

APPEAL NO. 981177

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 7, 1998, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issues before her, the hearing officer determined that respondent (claimant) sustained a compensable mental trauma injury on (date of injury) (all dates are 1997 unless otherwise stated), that claimant timely reported the injury to her employer and that claimant has had disability from (date) and continuing through the date of the hearing.

Appellant (carrier) appeals certain of the hearing officer's determinations, contending that claimant's mental trauma injury was not the result of a single event traceable to a definite time, place and cause; that if anything, claimant suffered a non-compensable repetitive mental trauma injury; that claimant failed to give timely notice to the employer, doing so only after her short-term group disability benefits ran out (election of remedies was not an issue); and that claimant does not have disability because claimant has not attempted to return to work and there were jobs with the employer that did not require customer contact. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds to carrier's contentions, urging affirmance. **DECISION**

Affirmed.

The background facts are largely undisputed. Claimant was employed as a consumer banker at a branch bank of a large national bank. On February 10th, the branch bank where claimant was working was robbed, during which time one of the robbers threatened claimant with a gun and ordered her to get down on the floor. Claimant testified that she was shaken by this incident, gave a statement to the FBI, perhaps missed a day of work and had one session with an "EAP counselor" provided by the employer. Claimant continued in her work full time as a consumer banker.

On (date of injury), the bank was again robbed, but this time the claimant was not directly involved, did not know about the robbery until it was over and did not actually see the robbery in process. (She did testify that she saw a man enter and leave the bank with a white bag.) Although claimant was not identified as "being involved" in this robbery, claimant testified that the FBI again took her statement. Claimant testified that she became very nervous after giving her statement and that while other coworkers went to another area of the bank for lunch, claimant went to the restroom and sat on the floor in the dark. A coworker found claimant sitting in the dark and summoned (Ms. GF), apparently a supervisor in the personnel department. Claimant testified that Ms. GF told her to call someone to take her home and claimant called her sister. Claimant testified that the following day ((date)) she was "nervous all over" and shaking when she got up,

that she got dressed but that she began to cry and was unable to leave the house. It is undisputed that claimant called (Mr. SF), the bank manager. Exactly what was said is in dispute. Claimant said that she was upset about the robbery of the previous day and would not be in; Mr. SF said that claimant just said that she was sick and that he (Mr. SF) reminded claimant that the counselors were at the bank doing post-robbery counseling and that claimant asked that the counselor be sent out to her home. Claimant did meet with the counselor on one occasion, but was upset about questions the counselor asked about her husband. Claimant subsequently sought counseling from a therapist and psychiatrist of her own choice. Claimant testified that she subsequently called Ms. GF on or about November 6th and asked about insurance and workers' compensation and that Ms. GF said she would look into it. Subsequently, the employer completed forms, signed by claimant, which applied for group short-term disability (STD) benefits and that claimant did, in fact, draw her full wages under employer's group STD plan for 90 days.

Claimant sought treatment with (Dr. T), who, in a progress note dated November 4th, took claimant off work, noted "[c]omes in with tears," comments on claimant's dehydration and states "[s]he also has post traumatic stress disorder [PTSD] from bank robberies, two times within five months." Dr. T referred claimant to (SS) and cautioned that claimant "needs to call and find out if Dr. S is State certified." SS's credentials are unclear, but her letterhead indicates S Psychotherapy and Consultant Services with "LMSW-ACP" after her name. A longhand intake note dated November 6th noted the (date of injury) robbery and the earlier February robbery, stated "events in (date) triggered trauma" (a line or two at the bottom of the intake note is cut off in the photocopy), notes claimant's fear, "hyper vigilant" and concluded:

Pt is experiencing severe trauma as a result of robbery on (date). This robbery also triggered a delayed reaction to an earlier robbery 2/97. Pt life has changed as a result of (date) incident and she is no longer able to function at her optimal level.

Because SS was not authorized to prescribe medication, SS referred claimant to (Dr. B), a psychiatrist, in a note dated "November 10, 1998 [sic, should be 1997]." Claimant continued therapy sessions with SS who in notes dated November 21st, December 1st, 5th, 17th, January 9 and 16, 1998, February 18, 23, and 27, 1998, continued to comment on "difficulty focusing," "flashbacks," being "overwhelmed," and anxiety. Dr. B, in a report dated March 12, 1998, writes:

[Claimant] has been a patient under my care since 11/11/97. She presented with typical symptoms of [PTSD]- - delayed onset which ensured following.

Two robberies during which she was present as an employee. Her symptoms were directly caused by these events on the job and, in my opinion, cannot be explained in any other way. She continues to suffer with significant symptoms and remains unable to function on the job at this time.

In another report, dated April 9, 1998, Dr. B reiterated that claimant suffers from PTSD, extreme anxiety and inability to sustain attention. In a report dated May 4, 1998, Dr. B again diagnoses PTSD and states “[i]n my professional opinion, [claimant] is unable to function at work at this time.”

It is well settled that 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; and Texas Workers' Compensation Commission Appeal No. 94785, decided July 29, 1994. Section 408.006(a) provides that the 1989 Act shall not be construed to limit or expand recovery in cases of mental trauma injuries; therefore, the cited cases decided under the prior law may be instructive.

The hearing officer concluded from the evidence that the (date of injury) robbery was a producing cause of claimant's PTSD, that claimant “informed the employer of her condition and that it resulted from the (date of injury) robbery on (date),” apparently when she called Mr. SF and told him she would not be in to work and asked that the “EAP” counselor be sent out to her home, and that claimant has had disability since (date). After characterizing the decision as “a travesty to justice,” carrier contends that since claimant did not directly witness the (date of injury) robbery it could not be the cause of claimant's PTSD. Carrier's opinion is countered by the medical evidence from SS and Dr. B, which characterized the PTSD as delayed onset with the (date of injury) robbery as triggering a delayed reaction. The hearing officer apparently relied on that medical evidence, as she had a right to do. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Carrier cites several Appeals Panel decisions which hold that mental trauma must be produced by a single event traceable to a definite time, place and cause. We do not disagree with that proposition and point out that that event was the (date of injury) robbery. The fact that claimant had experienced an event more traumatic some months before

does not negate the (date of injury) robbery or that it triggered a delayed reaction to the earlier robbery. Carrier cites Texas Workers' Compensation Commission Appeal No. 941150, decided October 7, 1994, which was a case where the hearing officer denied benefits for a claimed mental trauma injury where a fireman had images of death when he saw an air cylinder improperly stored hanging on a piece of wire. The Appeals Panel affirmed, noting that a gradual build-up of stress will not suffice to show a compensable injury. Both parties cite Texas Workers' Compensation Commission Appeal No. 931016, decided December 16, 1993, a case where the employee was a gasoline truck driver who developed mental depression "sustained during almost three years of employment by the persistent stress he felt over the dangerous nature of making gasoline deliveries" and other stressors. Both of those cases and others cited by carrier are clearly distinguishable on the facts where the mental trauma was caused by job-related stress over a period of time and found non-compensable. In this case, we have a specific event, the (date of injury) robbery, which was a triggering event of another robbery months prior and which was PTSD delayed reaction. Because a certain event happens twice in the course of eight or nine months does not make it, as a matter of law, a repetitive trauma. Compare that with the repetitive trauma suffered by the gasoline truck driver in Appeal No. 931016, *supra*.

Regarding disability, carrier contends that the testimony of employer's personnel administrative assistant and Mr. SF was that claimant was offered a light-duty job, which claimant refused to take. Our review of the evidence does not indicate that to be the case. There was testimony that the bank had positions which did not involve customer contact and that claimant had not applied for any of those positions. There was no evidence what those positions were, how much they paid or any of the other requirements of a bona fide offer of employment pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) which might relieve the carrier from the payment of temporary income benefits.

It is true that the hearing officer failed to list Mr. SF as a witness. We merely regard this as an administrative oversight. The hearing officer references Mr. SF's involvement in the case in her Statement of the Evidence. We further note that Mr. SF's testimony was, at times, inconsistent where he stated he was "aware" that claimant was "claiming" a work-related injury "in late November or early December" and when claimant's cross-examination raised the suggestion this might have been within 30 days of the (date of injury) robbery, Mr. SF said he only learned of the claim much later. Although the hearing officer should have listed Mr. SF as a witness she was not required to give his testimony any specific credibility. See Section 410.165(a). We do not find the hearing officer's failure to list Mr. SF as a witness reversible error as it was not reasonably calculated to cause and did not cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Regarding the timely reporting of the injury, the evidence is in conflict. Clearly, claimant spoke with Mr. SF on (date). What was said is in conflict. Claimant said that she told Mr. SF she would not be into work and they discussed the robbery and that Mr. SF sent the EAP counselor out to claimant's home that day. The hearing officer determined that was sufficient notice that claimant was claiming a mental trauma injury. Given the conflict in testimony and the uncertainty of exactly what was said, we are unwilling to say that the hearing officer's finding was against the great weight and sufficiency of the evidence. Further, the hearing officer could have found that claimant reported the injury to Ms. GF on November 6th when they talked about insurance and drawn an inference of a report to Ms. GF from Mr. SF's testimony that Ms. GF told him claimant was alleging a work-related injury in late November or early December. In any event, it is the hearing officer that resolves these conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)) and there is some evidence to support that claimant reported a work-related injury to Mr. SF on (date). Although carrier now, and at the CCH, appears to be arguing election of remedies, or at least that "it is against the law and manifestly unjust for a claimant to receive group disability benefits at the same time she is receiving workers' compensation benefits," we note that carrier has denied workers' compensation benefits and, therefore, claimant has not received both benefits at the same time.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Christopher L. Rhodes
Appeals Judge