

APPEAL NO. 931016

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq.*). A contested case hearing was held on September 2, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The single issue at the hearing was whether the appellant (claimant) sustained a compensable mental trauma injury on (date of injury). The hearing officer found against the claimant who now appeals, restating substantially the same facts and position he took at the hearing and asking the Appeals Panel "to review this cause as an ongoing work related mental trauma injury." The respondent (carrier) urges affirmance, arguing essentially that the cause of claimant's major depressive disorder was primarily family problems and was not traceable to any specific work-related event.

DECISION

We affirm the decision of the hearing officer.

The claimant began working for (employer) on May 8, 1990, driving a gasoline tanker truck. His job responsibilities included loading the truck with gasoline and unloading it at numerous gasoline marketing outlets within a 50 mile radius of (city). He testified that his psychological problems began even before he started work for the employer when his actual start date was delayed from that originally agreed upon. Because he had already quit his previous job, he was under a "lot of stress" to begin his new job and had to complain to the employer to let him start working. The employer's policy was that the truck drivers by seniority could "bid" on the shifts they wanted to drive. The claimant contended that he never got his preferred shift even though "everyone else did." He complained to his supervisor who gave him a "dirty look" and said the shift was no longer available. This shift was important to the claimant because his wife had her own business and it was the only shift which would have allowed him to spend each Sunday with his family. He believes the employer did away with this shift to keep him from getting it.

Sometime in March 1991, the claimant's wife became seriously ill. The claimant testified that this was the reason he first sought treatment from (Dr. T), a psychiatrist, on March 15, 1991. Dr. T's initial diagnosis was "major depressive disorder." According to Dr. T's report of July 2, 1993, the claimant was "quite traumatized" from the diagnosis of his wife's condition (lung cancer). He was treated with Prozac and "slowly responded with a decrease in his depressive symptoms." Dr. T did not release the claimant to go back to work until April 22, 1991. His mood seemed to stabilize and he denied any side effects from the medication. However, on August 15, 1991, he again was "overwhelmed" with concern for his wife's condition and was taken off work by Dr. T from August 9, 1991, through August 19, 1991. The following summer, he again wanted to bid on a preferred work shift, but the employer refused to even authorize the shift that would give him Sundays off.

In his testimony, the claimant described the causes of his stress as his wife's medical condition, the refusal of his health insurance carrier to pay for her medical bills until he went

to a lawyer and got the problem resolved, shift work which allowed no time with his family, the pressure of hauling 9,000 gallons of gasoline every day on the streets of (city) where any accident could have disastrous consequences, and verbal abuse from his co-employees. The employer knew he was taking Prozac and granted approval for his continuing to drive under this medication.

On (date of injury), claimant said he was again taken off work by Dr. T after conversations with his supervisors who, according to Dr. T, described the claimant as "experiencing tension and anxiety with very poor self control and poor self management" with "increased tension from work . . . not having any time with his family due to his new work schedule . . . under too much stress, which was brought on because of unfair voting for new schedules." At this time, the claimant said the biggest cause of his leaving work was the results of again not getting the shift he bid on. Claimant received non-occupational medical disability payments from his employer. He contends that had he gotten the shift he wanted he would have been more relaxed and with his medication would have been able to continue working, but on (date of injury), his assigned shift seemed "very unfair" to him. At an undisclosed time he was terminated by his employer because, he says, the employer concluded "he was working for profit" during the time he was receiving the non-occupational disability payments. At his last visit with Dr. T on July 23, 1993, the claimant "had notably regressed . . . was confused . . . disorganized . . . rageful . . . drinking on a daily basis . . . [and] was slowly losing his ability to control his anger."

The hearing officer found in pertinent part as follows:

FINDINGS OF FACT

- 4.The repetitive stresses of driving, and of loading and unloading a gasoline truck in (city) created a psychological condition for which [claimant] sought psychiatric treatment from [Dr. T] beginning in March 1991.
- 6.[Claimant] had various personal family problems which created additional stresses, in 1991, that created the need for further psychiatric treatment by [Dr. T].
- 7.There is no indication that [claimant's] failure to receive his preferred work hours was the result of anything other than a legitimate personnel action.
- 8.On (date of injury) [claimant] became further stressed because he had not received his bid work shift and could not change what he believed to be an unfair assignment of work hours.
- 9.On (date of injury) [claimant] was taken off work by [Dr. T]. [Claimant's] being taken off work for personal life stresses, and the repetitive stresses of driving a gasoline truck for [employer] (sic).

11. There was not a specific incident that occurred at work . . . on (date of injury) of sufficient magnitude to cause a mental trauma injury to [claimant].

CONCLUSIONS OF LAW

4. [Claimant] has shown by a preponderance of the evidence that: (i) the repetitive stress of driving a truck, and (ii) his failure to receive his bid on work hours were events that occurred during the course and scope of his employment with [employer]; and (iii) those matters were a cause of the mental symptoms he suffered on or around (date of injury), but because [claimant] has not shown by a preponderance of the evidence that a specific incident that occurred at work on (date of injury), was the cause of his mental symptoms rather than cumulative stress, and (iv) that his symptoms did not arise out a legitimate personnel action, [claimant] has not shown by a preponderance of the evidence that he suffered a compensable mental trauma injury under the Act, and the carrier is, therefore not liable for benefits.

The Appeals Panel has consistently held that to be compensable, a mental trauma injury must be "traceable to a definite time, place and cause." Texas Workers' Compensation Commission Appeal No. 93659, decided September 14, 1993. Repetitive mental trauma is not recognized under the 1989 Act or its predecessor statute as compensable. See Texas Workers' Compensation Commission Appeal No. 93596, decided August 26, 1993. In the case under appeal, the evidence introduced by the claimant, including his own testimony,¹ clearly establishes that the claimant's mental anxiety began even before he had started working. His initial treatment with Dr. T was precipitated by his wife's serious illness. His condition of mental depression was sustained during almost three years of employment by the persistent stress he felt over the dangerous nature of making gasoline deliveries, by his separation from his family, which in claimant's view was caused by the unfair refusal of the employer to give the claimant the shift he wanted, and by his wife's illness. There is little direct evidence about what happened on (date of injury), which the claimant alleges is the date of his mental trauma injury, other than an indication in the report of Dr. T that on that day he spoke with the claimant's supervisors who described the claimant as anxious, tense and exhibiting poor self-control due to the same causative factors which had contributed to his problems in the past. The claimant points to (date of injury), as the day when for the third year in a row that the employer refused to give him the shift he wanted. Claimant contends that the decision by the employer to no longer even offer this shift was an intentional act of the employer to mistreat the claimant.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. He found that various stressors in the claimant's work and personal life were cumulative in nature, occurring over the course of his employment, and that the claimant had not proved by a preponderance of the evidence that his mental trauma

¹The carrier was not present at the hearing.

(depression) was caused by a specific incident in the course and scope of his employment. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Based on our review of the record, we conclude that the decision of the hearing officer is supported by sufficient evidence.

We would also observe that the hearing officer found that the claimant had not shown that the allegedly precipitating events of (date of injury), i.e., the employer's refusal to give him a certain shift, did not arise from a legitimate personnel action. The 1989 Act provides that 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 purposes of the Act. Section 408.006(b). This panel has previously held that the list of personnel actions in the statute is not exhaustive, Texas Workers' Compensation Commission Appeal No. 92710, decided May 22, 1992, and that the assigning of work is a basic and legitimate personnel action. Texas Workers' Compensation Commission Appeal No. 93022, decided February 24, 1993. While not specifically appealed by the claimant, we would note that the evidence supports the hearing officer's finding in this regard. However, regardless of whether legitimate personnel action is an issue in a mental trauma case, in order to recover a claimant must still establish that such injury was traceable to a definite time, place, and cause. Bailey v. American General Insurance Company, 154 Tex. 430, 279 S.W.2d 315 (1955).

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge