

APPEAL NO. 980074

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 October 29, 1997. In the decision and order, the hearing officer stated that she held the record open until November 20, 1997. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable mental trauma injury on _____, and that she timely reported the injury she alleged to her employer. In her appeal, the claimant asserts that the hearing officer's determination that she did not sustain a compensable injury is against the great weight and preponderance of the evidence. She also complains that the hearing officer failed to consider certain evidence. The timely reporting determination was not appealed. The respondent (self-insured) asserts that the appeal was not timely filed and in the alternative urges affirmance in its response.

DECISION

We affirm.

We will first address carrier's contention that claimant's appeal was not timely. The records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision and order was distributed to the parties on December 19, 1997. The provisions of Section 410.202 allow 15 days to file an appeal with the Appeals Panel after receipt of the hearing officer's decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) allows five days for receipt of notices after mailing by the Commission. Five days after the distribution date of December 19, 1997, is December 24, 1997, but that day, along with December 25th and 26th were State holidays and December 27th and 28th fell on a weekend, so the following Monday, December 29th, is used as the deemed date.¹ Fifteen days later would be Tuesday, January 15, 1998. The appeal was filed on January 12, 1998, within the 15-day period and was timely.

The claimant testified that she had been working as an administrative clerk for a university (employer) since 1984. She said that she had been diagnosed with depression and attention deficit disorder (ADD) before her claimed mental trauma injury, but that these conditions did not affect her work. She said her claimed compensable mental trauma injury occurred on _____. She said that on that day a coworker, (Ms. FO), told her that "everyone" knew about a sexual harassment complaint that claimant had filed against another coworker, that coworkers were calling her names "behind her back," that claimant's telephone at work was being wiretapped, and that Ms. FO had heard a "playback" of one of claimant's telephone conversations. Claimant said she felt betrayed

¹See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.3(a)(3) (Rule 102.3(a)(3)).

and angry because she had thought the Human Resources Department would keep her sexual harassment complaint confidential. Claimant said she continued to work for two days after the _____, discussion with Ms. FO because “the two people involved in the retaliation” against her were out of town at the time. Claimant said she had contacted her doctor, (Dr. WI), on _____, that he saw her on January 27, 1997, that he took her off work, and that he gave her antianxiety medication. She said the last day that she worked was January 24, 1997. Claimant said that before Ms. FO talked to her on _____, she had thought “something was going on” because her television at work suddenly stopped working. She also said that she had already suspected that her telephone was wiretapped before she talked to Ms. FO. Claimant said that she had never been taken off work before due to ADD or depression and said that she was very shaken and traumatized after the _____, discussion with Ms. FO. In a January 29, 1997, letter to employer’s Human Resources Director, claimant said that “it was wrong for my phone to be wire tapped . . . in an effort to try and get rid of me” and that her doctor has taken her off work because he knows that “it is affecting me.” In an April 18, 1997, letter, claimant said her “depression is due to the sexual harassment complaint filed and the retaliation since filing the complaint.” Claimant said that she thought she was being “forced out” and that employer was using her ADD symptoms against her and “writing her up” for tardiness.

In a January 27, 1997, off-work slip, Dr. WI stated that claimant is off work for one to three weeks “because of the psychological effects of stress caused by the sexual harassment by a coworker and because of wiretapping of her phone calls.” In a February 12, 1997, off-work slip, Dr. WI wrote that:

[claimant] is on the verge of a “nervous breakdown” (her words) related to several issues at work. These are 1) Mistrust of employers related to . . . wiretapping and common knowledge of sexual harassment complaint, 2) ADD and “EEOC issues” related to ADD, 3) Feeling that her job is trying to be taken from her

Mental trauma, even without an accompanying physical injury, can produce a compensable injury if it arises in the course and scope of employment and can be traced to a definite time, place and cause. 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). However, 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.

The 1989 Act provides that the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). Such conflicts or inconsistencies in the evidence are to be reconciled by the hearing officer. Burelsmith v.

Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In so doing, the hearing officer may believe all, part or none of any witnesses's testimony or any other evidence. Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer's decision will be overturned on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, claimant maintained that she had sustained a compensable mental trauma injury on _____, the date a coworker told her that "everyone knew" that she had filed a sexual harassment complaint and that an employee was "wiretapping" claimant's phone at work. The hearing officer determined that the claimant did not sustain a compensable mental trauma injury because her stress was the product of repetitively stressful events at work. From the evidence, the hearing officer could have determined that the alleged matters that caused the mental trauma claimed by claimant involved several different mentally traumatic events, including being "written up" for tardiness, the alleged sexual harassment itself, and the gossip about her sexual harassment complaint. There was evidence that claimant was affected by "several issues at work." After carefully reviewing the record, we cannot agree that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for reversing the hearing officer's decision on appeal.

The hearing officer also determined that investigation and handling of claimant's sexual harassment complaint was a legitimate personnel action. Section 408.006(b) provides that a "mental or emotional injury that arises principally from a legitimate personnel action . . . is not a compensable injury under this subtitle." Claimant contends that coworkers gossiped about her because of her sexual harassment complaint. Employer's Human Resources director denied that the Human Resources Department had inappropriately revealed information about claimant's sexual harassment complaint. However, if the Human Resources Department had revealed such information during its handling of the matter, the hearing officer could find that this involved a legitimate personnel action. In evaluating whether it was a legitimate personnel action within the meaning of Section 408.006, the focus is not properly on the manner in which the action was done. As we noted in Texas Workers' Compensation Commission Appeal No. 93867, decided November 10, 1993, the questions of whether actions were appropriate are better left to an employer's grievance procedures than the workers' compensation dispute resolution process. See *also* Texas Workers' Compensation Commission Appeal No. 950168, decided March 17, 1995, where we noted that Section 408.006 only refers to a personnel action being "legitimate" as opposed to fair. There is sufficient evidence to support the hearing officer's apparent determination that the revealing of information about the claim during the handling or investigation of the claim involved a legitimate personnel action within the meaning of the 1989 Act. Our review does not demonstrate that that determination was so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, we will not reverse it on appeal.

Claimant contends the hearing officer abused her discretion in failing to consider certain evidence. Claimant asserts that the hearing officer left the record open until November 20, 1997, in order for claimant to send medical information from Dr. WI to the hearing officer. The hearing officer's decision and order does state that the record remained open until nine days after that date, but states that no additional documents were received.² To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Here, claimant testified that the cause of her mental trauma was the incident on _____, and indicated that her mental state worsened from that specific incident. We have reviewed Dr. WI's November 1, 1997, report, and conclude that his report is cumulative of claimant's testimony. Further, regarding what caused the alleged mental trauma, Dr. WI only repeated what claimant told him regarding the cause. Therefore, we conclude that Dr. WI's report is cumulative evidence and that the hearing officer's failure to consider it, even if she had received it, was not reasonably calculated to cause and probably did not cause the rendition of an improper decision. Appeal No. 92241, *supra*.

The hearing officer's decision and order are affirmed.

Judy Stephens
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Christopher L. Rhodes
Appeals Judge

²We note that the document in question was sent to the field office addressed only to "Hearing Officer" without specifying which hearing officer was the specific addressee.