claimant at one point had good cause, the claimant must act with diligence to notify the employer of a claim or to file a claim. The totality of a

claimant's conduct must be primarily considered in determining ordinary prudence. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d at 297; Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d 846 (Tex. 1968). The Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to perfect a finding of good cause for delay in giving timely notice. Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993. The Texas Supreme Court in Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 373 (1948) stated:

> In all cases a reasonable time should be allowed for the investigation, preparation and filing of a claim after the seriousness of the injuries is suspected or determined. No set rule could be established for measuring diligence in this respect. Each case must rest upon its own facts.

Although the claimant may have initially had good cause, the hearing officer as the finder of fact determined that claimant began having symptoms and therefore knew or should have known her symptoms were work related in _____. Claimant was required to file her claim within a reasonable time thereafter, not the statutory one year as indicated by the hearing officer. *See also* Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. For that reason, we reverse the hearing officer's determination on this point and render a new decision that claimant did not timely file her claim with the Commission (which would have been shortly after _____). We would further note, on this point, that even if claimant had sustained a compensable mental trauma injury on (alleged date if injury), and there was good cause for not timely reporting the injury or not timely filing the claim until January 31, 1994, as the dissent, and claimant contend, the self-insured would still be relieved of liability (i.e., the claimant would still lose) because claimant's good cause ended on January 31, 1994, and did not extend to March 16, 1994, when claimant filed her claim. Good cause must continue to the date when claimant actually filed her claim. (*See* Lee and Farmland, *supra*) or within a reasonable time thereafter. *See* Hawkins, *supra*. This claimant failed in any event to do.

Regarding the issue of disability, in that claimant has not sustained a compensable mental trauma injury, claimant by definition does not have disability. *See* Section 401.011(16).

Having reviewed the record, we find sufficient evidence to support the hearing officer's determinations that claimant did not sustain a compensable mental trauma injury, and affirm that determination and the hearing officer's determination on disability. We do reform, by deletion, so much of the hearing officer's decision which refers to a date of injury as _____, and reference to occupational diseases. We accept the hearing officer's decision that claimant had good cause for failing to report her injury (and file her claim for compensation) until _____, and reverse and render that therefore notice to the employer of the injury and filing her claim in 1994 was not timely.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. Both Dr. OM and the carrier's doctor, Dr. A, diagnosed claimant's condition as PTSD - Delayed Onset. As I understand the hearing officer's decision, while she found that claimant did indeed have the PTSD condition, she further found that the PTSD was not solely the result of the specific job-related event of (alleged date if injury). Though claimant did not testify, apparently because of her fragile mental state, her interrogatory answers stated that she heard an inmate "screaming in agonizing pain while being brutally murdered by the other inmate," that she saw his body being carried out with face contorted, saw blood everywhere, and realized that "it was my trustee" who did the killing and who had just minutes earlier been assisting her. Her interrogatory answers also indicated she witnessed the murder and The Employee's Notice of Injury or Occupational Disease and Claim for Compensation form filed by the claimant stated: "I witnessed an inmate being killed." Though making no finding, as such, the hearing officer's discussion indicates she felt that the additional, cumulative stressors of feeling unsafe at work and of a subsequent divorce with a child custody dispute were also causative of the PTSD and thus disqualified claimant from a compensable mental trauma injury. While there was evidence that after the traumatic event of (alleged date if injury), claimant experienced additional, cumulative stressors from the divorce. Dr. A's statement said he received little information about the divorce from which to draw any conclusions. The hearing officer herself indicated Mr. L testified that he did not consider the divorce "a significant factor" in the causation of claimant's PTSD. Nor does Dr. OM mention it as a causative factor.

Claimant also stated in her interrogatory answers that after the incident she felt fear of a future episode at work. Dr. A indicated that it was "understandable" that claimant acquired feelings of mistrust and misgivings following the incident. Dr. OM mentioned claimant's concern with being denied certain training after the incident to enhance her safety. However, a statement from the sheriff indicated claimant came to work every day thereafter as scheduled and without apparent problems, and the deputy testified that

claimant worked at the jail without apparent problems until January 31, 1994. In my view, the hearing officer's determination that claimant's mental trauma injury was not compensable, ostensibly because of subsequent, additional, cumulative stressors, is against the great weight and preponderance of the evidence.

The hearing officer further found that claimant's notice of the injury was provided in January 1994 and was untimely. The hearing officer's decision not only fails to state a particular date in January 1994 that notice was given but further fails to indicate to whom the notice was given and the manner in which it was communicated. The self-insured's position at the benefit review conference was that its first knowledge of the injury was on February 16, 1994. Claimant stated in her interrogatory answers that it was not until January 31, 1994, that she was told by a doctor that her PTSD was related to having witnessed the murder. However, the evidence showed that she was first seen by Dr. OM on February 17, 1994, not January 31st, although she did begin missing work on January 31, 1994. Claimant, a person obviously without medical training, could not be expected to know she had PTSD caused by her employment until told so by someone qualified to diagnose the condition and relate it to her employment. Claimant's lack of knowledge of the nature of her medical condition and its job relatedness prior to being advised by her doctor (on January 31 or February 17, 1994), in my opinion, constituted good cause for not reporting the injury within 30 days of (alleged date if injury). The test for good cause is that of ordinary prudence, that is, whether the claimant prosecuted the claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). And, a claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met. Farmland Mutual Ins. Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). We have previously observed that the Appeals Panel applies "broad and ungrudging" interpretations of the provisions of the 1989 Act as to whether a given set of facts meets the notice requirements. Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993. Once advised of the diagnosis and its job relatedness, claimant promptly provided notice of the injury and filed her claim for benefits.

I would reverse the hearing officer's decision as being against the great weight and preponderance of the evidence and render a decision that claimant had a compensable mental trauma injury, that she had good cause for not providing timely notice thereof and for not timely filing her claim, and that she had disability as a result of her injury.

Philip F. O'Neill
Appeals Judge