

## APPEAL NO. 970292

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 25, 1996, and January 9, 1997, a hearing was held. He (hearing officer) determined that appellant (claimant) did not sustain a compensable mental trauma injury on \_\_\_\_\_. Claimant asserts that the medical evidence shows that the specific event of \_\_\_\_\_, caused the mental trauma injury, that whether the incident comprised a legitimate personnel action should not have been considered in this case, and that carrier provided no evidence that the event was a legitimate personnel action. Respondent (carrier) replies that the decision should be affirmed.

### DECISION

We affirm.

Claimant worked at a bank (employer) as an Assistant Vice President for over 10 years. She described herself as an assistant to the Chairman of the Board, Mr. C. Claimant also described herself as not being able to function after an incident with Mr. C on \_\_\_\_\_. On that day claimant was on the phone in an area that contained the desks of at least two other employees. Mr. C came into this area and asked claimant a question, which she said she answered. Shortly thereafter, Mr. C returned while claimant was still on the call and asked another question to which claimant replied. Then a few minutes later Mr. C was leaving for lunch and stopped at her desk (she was still on the phone) and made a comment. After departing, a few seconds later he came back to the door and claimant said he asked, in a raised voice, "are you still on that phone call?" Claimant further stated that the tone of the voice was disconcerting to her.

Claimant stated that she had been on the personal phone call less than 10 minutes. She was very upset after this incident but stated that she "kept my composure" and went to lunch early. This incident happened on a Wednesday; she worked Thursday and Friday. She saw a doctor on the following Monday, (after alleged injury date), and has not worked since that date. Her diagnosis is post-traumatic stress disorder (PTSD) with major depression.

Dr. M, a psychologist, testified that he had treated claimant in 1994 and when he last saw her in 1994, she was "functioning well." On cross-examination he stated that in 1994 she had been susceptible to panic attacks. In answering questions about PTSD, Dr. M first said that PTSD does not result from "a gradual build-up of stress"; he later said, in answer to a somewhat different question, that it is possible for events to build-up to PTSD. He then added that he would have to think about whether there could be a gradual build-up of stress to reach PTSD. He said that in 1994 claimant had been upset but was not "barely hanging on" as she is now. Dr. M also stated that there may be other underlying problems, such as with claimant's personal life, but said the "trigger event" for her condition now was the incident of \_\_\_\_\_; after that she "shutdown." Dr. M also agreed on cross-

examination that claimant reported conflicts with Mr. C before and that in January 1996 her problems with him began again. Dr. M referred claimant to Dr. H a psychiatrist (M.D.), stating that they agreed on the diagnosis of PTSD.

Ms. C and Ms. D both testified that they work in the same area within a few feet of claimant. Both recounted essentially the same sequence as claimant related in regard to her phone conversation and the interruptions by Mr. C. Neither said that Mr. C's voice was louder when he asked if claimant was "still on that phone call," but Ms. C did say that his voice was more agitated as compared to his earlier questions, adding that Mr. C's questions were not inappropriate. Both said that claimant was angry after the incident, with both also indicating that claimant had said that the comment made her "so angry." Ms. D said that in the remaining two or three days of work before claimant ceased working, she noticed no difference in her but added that if claimant was crying on one of the days, that would not be unusual because claimant had "been having crying spells prior to" the day of the incident. Both said that claimant had appeared to have more problems during the last year and one-half or so; both said that they never knew how she would be on any given day. Ms. C said claimant would comment that "she didn't have her legs under her," while Ms. D said claimant was "moody and shaking" a lot. Ms. D also indicated that she "catered to her" (claimant).

Both Ms. C and Ms. D said that Mr. C was "matter-of-fact"; he was also referred to as abrupt. Ms. C said that claimant has stated that she hated Mr. C. Ms. D stated that claimant has called Mr. C a "jerk." Ms. D added that the relationship between the two was unusual because she believes Mr. C had confidence in claimant while claimant did not like Mr. C. Ms. D testified that Mr. C did not always ask how claimant was and "she would take that as being rude." Ms. C recalled that in January claimant was upset, but does not know if it related to Mr. C. In answer to a question from the hearing officer, Ms. C said that during the last year and one-half claimant worked but not as efficiently as she had before. She added that some of claimant's work had been done by others for her. Ms. C's last comment was that claimant was on an "emotional roller coaster."

Dr. H testified by telephone. He testified that claimant had been referred to him and he first saw her on April 2, 1996. He diagnosed PTSD as the primary diagnosis, with major depression also. He related that claimant reported being under great stress at work with her boss "yelling at her," adding that this was said to have gone on "for years." He said that in January 1996 claimant had a "panic attack" and has not been able to work since February 26, 1996. (We note that at this point in the testimony, Dr. H has not mentioned \_\_\_\_\_.) Dr. H was then asked about a "specific event," with the question including whether the PTSD was due to a more recent stressor or event. Dr. H then answered, "hers was the ongoing, repeated anxiety and stress of this situation - that was her stressor." When asked about \_\_\_\_\_, Dr. H replied that that was around the date of an event of "panic attack" at work, saying "it apparently reached that degree of stress - I just used that as an onset date"; he then said that the stress had been going on a longer period of time.

Dr. H said that PTSD can build up. He referred to its definition as including the words, "an event or events." He added that the event or events that could cause PTSD in one case may not do so in another. When asked about an "event or events," relative to claimant, on cross-examination, Dr. H said that it "occurred again and again and again and slowly eroded away her ability to cope with it." In so saying, he pointed out that the stressor, in wearing away, can then make the patient more vulnerable to it. The hearing officer asked if there had been "cumulative years of problems with her boss," to which Dr. H replied, "yes." Dr. H said that claimant felt "hopeless" at work and cannot return to work at this point.

The first doctor claimant saw after \_\_\_\_\_ was her family doctor, Dr. He. Dr. He had commented in June 1994 that claimant was anxious, depressed, and agitated. In July 1994 he referred her to Dr. M for this. In 1996, Dr. He noted on January 24th that claimant had "an episode of weakness and shakiness today." On February \_\_, 1996, he then noted that her stress had increased during the past few days. On February \_\_, 1996, he wrote, "her job stress has continued." He also said that she developed "continuous tremors from Monday to Friday" (Monday would have been February 1996 since Dr. He was writing this note on Monday, February 1996.) He referred her back to Dr. M. (Neither the date of \_\_\_\_\_, nor the events of that day, were mentioned by Dr. He in his note of February \_\_, 1996.)

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. While claimant described the incident of \_\_\_\_\_ as the incipient event upon which her PTSD was based and Dr. M's testimony was basically supportive of that conclusion, the medical testimony of Dr. H along with the medical notes of Dr. H and Dr. He do not point to \_\_\_\_\_, as the event which resulted in PTSD. In Texas Workers' Compensation Commission Appeal No. 94573, decided June 15, 1994, a decision that claimant did not sustain a compensable mental trauma injury was upheld. That claimant had been under stress and, on a particular day, received a memo from her supervisor questioning her action in hiring an employee. Medical records were said to show the "severity of her mental condition" but the hearing officer found that the claimant did not show that the memo was sufficient to cause the injury. Findings also included that the claimant had repetitive stress at work and that claimant did not show that the memo was not a legitimate personnel action. The Appeals Panel stated that there was no error committed in applying the law and affirmed. See *also* Texas Workers' Compensation Commission Appeal No. 94349, dated May 5, 1994, in which a hearing officer's decision of no compensability was affirmed even though there was evidence of one event that caused that claimant to be unable to cope with the stress at work - when that stress had also been shown to have extended over a period of months. The finding of fact that claimant has a cumulative stress disorder is sufficiently supported by the evidence, including that of claimant, Ms. C, Ms. D, Dr. H and Dr. He. In addition, the conclusion of law that claimant did not sustain a compensable mental trauma injury on \_\_\_\_\_, is sufficiently supported by the evidence and the finding of fact just mentioned; that conclusion of law is also sufficiently supported by the supportable determination as to legitimate personnel action which is discussed below.

While claimant states that carrier provided no evidence as to the legitimacy of the personnel action, Texas Workers' Compensation Commission Appeal No. 960059, decided February \_\_\_\_, 1996, in answering a claimant's assertion, said that the hearing officer had not applied an incorrect burden of proof when he did not place the burden on carrier to show legitimacy. It cited Texas Workers' Compensation Commission Appeal No. 93137, decided April 7, 1993, which said that Section 408.006(b) applied (that section says a mental trauma injury that arises principally from a legitimate personnel action is not compensable) when there was no showing that the action was "contrary to law, employer's policies, or any other requirement that would render illegitimate the underlying personnel action." See *also* Appeal No. 94573, *supra*. We find no error, because of an absence of evidence provided by the carrier, in finding of fact two that said the incidents of \_\_\_\_\_, were all a legitimate personnel action.

Finally, claimant asserts that the question of legitimate personnel action should not have been considered because it was not listed in the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) carrier submitted which contested that claimant had suffered a compensable mental trauma injury. As stated in many prior decisions, the burden of proof to show a compensable mental trauma injury is on the claimant to show that the injury stemmed from a definite time, place, and event within the scope of employment. When a mental health injury has been shown, then the claimant must show that it did not emanate from a legitimate personnel action. See Appeal Nos. 93137, 94573, 960059, *supra*, and Texas Workers' Compensation Commission Appeal No. 94310, decided April 28, 1994, which said that the hearing officer did not err in making no finding regarding the legitimacy of the personnel action because there was no finding of a mental trauma injury. That opinion said:

The question of legitimate personnel action ... comes into play when a claimant has shown a mental trauma injury that may be compensable. . . , because at that point, even with a finding that a specific event caused the mental trauma injury, there is no compensability if it arose from a legitimate personnel action.

In addition, in the case under review, there was no issue reported from the benefit review conference (BRC) to the effect that the carrier's dispute within 60 days was not adequate to include any question of legitimate personnel action, if needed. See Texas Workers' Compensation Commission Appeal No. 94425, decided May 18, 1994, which said that a claimant "may waive his right to contest whether a carrier timely and properly controverted the claim...." The hearing officer noted that there was not an issue as to the adequacy of the TWCC-21 reported out of the BRC when he held that the question of legitimate personnel action was not foreclosed by the TWCC-21 in this case. In addition, we note that the BRC report shows that the position of the carrier, on the issue of whether a compensable mental trauma injury had been sustained, was that such an injury had not been sustained, but added that if injury were found, it was not compensable because it "resulted from a legitimate personnel action." We find no error in the hearing officer having considered legitimate personnel action and having made a finding of fact addressing it. In

addition, the evidence sufficiently supports the determination that the events of \_\_\_\_\_, constituted a legitimate personnel action.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge