APPEAL NO. 93747

At a contested case hearing held on June 9, 1993, in (city), Texas, the hearing officer, (hearing officer), considered whether the appellant (claimant) sustained a mental trauma injury on (date of injury), compensable under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 *et seq*. (1989 Act), and, if so, whether claimant had disability as a result of such injury. On that date the claimant was employed by the (agency), which was self-insured by the respondent, State of Texas, Workers' Compensation Division (carrier). Based on a number of factual findings, two of which claimant challenges for insufficient evidence, the hearing officer concluded that a meeting claimant had with the executive director of the agency on (date of injury), constituted a legitimate personnel action pursuant to Section 408.006(b), that claimant did not sustain a mental trauma injury on that date in the course and scope of his employment, and, thus, that claimant has not had disability as defined by Section 401.011(16). Claimant disputes the sufficiency of the evidence to support these legal conclusions and further challenges statements in the hearing officer's "Decision and Order" (decision) that claimant's mental trauma injury resulted from repetitious stressful events while working for employer, that these repetitious stressful events, including the meeting on (date of injury), were legitimate personnel actions, and, thus, that claimant's mental trauma injury is not compensable. The carrier's response asserts the sufficiency of the evidence to support the challenged findings and conclusions, as well as the statements in the decision, and urges our affirmance.

DECISION

Finding that the evidence sufficiently supports the challenged findings and conclusions, we affirm.

The agency's administrative assistant,(Ms. M), testified that the agency administered for the state of Texas the federal government's surplus property disposal program by which qualified public and private, nonprofit entities, called "donees," may qualify and receive surplus government property. According to Ms. M, a (Dr. F) was the director of an aviation research museum which had qualified as a donee, had later had a "compliance" problem resulting in disqualification, had still later been requalified after an appeal, and which was suspended in October 1992 pending investigations by two federal agencies. Ms. M stated that after the museum requalified, Dr. F conducted himself in a threatening and abusive manner towards a number of agency employees, was understood to have instituted or to be preparing to institute legal action against the agency, and that his threatening behavior had become common knowledge throughout the agency. Ms. M stated that because of Dr. F's conduct, the agency's executive director, (Mr. T), directed that the approximately seven agency employees who had the contacts with Dr. F, including herself and the claimant, document their conversations and interactions with Dr. F.

Claimant testified that he sustained a mental trauma injury at a meeting with Mr. T in the latter's office on (date of injury), where he was directed by Mr. T to comply with the agency's earlier request that he document his discussions with Dr. F, and that if he felt he could not comply with the directive, he could look for other employment. Claimant said Mr.

T also mentioned what he characterized as the insubordinate tone of a memo claimant had recently written to him on the matter. According to the claimant, his supervisor, (Mr. H), was the one who first conveyed to him Mr. T's instruction to document conversations and interactions with Dr. F. Claimant said he felt he was being asked "to spy" on Dr. F, that he felt uneasy about the requirement, and that he had been a former private investigator and felt his skills were being taken advantage of.

Section 408.006(b) 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 under this subtitle." Based on his arguments to the hearing officer claimant's apparent theory was that Mr. T's directive was not a "legitimate personnel action" because such an activity was nowhere described in claimant's job description or in any written policy of the agency. Claimant cited no legal authority for his position. Also, claimant's interrogatory responses indicated he felt coerced and intimidated by Mr. T at the (date of injury) meeting and asserted that such was "not an appropriate personnel action."

Claimant further testified that he knew Dr. F aside from being a donee in that he had taken his Boy Scout troop to Dr. F's museum on a camp-out and had also inquired of Dr. F about a possible counselor for troubled scouts. Claimant conceded he had been previously counseled about spending too much time talking to Dr. F and to other donees when they came to the agency to do business. A July 18, 1989, warning letter from his supervisor, Mr. H, commented on claimant's negligent performance of his duties and stated that his failure to improve within six weeks would result in termination. A September 11, 1991, letter documented claimant's failure to wear safety shoes in the warehouse as required. Claimant's written evaluation, signed by Mr. H on "10-2-91," stated claimant needed improvement in the areas of compliance with agency rules and safety practices, and in his productivity. In his evaluation of August 20, 1992, claimant was marked down in the same areas and in addition in the area of his contact with donees.

In apparent initial compliance with Mr. T's directive, claimant wrote a memo to Mr. T on August 3, 1992, reporting an interaction with Dr. F on that date when Dr. F returned some property to the agency. On August 11th, claimant wrote another memo to Mr. T recounting a meeting with Mr. T on August 7th at which meeting, according to the memo, Mr. T had advised claimant that Dr. F was bringing a legal action against the agency and was trying to use claimant for his purposes, that claimant was instructed not to talk to or help Dr. F on the job but that he could do so on his own time, and that he was to make a written report of his conversations with Dr. F. The memo continued that claimant had never discussed personal business with Dr. F, and had from time to time been told not to talk to various donees. The memo concluded: "I consider myself to be a good and faithful employee, willing to do whatever my superiors ask of me whether that be on my job description or not. However, this new requirement of having to write reports on my conversations with donees puts a certain amount of stress on me. Today its reports (sic) on Mr. F. Whom will it be tomorrow."

On (date of injury), Mr. T subscribed on claimant's August 11th memo that the content

of the memo and its "insubordinate tone" were discussed with claimant that morning at 10:05 a.m., that claimant was told that insubordination was grounds for dismissal, that if he felt he could not handle the requirements of his job he should resign, that claimant said he understood what was required of him and would comply, and that claimant was offered a less stressful job but did not respond. Claimant stated that he had been called into Mr. T's office on the morning of (date of injury) and was told by Mr. T that Dr. F was going to bring an action against the agency, that claimant should learn who his friends were, and that if he could not make the reports Mr. T had requested he could look for another job. Claimant said he felt "overwhelmed" and "confused," and felt his livelihood was threatened, given that Mr. T headed the agency. He attributed his mental trauma injury to that meeting which he described as "gestapo-like," and where he said he was treated "like a little kid." Ms. M said the meeting, which she attended, was a closed door meeting in Mr. T's office which lasted about 15 minutes, that she was unaware that claimant was upset, and that she did not see Mr. T threaten claimant. Claimant said he worked the remainder of the day, though he felt nervous, sweaty, and emotional. As the day progressed he said he began to experience "flashbacks" about getting kicked out of the building, getting shot by Mr. T, and, later on, about his Vietnam war experiences. He said he also felt suicidal. At home that evening claimant said he called (Dr. G), a clinical psychologist whom Dr. F had recommended for claimant's troubled scouts, and later went to Dr. G's office. Claimant denied prior traumatic stress as well as prior treatment for such. He said he stopped working for the agency on August 20th, has not worked since, and is receiving social security disability benefits. According to his Veterans Affairs (VA) medical records, claimant also applied for VA benefits. Ms. M said claimant was still being carried as an agency employee on leave without pay.

An August 20, 1992, memo of Dr. G stated that claimant was "under extreme stress which is related to job conditions," has severe depression, is unable to sleep, has suicidal ruminations, and was advised to seek mental health treatment and remain off work until released by a treating physician. According to Dr. G's psychological evaluation of August 21st, claimant, then 47 years of age, had spent 18 months (1967-68) in Vietnam where he "saw many buddies get killed," and in 1970 received psychiatric treatment from the VA. The report stated that on (date of injury) claimant said "he was threatened by his supervisor and feels he was coerced to take certain actions against his will," and that since this incident claimant has had nightmares, flashbacks, dizzy spells, headaches, muscle twitching, crying spells, and suicidal ideation, and that he was afraid he would be killed or have drugs planted on him at the job. Claimant's post-traumatic stress test scored 98 which, stated Dr. G's report, "is a very strong indication of a post-traumatic stress disorder [PTSD] caused by the incident on (date of injury)." Dr. G's psychological diagnoses included PTSD, major depression, and paranoid personality. Dr. G recommended immediate in-patient psychiatric treatment and that claimant be considered "totally disabled for at least one year."

Claimant testified he was seen first at Humana Hospital and later at the VA Hospital. The VA hospital records reflect that claimant was admitted on August 27th, discharged on September 14, 1992, and that his diagnosis was chronic PTSD. According to the history claimant provided the VA facility, he felt his problems all began in 1969 before being

discharged from the Army, that he had many nightmares which he attributed to drinking alcohol, that in 1978 he had an attack in which he "froze in the middle of the street, having a flashback, and could not move, and that this happened many times." After his Army discharge, claimant did investigative work and later worked for a newspaper distribution company before going to work for the agency in 1987. For the past four years, and particularly during the preceding two weeks, claimant experienced increased tension and flashbacks of Vietnam experiences and, "in his own words, he said he could not keep these jobs because of too much stress and increasing inability to cope with stress." When discharged, the records state that claimant required no medication, that he was discharged to his home to be followed on an outpatient basis and at PTSD group meetings, and that he had the ability to seek employment. As late as June 11, 1993, his medical records reflect claimant was complaining of being "stressed out all the time" and easily angered.

The hearing officer found and concluded, in part, as follows:

FINDINGS OF FACT

4.The claimant was a Vietnam veteran and had been diagnosed in 1969 as suffering from post-traumatic stress disorder.

5.The claimant's duties involved interpersonal interaction with the agency's clients, known as "donees."

6.During his five years of employment, the claimant had received several warnings from the employer regarding his contacts with certain donees.

7.On or about 3 August 1992, the executive director, believing that a certain donee planned to file an action against the employer, directed all employees who interacted with this donee, including the claimant, to document their interactions with the donee in written reports.

8.On 3 August 1992, the claimant verbally objected to this requirement to his supervisor.

9.On 7 August 1992, the executive director explained to the claimant the reason for the reporting requirement, instructed him to refrain from interacting with the donee on the job, and requested written documentation of all contacts with the donee.

10.On 11 August 1992, the claimant objected to the reporting requirement in a memo to the executive director.

11.On (date of injury) in a meeting with the claimant, the executive director demanded and received the claimant's agreement to comply with the instructions given on 7 August 1992, after advising him that the consequence of

non-compliance was terrmination (sic).

12.After the (date of injury) meeting, the claimant's post-traumatic stress disorder became increasingly symptomatic, requiring hospitalization from 20 August 1992 to 14 September 1992.

CONCLUSIONS OF LAW

2.The meeting on (date of injury)was a legitimate personnel action.

3.The claimant did not sustain a mental trauma injury on (date of injury) in the course and scope of employment for the employer.

4.The claimant has not had disability as defined by the Act.

In his request for review claimant requests review of the sufficiency of the evidence to support two factual findings, Nos. 6 and 7. We have reviewed the record and are satisfied that these findings are sufficiently supported by the testimony of claimant and Ms. M, as well as by the claimant's last performance evaluation and his August 11th memo. Claimant also challenges the hearing officer's legal conclusions Nos. 2, 3, and 4. The evidence sufficiently supports these conclusions and the findings upon which they rest.

Claimant had the burden to prove he sustained a compensable mental trauma injury. In Texas Workers' Compensation Commission Appeal No. 93659, decided September 14, 1993, we stated that "[r]egardless of whether the legitimate personnel action defense is raised in a mental trauma case, in order to recover, a claimant must establish that a mental trauma injury arose in the course and scope of employment and was traceable to a definite time, place, and cause. (Citation omitted.) As with any alleged work-related injury, it necessary to establish a causal relationship between the event causing the alleged injury and the ultimate condition. (Citation omitted.)" We went on to observe that the hearing officer's determination in that case was, in essence, that such causation had not been established. Similarly, in the case at hand the hearing officer determined, with adequate support in the evidence, that the (date of injury) meeting was merely one in a series of job-related stressors and not in and of itself the cause of claimant's PTSD which dated back to 1969 and which was diagnosed as chronic.

As for the conclusions respecting the legitimate personnel matter defense, in Texas Workers' Compensation Commission Appeal No. 92149, decided May 22, 1992, we observed that the very language of Section 408.006(b) [then Article 8308-4.02(b)] imported the tenor of the phrase "personnel action" by including the examples of transfer, promotion, demotion, and termination, and we cited a commentary on the provision which further illuminated the phrase in stating that "[r]easonable interpretation should also exclude mental or emotional trauma injuries arising principally from reprimands, evaluations, and changes in compensation." It strikes us that the concern of the agency's executive director over Dr. F's alleged threatening and abusive behavior towards various agency employees together

with the alleged intent to bring some legal action against the agency was well taken, and that Mr. T's requirement that the several employees who had contact with Dr. F during the course of their duties document their conversations and interactions was prudent and certainly a legitimate personnel action. We do not find claimant's apparent theory that Mr. T's directive was not a legitimate personnel action because it was not contained in claimant's job description or in any written agency policy to be well taken. Similarly, if claimant's theory, in whole or in part, was that the (date of injury) meeting was not a legitimate personnel action because of Mr. T's conduct, again we do not find merit in such contention. Claimant said he felt "overwhelmed" and "confused" at the 10:00 a.m. meeting. However, Ms. M testified claimant was not visibly upset at the meeting and said that Mr. T did not threaten claimant. Claimant himself said he worked the remainder of the day and became increasingly disturbed as the day wore on. He was diagnosed at the VA hospital as having chronic PTSD and his medical records are replete with references to a long-term pattern of difficulties dealing with work-related and other stressors.

Claimant also takes issue with the hearing officer's comments in the decision that claimant's mental trauma injury resulted from repetitious stressful events while working for the employer and that these repetitious stressful events, including the (date of injury) meeting, were legitimate personnel actions. While these comments were not stated as factual findings or legal conclusions but rather were in the nature of a discussion (and might have more appropriately been included in the discussion portion of the decision), they nevertheless find adequate support in the evidence and are not against the great weight of the evidence. We have previously noted that repetitious mental trauma injuries are not compensable. *See* Texas Workers' Compensation Commission Appeal No. 93596, decided August 26, 1993.

Claimant had the burden to prove both that he sustained a compensable injury and that he had disability as defined in Section 401.011(16) of the 1989 Act. We have often observed that these issues may be proven by the testimony of the claimant alone. Since claimant failed to prove he sustained a compensable injury, it follows that he did not prove he had disability. *See* Texas Workers' Compensation Commission Appeal No. 92217, decided April 13,1992. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge