APPEAL NO. 92396

A contested case hearing was held on July 13, 1992, in (city), Texas, before (hearing officer). The issue was whether the appellant's (claimant below) mental or emotional injury was one that arose principally from a legitimate personnel action and thus was not a compensable injury under Section 4.02(b) of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer held that the employer's decision to transfer appellant into a new position caused him to become emotionally and physically upset and to require medical treatment, but that he failed to prove by a preponderance of the evidence that the decision to transfer him was not a legitimate personnel action under the 1989 Act.

Appellant asks that we review this decision, contending that his employer put him in a job he could not do, which caused him stress and ruined his health. Respondent claims that the hearing officer's decision and order are supported by the evidence.

DECISION

We affirm the hearing officer's decision in this case.

Appellant testified that he had worked for (employer), a poultry processor, and its predecessor, (Farms), for a total of 31 years. He had held a supervisory position at employer's (city) facility which involved the supervision of cage building and pallet repair. He also supervised two drivers at the yard. In July of 1989 employer acquired (Farms), and the company began making certain changes. Appellant said that on February 4, 1992, he was told that his job was being eliminated and that he should go talk to (Mr. L), the manager at the (city) complex. Mr. L told him he was being transferred to a night shift supervisory job which required paperwork. Appellant testified that he has never learned to read and write, and that he told Mr. L that he could not do the work. He said he was told he could "take it or leave it" and that he had "no option." His previous job had involved some paperwork, but he said he was able to take it home for his wife to help with or have one of his employees fill it out. He also was able to do some amount of "figuring." In this job, he said the paperwork had to be turned in every morning, and he said he couldn't "run someone down" every time he needed to have something written. He said he believed employer did not want him there, because they had put him in a job he couldn't do, and because they had been gradually eliminating his duties and giving them to other supervisors. He believed it was not fair that the employer was treating him this way after his many years of service, and that he was being discriminated against.

Appellant also talked with (Mr. B), the plant manager, on February 5. He said he told Mr. B he could not do the new job because he was illiterate, but that Mr. B told him to try to learn it. For the next three days appellant trained with the former night shift supervisor who had been moved to the day shift; however, he said that by (date of injury) the stress had caused him to become ill with nausea and insomnia. He said he asked for time off but that this request was not granted. He assumed the duties of his new job on February 9th,

and worked from 9 p.m. to 7 a.m. The next day, he said he could not sleep or keep any food on his stomach. He did not return to work.

An undated clinical summary signed by (Dr. B), a psychiatrist, said appellant was first seen at the (Clinic) on February 14th. The diagnosis was major depression secondary to work related stress. Dr. B began seeing appellant on March 26th and on that date stated that appellant was unable to return to work. Nothing in the record indicates that Dr. B has released appellant.

At appellant's request, his supervisor, (Mr. M), testified by speaker telephone. He agreed that appellant's job duties had been gradually diminished, but he said he thought appellant had had only two people under him for the past couple of years. He said the job was finally eliminated because it was a position that no other plant had, and the company could not justify keeping it as a pure matter of economics. Mr. M said the paperwork in the new job requires addition, subtraction, and multiplication; he said appellant's former job required writing up requisitions for materials and putting together cost figures. He said he thought appellant had limited reading ability, and that he had "put figures together" before. He said, however, that he was based at the (G) plant and was at the (city) facility only two days a week, and that he was not aware of appellant's wife or any other person doing any paperwork for him.

(Mr. B) testified that he is the plant manager for poultry processing at the (city) processing facility. He said he came to (city) in October of 1990 and that appellant reported to him on a "dotted line" basis for purposes of supervision of the yard drivers and for pallet repair; otherwise, appellant's direct supervisor was Mr. M. He said the elimination of appellant's former position came about through a corporate policy to control and decrease costs. A decision was made to eliminate that job because (city)/(city) constituted the only complex with a supervisor over just cage and pallet repair, and there was a belief that those employees did not require a full-time supervisor. He said that because the employer wanted to reduce employees through attrition and not by layoffs, he was asked whether there was any position the appellant could perform in that plant. He recommended the night supervisor job because it had a limited number of employees and required limited paperwork--simple addition and subtraction--that he felt appellant could handle because of the written work appellant had done in his prior job. He did not feel appellant could perform a day shift job in deboning, which required supervision of 45 employees, so he transferred the previous third shift person to deboning and moved appellant to the opening created by that move. The new position paid the same salary as the former job.

Admitted into evidence as respondent's exhibits were weigh tickets and the daily written report that appellant would have to complete in the new position. Mr. B said when the birds arrive at the plant they are weighed twice to ascertain gross and net weight. The weigh tickets are completed by security guards; appellant would have to transfer the information from the weigh tickets to the report, a sheet with 13 columns. The report also requires, among other things, the computation of average weight and the calculation of what

percentage of each haul is DOA, which Mr. B said could be done with a calculator. He also said appellant could complete the form with assistance. The only other paperwork required would be for personnel actions, which appellant's former job had required (and which appellant testified his wife helped prepare). Appellant was given three days training for the new position, and was told that the previous supervisor would work with him for a minimum of two weeks on filling out the daily report. Mr. B also said further training would be provided as needed.

The 1989 Act provides as follows with regard to mental trauma injuries:

(a)It is the express intent of the legislature that nothing in this Act shall be construed to limit or expand recovery in cases of mental trauma injuries.

(b)A mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination is not a compensable injury for the purposes of this Act.

Article 8308-4.02.

The Texas Supreme Court in construing the prior statute has held that mental trauma can produce a compensable accidental injury, even without an underlying physical injury, if it arises in the course and scope of employment and is traceable to a definite time, place, and cause. Bailey v. American General Insurance Company, 279 S.W.2d 315 (Tex. 1955); Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972); Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979). While the former law did not contain an exception for personnel actions, courts have held not compensable mental trauma resulting from certain types of personnel actions.

In Marsh v. Travelers Indemnity Company of Rhode Island, 788 S.W.2d 720 (Tex. App.-El Paso 1990, writ denied), a claimant's mental and emotional stress from having to choose between retirement or a demotion was held noncompensable. The court noted that a compensable injury must originate in the employer's work and must have been suffered while the employee was engaged in or about furtherance of the employer's affairs. "Disappointment in job expectations, worry and anxiety over job loss, failure to be promoted, and the like have long fallen outside the ambit of `injury sustained in the course of employment' simply because such emotional or mental states are not connected with the employer's business." Id. at 721-2. Likewise, in Duncan v. Employers Casualty Company, 823 S.W.2d 722 (Tex. App.-El Paso 1992, n.w.h.) the claimant was denied compensation over a reprimand and transfer: "Being reprimanded, deserved or undeserved, for one's job performance may well be, from both the employer's and the employee's standpoint, a natural part of any job causing mental stress but the resulting injury, if any, is not suffered while the employee is engaged in or about furtherance of the affairs of the employer." Id. at 725-6. *See also* City of Austin v. Johnson, 525 S.W.2d 220 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.) (fatal heart attack suffered after claimant learned his job would be terminated).

While the 1989 Act does not define "legitimate personnel action," Article 8308-4.02(b) specifically provides that the term includes a job transfer. We find there was sufficient evidence in the record to support the hearing officer's finding of fact that the employer's decision to eliminate appellant's position and transfer him to another position furthered the employer's business interests, and her conclusion that appellant had failed to prove that the employer's decision to transfer appellant was not a legitimate personnel action. *Compare* Texas Workers' Compensation Commission Appeal No. 92189 (Docket No. redacted), decided June 25, 1992 (evidence showed work-related reprimand violated employer's standards of supervision, such that hearing officer could conclude that the exception of Article 8308-4.02(b) did not apply). The hearing officer is the sole judge of the relevance and materiality of the evidence, and of its weight and credibility. Article 8308-6.34(e). We will not substitute our judgment for that of the hearing officer if the decision is supported by evidence of probative value and is not against the great weight and preponderance of the evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge