

APPEAL NO. 950633

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). A contested case hearing was held on February 3, 1995. With respect to the issues before her, the hearing officer determined that appellant's (carrier) contest of compensability was timely and sufficient to raise the issue of whether respondent (claimant) sustained a mental trauma injury in the course and scope of her employment; that claimant sustained a compensable mental trauma injury on ____; that claimant had disability from June 11, 1993, to October 21, 1994; and that claimant is not barred from pursuing workers' compensation benefits because she did not make an informed election of remedies. Carrier's appeal challenges the hearing officer's injury, disability and election of remedies determinations. No response was received from claimant. In addition, claimant did not appeal the determination that carrier timely contested compensability in this case; therefore, that determination has become final under Section 410.169.

DECISION

Finding the evidence insufficient to support the hearing officer's decision and order, we reverse and render a new decision that claimant did not sustain a compensable mental trauma injury and therefore, did not have disability within the meaning of the 1989 Act. We affirm the hearing officer's determination that claimant did not make an effective election of remedies.

Claimant testified that she began working for (employer) in 1977. On _____, claimant was working as a senior service representative in employer's city 1, Texas, office. Claimant stated that at approximately 9:00 a.m. on that day, while claimant was alone in the office, a customer came into the office accompanied by her mother. That customer had called claimant on approximately three occasions in the preceding week inquiring about whether her premium payment had been received. Claimant stated that the customer became confrontational in the third telephone conversation which occurred on May 10th. Claimant stated that when the customer came into the office on _____, she again inquired about the premium payment. Claimant stated that she checked her computer, learned that the payment had been posted, and told the customer and her mother that the money had been received. At that point, the customer's mother became very angry and cursed at claimant. Then the customer started to curse at claimant and began picking up files, papers, furniture and other items in the office and throwing them around. Claimant testified that she called employer's city 2 office and spoke to Mr. J. Claimant stated that when she called the main office the irate customer and her mother left the office. Following the incident, Mr. J advised claimant to lock the door and to turn on the answering machine. Thereafter, claimant's supervisor, Mr. I, came to the office and they called the police. The police officer who responded to the call told claimant that there was nothing they could do because the customer had not physically harmed her. After the police left, claimant testified that she left work and went home for the rest of the day. Claimant stated that she

returned to work on the day following the incident and continued to work until June 10, 1993, when she had a confrontation with Mr. S, about his not getting a telephone call from a client. Claimant testified that her confrontation with Mr. S on that date was unrelated to the _____, incident. Claimant testified that generally that type of confrontation would not upset her, but this one did. Specifically, claimant stated that the incident "just broke the camel's back. That's all I can say. It was just the last straw that took whatever it was wrong with me to just come out and so I could get some help"

On cross-examination, claimant acknowledged that she had been involuntarily transferred from one of employer's city 2 locations to its office in city 3, Texas. Claimant testified that she was the only black employee in the city 3 office and that she was lonely because no one would talk to her and there was no one with whom she could have lunch. Claimant stated that she had a racial problem at city 3, which resulted in her transfer to employer's city 1 office. Claimant stated that initially she was happy about the transfer to city 1 because a man whom she had known since she started working for employer worked in that office. However, after she transferred to city 1, claimant learned that he was going to retire. Claimant began to cry at the hearing while she was recounting her disappointment in learning of his retirement. When asked about whether her coworker's departure was upsetting to her at the time as well, claimant stated "Well, you have to understand, in my mind it's collective. It's all together." In addition, claimant testified that when she got to the city 1 office she felt as lonely and isolated as she had felt in city 3 in that he coworkers did not talk to her or have lunch with her. Finally, claimant testified that her coworkers at city 1 upset her because she would be crying at her desk and they would just ignore her. She stated that she did not receive any empathy from her coworkers and that hurt.

Claimant's primary treating physician for her depression was Dr. F. In a progress note of August 15, 1994, Dr. F refers to an on-the-job incident where claimant had been threatened and of claimant's fear of future harassment. In a letter dated October 19, 1994, Dr. F stated:

[Claimant] has been under my care since June 17, 1993 for treatment of her major depression. [Claimant's] illness resulted as a direct consequence of the job-related incident that occurred in June 1993.

In attending physician statements related to claimant's application for disability benefits dated August 16, 1993, and October 13, 1993, Dr. F lists the date of symptoms or the date of the precipitating incident as unknown and in the portion of the form completed by claimant the date of the incident is listed as June 11, 1993.

With respect to election of remedies issue, claimant testified that when she began to lose time from work on June 11, 1993, she applied for and received both short-term and long-term disability benefits and that her medical bills were paid by her group health insurance. Claimant stated that her disability benefits were stopped in February 1994 and thereafter were reinitiated and continued to be paid until October 21, 1994, when she was offered and

accepted a severance package from employer. Claimant stated that when her disability benefit payments were stopped, she was advised by some of her coworkers to pursue a workers' compensation claim. She stated that it had not occurred to her to do so until that time.

Carrier argues that claimant did not sustain a compensable mental trauma injury because the great weight of the evidence demonstrates that claimant's injury was the result of repetitious mentally traumatic activity and cannot be traced to an incident arising in the course and scope of claimant's employment traceable to a definite time, place and cause as is required under the statute. Bailey v. American General Insurance Co., 279 S.W.2d 315 (Tex. 1955); Olson v. Hartford Accident and Indemnity Co., 477 S.W.2d 859 (Tex. 1972). The Texas Supreme Court has specifically held that damage or harm caused by repetitious mentally traumatic activity, as opposed to physical activity, cannot constitute an occupational disease. Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979); See *also* Texas Workers' Compensation Commission Appeal No. 941551, decided December 23, 1994; Texas Workers' Compensation Commission Appeal No. 94785, decided July 29, 1994.

Generally, the existence of an injury may be established through the testimony of the claimant alone; however, in Appeal No. 941551, *supra*, we noted that the cause, progression and aggravation of mental disease is a subject of such a technical nature that expert medical evidence is required. In this instance, claimant testified that the May 1993 incident was the event which caused her mental trauma injury. However, she also acknowledged that she was involuntarily transferred from employer's city 2 office to an office in city 3 where she felt isolated and lonely and that she was transferred from city 3 to city 1 as a result of a racial incident. In addition, claimant testified to her disappointment in learning after she was transferred to city 1, that a longtime coworker at that office, whom she considered a friend, was going to retire. She also stated that her isolation and loneliness continued at the city 1 office in that her coworkers ignored her, even when she sat crying at her desk. In discussing these incidents and whether they contributed to her being upset at the time claimant stated that the incidents were "collective" and it was everything "all together" that caused her problems. Finally, claimant testified to a confrontation with Mr. S on June 10, 1993, unrelated to the _____, incident, which was the "last straw" and after which she stopped working and sought medical treatment. Although claimant argued at the hearing that it was the _____, incident with the irate customers which caused her mental trauma injury, her testimony considered as a whole belies that assertion. As we have previously noted, a claimant's singling out of one traumatic event among several similar events as being the causative factor is insufficient to sustain her burden of proving a compensable mental trauma injury, particularly in the absence of probative medical evidence of causation to support the contention. Appeal Nos. 941551 and 94785, *supra*. In this instance, although Dr. F refers to trauma claimant sustained in June 1993 at the city 1 office as the cause of her depression, Dr. F nowhere identifies the _____ incident as the specific event which caused claimant's mental trauma injury, as opposed to that incident in conjunction with the other stressful circumstances at the office which claimant described as the coldness of her coworkers, claimant's sense of loneliness

and isolation, and her confrontation with Mr. S in June 1993 which was the "last straw." We can only conclude that the _____ incident was one in a series of stressful events beginning with her involuntary transfer to the city 2 office and the incidents which occurred there and continued at the city 1 office. Accordingly, in this instance, as in Appeal Nos. 941551 and 94785, the great weight of the evidence establishes that claimant's mental trauma injury was the result of repetitious activity and cannot be traced to a definite time, place and event and is, therefore, not compensable under the 1989 Act. Because we have determined that the evidence is not sufficient to support a determination that claimant sustained a compensable injury, we must also reverse the hearing officer's disability determination given that the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

Carrier also challenges the hearing officer's determination that claimant did not make an effective election of remedies in applying for and receiving disability benefits and group health medical benefits. In Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993, we noted that in order to bar a workers' compensation claim under the theory of election of remedies the election must be:

- (1) an informed choice
- (2) between two or more remedies, rights, or states of facts
- (3) which are so inconsistent as to
- (4) constitute a manifest injustice to a third party.

(citing Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, 851 (Tex. 1980)). There is disputed evidence on the issue of whether claimant made an effective election of remedies in this instance. It was for the hearing officer as the sole judge of the weight, credibility, relevance and materiality of the evidence under Section 410.165(a) to resolve that conflict. Our review indicates that there is sufficient evidence to support the hearing officer's determination; therefore, no basis exists for disturbing it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Determining that the hearing officer's determination that claimant sustained a compensable mental trauma injury is against the great weight and preponderance of the evidence, we reverse and render a new decision that claimant's mental trauma resulted from ongoing activity and, therefore, does not constitute a compensable mental trauma injury under the 1989 Act. We likewise reverse the hearing officer's disability determination in that a compensable injury is a necessary prerequisite to a finding of disability. We affirm the hearing officer's decision on the election of remedies issue.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge