APPEAL NO. 93205

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On December 17, 1992 and February 8, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing was "did the claimant suffer a compensable mental trauma injury on (date of injury)?" The hearing officer determined that the respondent (claimant) sustained a compensable mental trauma injury in the course and scope of her employment on (date of injury) which did not arise principally from a legitimate personnel action. Appellant, carrier, contends that the hearing officer erred because claimant's meeting with her supervisor on (date of injury) was a legitimate personnel action, that there was "no evidence" that claimant's hospitalization was caused by the meeting with claimant's supervisor and there was "no evidence" that claimant's injury, if any, occurred at a specific time, date, or place. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer starts off the statement of evidence by saying "If ever a case turned on credibility, this case certainly fits the bill." We do not disagree. It is undisputed that claimant was hired as the administrator/office manager by the employer, a non-profit organization, sometime in November 1991. Claimant had significant experience working with organizations such as the employer. Her immediate supervisor was (Mr. A), who was the organization employer's executive director. Claimant testified either just before she was hired, or just after, she had a meeting with (Ms. M), who was the President of the Board of Directors (Board) and sat on the personnel committee, and (Ms. B), who was also on the employer's Board. According to claimant, both Ms. M and Ms. B told her Mr. A had some problems, implied that Mr. A might make some sexual advances, and told claimant that if she had any problems with Mr. A she could come to them or the Board. Ms. M at the CCH denied this meeting occurred. A statement admitted into evidence from Ms. B is silent about whether the meeting occurred as claimant described. Claimant's testimony was that between November 1991 and July 1992, she was an outstanding employee. Mr. A's testimony was less effusive but he generally conceded claimant was an above average employee. Claimant was a diabetic, but testified she was able to keep her condition under control by diet and exercise. Mr. A testified that claimant's ability to adhere to her diet was not as successful as claimant would have one believe. Claimant introduced what purported to be a three month evaluation, that she received from Mr. A. Mr. A denied he had dictated, written or had given claimant any notes to type regarding the evaluation although he concedes he told claimant she was doing a good job. The evaluation was unsigned. It is

undisputed that claimant had personal problems (two grown children, one of whom was in college, and a granddaughter living with her) and financial problems caused principally by the need for extensive dental work and oral surgery. Claimant had on occasion borrowed, or asked to borrow, money from coworkers and/or Board members. It is generally agreed by the parties that things went fairly smoothly until July 1992, although claimant questioned some of Mr. A's practices in handling organization funds, expense accounts and what she perceived were improper management practices. Claimant testified, and it is unrefuted, that on July 3 or 7, 1992, claimant received a telephone call from (Mr. S), employer's organizer and director in the Dallas office. Exactly what was said is not clear but claimant states Mr. S generally inferred that there were some problems in the organization and that Mr. A was in some way responsible. According to claimant, Mr. S wanted to know what claimant knew about these matters so she could assist him in a plan to submit a proposal for a co-directorship with Mr. A to the Board. This proposal would limit some of Mr. A's authority. Mr. S asked claimant to keep their conversation confidential, but claimant testified that she told Mr. S she did not want to get involved. Telephone records, introduced and admitted, show that claimant made a call to Ms. M on July 7th, at 10:30 p.m. Ms. M testified that claimant complained about Mr. A and his handling of funds. Ms. M testified she was sufficiently concerned to contact the organization accountant to ascertain if there was any substance to claimant's complaints. There is evidence that the employer's records conformed to "generally accepted accounting and control procedure."

Matters came to a head, and the divergence in testimony widened, on (date of injury). Mr. A called claimant into his office. Claimant testified that initially, Mr. A told her that he had heard that she was talking about him behind his back. Claimant states she denied the charge and then Mr. A went and got Ms. M who then came into the meeting. Claimant's testimony was that Mr. A and Ms. M both sat directly across from her and that Mr. A, alternately sitting behind his desk and standing over her, screamed and shouted at her, threatened and intimidated her, and demanded to know what she had talked to Mr. S about. Claimant said she "spilled her guts" and told Mr. A about her conversation with Mr. S. Claimant testified that Mr. A was "red in the face," told her she would have to prove her loyalty to him, that she was either with him or against him and that she could go ahead and cry but it wouldn't do any good. Mr. A's version is completely different. He stated they had a polite and professional meeting where he told claimant she should not be making complaints about him to Board members (apparently including Ms. M), to Mr. S or to other employees. Mr. A's version is largely supported by Ms. M. Claimant testified she told Mr. A that his problems were not with her but with Mr. S. Claimant testified after the meeting she was quite shaken and went back to her office. She further testified Ms. M then came to her office and apologized for the way the meeting was handled and for Mr. A's actions, but explained she and Mr. A felt that claimant had information that they needed to know about Mr. S and his plans. Claimant testified she felt humiliated and "set up."

A staff meeting, where Mr. S would be in attendance, was scheduled for the next

day, July 15th. It is undisputed that claimant was apprehensive about attending the meeting, and asked to be excused. Mr. A, however, directed claimant to attend which she reluctantly did. Claimant testified the meeting on July 15th was "explosive," and that Mr. A and Mr. S yelled and screamed at each other using all manners of profanity and cursing. Claimant states she was afraid Mr. A and Mr. S would come to blows. Claimant concedes that eventually the meeting calmed down and a compromise or truce was reached with Mr. A agreeing to consider Mr. S's proposal. None of the verbal abuse on July 15th was directed at claimant and claimant agreed none of the matters of the previous day or her involvement were brought up. Claimant concedes that at the end of the meeting she was relieved, and said she was glad she had come. Claimant nonetheless testified she was stressed by the meeting, and that her hands turned blue and became numb. Mr. A's version, supported by Ms. M, was that the meeting had a "spirited discussion" of organization restructuring and that claimant appropriately contributed. Both Mr. A and Ms. M testified claimant appeared to be in good health when she left the meeting to go home. Claimant testified when she got home, she passed out, and the next day a niece had to call an ambulance to take her to the closest hospital. Claimant testified she had gone into a diabetic reaction and was hospitalized seven days.

(Dr. M) M.D. was claimant's treating physician. By note dated July 20, 1992, Dr. M states claimant ". . . is under my care and treatment for anxiety and Diabetes, and she is unable to work due to her condition." The hospital records show claimant's blood sugar at 395 at 11:35 a.m. on July 16th. Claimant was put on a cardiac monitor and medicated with insulin. Claimant was subsequently referred to (Dr. B), , a clinical psychologist on the faculty of Baylor College of Medicine. Dr. B by a report dated November 24, 1992 stated:

> [Claimant] first consulted me July 28, 1992, and has been in my care since then. I have seen her for a total of seven therapeutic sessions. My initial impression, based on interviews and a psychological evaluation, indicated severe anxiety which involved marked exacerbation of already existing diabetes. There was no history of prior emotional disturbance requiring treatment. Her distress has been severe, and has interfered with her ability to function effectively in carrying on the requirements of daily living. She has been incapacitated by her anxiety and rendered unable to be creative in ways that she was previously. [Claimant's] life had been characterized by a number of achievements.
>
> The onset of her distress was attributable to a severe conflict with her employers which she experienced as intimidating, threatening and inappropriate. It led to the loss of her position in a manner over which she had no control. Her present condition is clearly traceable to this unfortunate experience.

The hearing officer found that claimant suffered a mental trauma injury ". . . due to

[Mr. A's] conduct in the meeting on (date of injury), and her condition did not arise principally from a legitimate personnel action." Carrier appealed on basically three points:

a)[Claimant's] (date of injury), meeting with her supervisor was a legitimate personnel action;
b)There is no evidence that [claimant's] hospitalization of July 16, 1992, was in reasonable medical probability caused by her (date of injury) meeting with her supervisor;
c)There is no medical evidence that Claimants (sic) injury, if any, occurred at a specific time, date or place.

Initially we note that carrier states there is "no evidence" that claimant's injury occurred at a specific time, date or place, and that claimant's hospitalization was caused by the (date of injury)th meeting. We have held, in accordance with Texas case authority, that on a "no evidence" point, a reviewing body should consider only the evidence and reasonable inferences therefrom which support the finder of fact, and reject all evidence and inferences to the contrary. Texas Workers' Compensation Commission Appeal Nos. 93181, decided April 19, 1993, and 91002, decided August 7, 1991. *See also* Nassar v. Security Insurance Co., 724 S.W.2d 17 (Tex. 1987). The testimony of the claimant if believed as the hearing officer obviously did, and Dr. B's report is evidence tending to establish the matters in question. Nevertheless we will review the points raised by the carrier and addressed by claimant on appeal.

I

THERE IS NO EVIDENCE THAT CLAIMANT'S INJURY, IF ANY, OCCURRED AT A SPECIFIC TIME, DATE OR PLACE

Carrier cites Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979) and claimant cites Director, State Employees Workers' Compensation Division v. Camarata, 768 S.W.2d 427 (Tex. App.-El Paso 1989, no writ) for the proposition that a trauma, or mental trauma, to be compensable, must be traced to a definite time, place and cause. We do not disagree with that general proposition of law. However, specifying time, place and cause does not mean that a precise, to the minute, time is required. In Texas Employers' Insurance Assoc. v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.) the court held that an event occurring over a period of three days was "sufficiently definite." In Murphy, *supra*, when gas was inhaled over a three day period, it could not be determined whether the injury resulted from one final whiff of fumes, or from the cumulative effect of repeated inhalation, the court held that an undesigned, untoward event traceable to a definite time, place and cause had occurred. As in Murphy, claimant testified that the meeting on (date of injury)th caused her to be ill and that she did not want to go to the meeting on July 15th. Nevertheless, and it is undisputed, that Mr. A ordered

claimant to attend the July 15th meeting. Although no profanity or shouting was directed at claimant in the July 15th meeting, she testified that she became very stressed, the meeting was explosive, her hands turned blue and became numb, and she feared Mr. A and Mr. S would come to blows. The hearing officer found that claimant sustained a mental trauma injury, as well as harm to the physical structure of her body, as a result of the meeting with Mr. A on (date of injury)th. The hearing officer could well have found the mental trauma injury to the traceable to a definite time, place and cause, on or about (date of injury)th. We find carrier's allegation of error on this point invalid.

II

THERE IS NO EVIDENCE THAT CLAIMANT'S HOSPITALIZATION OF JULY 16, 1992 WAS IN REASONABLE MEDICAL PROBABILITY CAUSED BY HER (DATE OF INJURY) MEETING WITH HER SUPERVISOR

Carrier complains, among other allegations, the only evidence that claimant's condition is attributable to her (date of injury) meeting "is the report of Dr. B(sic) [Dr. B] dated November 14, 1992, and that Dr. B ". . . adjusted his opinion between the time of the Benefit Review Conference [BRC] report of November 24, 1992." We note, however, carrier introduces no evidence to refute Dr. B, nor was the report presented at the BRC placed into evidence. The only comment is by the Benefit Review Officer who states "[a]ccording to the report from claimant's doctor, [Dr. B], the confrontation with the employer left claimant 'with a sense that her career was destroyed.' Claimants' injury is due to stress caused by a fear over her job status." We do not know what, if anything else, Dr. B may have said in that report to explain his position. Nor does carrier present any medical evidence to refute the testimony that claimant's hospitalization was caused by the confrontation of (date of injury). We would further note that claimant testified to the cause of her elevated blood sugar and "diabetic reaction." While the claimant's testimony is that of an interested party, her testimony raises an issue of fact for the trier of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ) and that testimony may be believed by the trier of fact and the testimony of others, even experts, may be rejected. Texas Employers Insurance v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1981, no writ). Dr. B report together with claimant's testimony establishes sufficient causation to support the hearing officer's finding. A medical expert, such as Dr. B, need not use the exact magic words "reasonable medical probability," as long as the testimony is sufficient under the circumstances to show that this is the substance of what the expert is saying. Stodghill v. Texas Employers Insurance Association, 582 S.W.2d 102, 105 (Tex. 1979).

III

CLAIMANT'S (DATE OF INJURY), MEETING WITH HER SUPERVISOR

WAS A LEGITIMATE PERSONNEL ACTION

Claimant in closing argument asks "[h]ow far does a legitimate personnel action go?" It is undisputed that initially the announced purpose of the (date of injury) meeting was to discuss with claimant her failure to use the grievance procedure in lodging complaints against Mr. A. Article 8308-4.02(b) states that mental trauma injuries that arise principally from a legitimate personnel action, including transfers, promotions, demotions, or termination are not compensable. The examples used in the Act would also clearly cover reprimands for failing to follow procedures in reporting complaints. The hearing officer finds the (date of injury) meeting "was an activity, that had to do with the business or affairs of [employer] [and] [Mr. A's] conduct therein, . . . was not a legitimate personnel action." (Emphasis added.) In so finding it appears the hearing officer is focusing on the manner of how the meeting was conducted, rather than the content, as not being a legitimate personnel action. The hearing officer could, and apparently did, disbelieve Mr. A that the meeting was simply a meeting to discuss organizational restructuring but rather had personal overtones dealing with Mr. A's potential loss of authority.

We have frequently noted the provisions of Article 8308-6.24(e) that the hearing officer is the sole judge of the relevancy and materiality of the evidence and of the weight and credibility to be given to the evidence. The hearing officer saw and heard the testimony and observed the demeanor of the witnesses including that of the claimant. The hearing officer clearly believed claimant and that Mr. A "inappropriately intimidated the claimant by his conduct, including standing over the claimant as he was talking, repeatedly raising his voice, telling the claimant that she had to prove her loyalty . . . ." The hearing officer apparently felt the manner in which the meeting was conducted took it outside the context of a legitimate personnel action.

In Texas Workers' Compensation Commission Appeal No. 92710, decided February 16, 1992, we noted that the statute is not exhaustive in its listing of personnel actions, and that reprimands or evaluations would be included. Texas Workers's Compensation Commission Appeal No. 92149, decided May 22, 1992, quoting Montford Barber & Duncan, A Guide to Texas Workers' Comp Reform, Part 4.A.02b, 1991. In Appeal No. 92710, *supra*, we stated "[i]t is clear to us that discussion with a supervisor about matters relating to the ability to get along with coworkers (or lodging complaints about one's supervisor) in the performance of the work qualifies as a legitimate personnel action. As to whether a discussion can move beyond the range of 'legitimate,' because of the language used, or the way in which conducted, we note that there was controverted testimony in this case about the nature and intensity of the discussion." (Emphasis added). In Appeal No. 92710, there was sufficient evidence to support the hearing officer's finding the reprimand was a legitimate personnel action. In the instant case the hearing officer found the meeting was not a legitimate personnel action, both because of the threatening, intimidating and inappropriate manner in which the meeting was conducted, and because of Mr. A's hidden

agenda (genuine goal) of obtaining information about Mr. S.

In Duncan v. Employers' Casualty Co., 823 S.W.2d 722 (Tex. App.-El Paso 1992, no writ) the employee stated "it wasn't the transfer itself that bothered her, it was the manner in which the transfer was done." (Emphasis added.) The court held "[b]eing 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." In Appeal No. 92710, *supra*, we stated "[i]t could be similarly argued that even if crude language is used during a reprimand, such language would not inexorably remove the reprimand from the ambit of [8308-]4.02(2)." In the instant case, according to claimant and as found by the hearing officer, not only was the meeting conducted in a threatening intimidating manner but Mr. A's "genuine goal at the meeting was to obtain from claimant information that he thought she had regarding another employees' plans to effect a co-directorship within the employer's structure that could limit [Mr. A's] authority." The hearing officer apparently felt that the "genuine goal" of the meeting plus Mr. A's inappropriately intimidating conduct removed the situation from being principally a legitimate personnel action.

The hearing officer in judging the credibility of the witnesses could believe claimant and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann,722 S.W.2d 694 (Tex. 1986). Having believed the claimant the hearing officer found that the (date of injury)th meeting was in fact an interrogation to obtain information about Mr. S's plans for a co-directorship, conducted in an intimidating, threatening and inappropriate way, thereby taking it out of the realm of a legitimate personnel action. The Appeals Panel should not set aside a decision of a hearing officer because the hearing officer may have drawn influence and conclusions different than those the Appeals Panel deem most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences. Garza v. Commercial Insurance Co. of Newark,, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We cannot, as a matter of law, hold that the hearing officer erred and that any meeting, regardless of how it was conducted, where the principal purpose, as found by the hearing officer, had as its goal the interrogation of an employee to obtain information regarding another employee's plans, to be a legitimate personnel action. This decision is not authority for the proposition that a reprimand, transfer, demotion, termination, or other adverse personnel action, however badly handled, whatever crude language is used, would remove that action from the ambit of 4.02(2) or automatically warrant a mental trauma injury.

The decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur in this decision, but I would modify the hearing officer's reasoning leading to her conclusion that the action was not a "legitimate personnel action" within Article 8308-4.02(b). For me, the reason that the action leading to claimant's injury is not within the ambit of a "legitimate personnel action" is that the context of the activities is not analogous to those actions listed in Article 8038-4.02(b). The context of the actions causing injury was, rather, an unpleasant discussion with the supervisor involved with an inter-employer rivalry and also a report to a board member of alleged mishandling of funds.

In my opinion, a legitimate personnel action is one which furthers the business interests of employer (not primarily individual interests of supervisors), is not unlawful or does not violate company policies with regard to style and manner of discipline, and is analogous to one of the examples listed in Article 8308-4.02(b). Such actions may be intimidating, cause wounded sensibilities, and may be carried out with what a Monday-morning quarterback may not consider the kindest language. However, I hesitate to go down the road upon which the hearing officer has embarked: that rude, crude, or uncouth language or conduct in and of itself can remove personnel actions from the ambit of Article 8308-4.02(b). I believe that case law is to the contrary. *See* Duncan v. Employers' Casualty Co., *supra*.

Therefore, I would uphold the decision, but based on the reasoning that the activities leading to injury were not comparable to the examples given in Art. 8308-4.02(b). The claimant, for her part, was acting within the course and scope of employment because she was being directed by the supervisor during the actions leading to her injury. But the supervisor, for his part, was not acting within the context of a legitimate personnel action as is contemplated by Article 8308-4.02(b).

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Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. Despite the language of Article 8308-4.02 that nothing in the

1989 Act shall be construed to limit or expand recovery in cases of mental trauma injuries, the legislature proceeded to narrow the compensability of mental trauma cases which arise "principally from a legitimate personnel action." The latter term is not defined in the Act, and we have previously held that the types of personnel actions listed in the statute are exemplary only, and not exhaustive. *See* Appeal No. 92710, *supra*. What is not specified in the statute is whether a personnel action can be rendered non-legitimate, and the resulting mental trauma thereby compensable, simply because of the manner in which the personnel action is effected.

Apparently the new language in the act was meant to change the result of cases such as Director, State Employees Workers' Compensation Division v. Camarata, *supra*, in which the court found compensable an employee's post-traumatic stress disorder suffered following receipt of a memorandum from his supervisor which criticized his work. *See* Montford, A Guide to Texas Workers' Comp Reform, at A4.02, which opines that Camarata "should no longer be compensable" under Article 8308-4.02(b); presumably, even an allegedly erroneous memo would be considered an exercise of a legitimate personnel action, although it is impossible to speculate, based upon the facts in Camarata and the language of Article 8308-4.02, whether such a memo could be so slanderous or vituperative as to be taken out of the realm of legitimate personnel actions.

I believe that, with regard to this question, the court's language in Duncan v. Employers Casualty Company, *supra* is instructive. In that case, the employee testified that it was not the action itself (a transfer) which bothered her, but rather the manner in which it was done. As the court said, "[b]eing 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 the furtherance of the affairs of the employer." The court cited the case of City of Austin v. Johnson, 525 S.W.2d 220 (Tex. Civ. App.-Beaumont 1975, writ ref'd n.r.e.), which states that "[t]o hold that worry and anxiety over job loss is connected with what a workman has to do in performing his contract of service would in our opinion not be reasonable." It also quoted March v. Travelers Indemnity Company of Rhode Island, 788 S.W.2d 720 (Tex. App.-El Paso 1990, writ denied) as follows: "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."

The facts of the above cited cases demonstrate an unfortunate fact of life: that personnel actions such as demotions, transfers, and reprimands frequently occur when inter-personal interactions and communications have broken down and much frustration, anger, and even personal animosity exists between supervisors and their employees; as a result, many of these actions are not undertaken with that degree of objectivity and

sensitivity which might be optimal. Nevertheless, I believe that this fact alone will not, in the vast majority of cases, remove such interactions from the category of legitimate personnel actions. (*Compare*, however, Texas Workers' Compensation Commission Appeal No. 92189, decided June 25, 1992, where a supervisor testified that the manner in which a reprimand occurred violated the employer's standards.) That appears to be true with regard to the facts of this case, further borne out by the hearing officer's finding that the meeting was an activity that had to do with the business or affairs of the employer, but that the supervisor's conduct therein was not a legitimate personnel action. Based upon this finding of fact, I would reverse and render a decision that the claimant's injury was not compensable.

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Lynda H. Nesenholtz
Appeals Judge