APPEAL NO. 93867
FILED NOVEMBER 10, 1993

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. 8308-1.01 *et seq.*). On August 24, 1993, a contested case hearing (CCH) was begun in [City 1], Texas, with [hearing officer] presiding as hearing officer. The hearing was concluded on August 30, 1993. The issues left unresolved from the benefit review conference (BRC) were:

1. Did the Claimant sustain a compensable mental trauma injury on [date of injury]?

2. Did the Carrier waive its right to contest compensability pursuant to Article 8308-5.21(a) (now Section 409.021)?

3. Does the Claimant have a right to amend his Employee's Notice of Injury or Occupational Disease and Claim for Compensation?

Only the first issue was actually litigated at the CCH. The hearing officer found that carrier had not waived its right to contest compensability and that finding was not appealed and consequently is not before us now. Section 410.204(a). The hearing officer determined that issue three ". . . is a non-issue and the attempt to raise this issue is without merit and needs no additional explanation." This, too, was not appealed and we will not further comment on it.

On the sole remaining issue the hearing officer determined that the appellant's, claimant herein, mental trauma injury on [date of injury], arose principally from a legitimate personnel action and is not compensable. Claimant contends that the hearing officer's decision is not supported by a preponderance of the evidence, has no basis in law or fact and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, [Employer], a self-insured governmental entity, employer herein, 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.

It is undisputed that claimant was employed as a truck driver/equipment operator/asphalt distributor operator with general duties, by employer and was characterized as a good hard worker. On [date of injury], claimant and two other employees were pouring concrete for a culvert when claimant's immediate supervisor, (Mr. B) came on the scene. Exactly what was said and the context in which it was said

was in significant dispute. Claimant testified that Mr. B criticized the work he was doing and demanded claimant do the work in a manner claimant did not feel was possible. Claimant said he ". . . tried to do it like he wanted it." According to claimant, when it became apparent to claimant that Mr. B wouldn't understand what he was trying to say, claimant testified ". . . I got up out of the ditch and told [Mr. B] that I needed to take a few days of my vacation . . . and I told him he could either take me to the warehouse or I could walk. He stood there and wouldn't listen to me . . . [Mr. B] opened the door up and told me to get my G-D ASS in the car . . . ." Claimant refused and walked some two or three miles to the "warehouse" (which was also the local office). At some point after Mr. B and claimant got back to the warehouse, Mr. B said "I can't use you." Claimant said that he interpreted this as meaning he had been fired and he left the local office (in [City 2]) and went to [City 1] "to get my job back." Claimant testified he stopped on the way to [City 1], got a six-pack of beer ". . . and drank two or three of them . . . ." Claimant testified when he got to the regional officer in [City] he was met by two individuals, who apparently were senior level management and who ". . . told me to go back to [City 2], that I had not lost my job." Claimant returned to [City 2] and states he was told by Mr. B that ". . . he would see to it that I didn't get to keep my job." Claimant had been referred to Mr. B's supervisor who referred claimant to a mental health professional for his drinking problem. Claimant was subsequently given an oral reprimand for insubordination, behavior which negatively affects other employees and violation of the employer's drinking policy on December 11, 1992.

Claimant was mandatorily referred to [GW], a doctor of education in counseling and psychology (Dr. W), who first saw claimant on December 16, 1992. Dr. W testified, and it was her opinion, that claimant did not have a drinking problem but was suffering from "depression and stress of being fired." Dr. W testified regarding claimant's symptoms, severe depression, suicidal thoughts and concluded claimant was very ill. Dr. W states claimant had no previous history of severe depression ". . . and his condition appears to be the result of his job with [employer]."

Claimant returned to work for employer on or about December 16th and worked intermittently until January 26, 1993. Claimant's recollections of events after [date of injury] are vague and uncertain. However Mr. B's testimony was that claimant came to the office on the morning of January 26th wanting to talk about another employee. Mr. B testified after they finished the conversation, claimant "actually broke down" and Mr. B and another supervisor took claimant to the hospital. It was undisputed, at least in this proceeding, that claimant was again hospitalized and remains very ill.

Mr. B's version of what happened on [date of injury], is substantially different from claimant's version. Mr. B testified he came by the work site, saw what the workers were doing and said "[t]hat's not what I want." Mr. B testified claimant said ". . . just carry him

to the warehouse and I (Mr. B) said 'It's not that big a problem here' and then he turned around and said 'I don't have to put up with this s---,' and walked off." Mr. B testified that claimant then took off his hat and vest, and started walking to the warehouse. Mr. B states he offered claimant a ride but that claimant ". . . said he did not want to ride with me and slammed the door." Mr. B concedes he made the statement to the effect "I can't use you" but explained that it only meant he could not use claimant as long as he was acting the way he was. Mr. B testified he thought claimant was quitting. Mr. B stated that he did nothing more than give directions concerning details of the work and that claimant became agitated and walked off the job. Mr. B denied using profanity with claimant (or anyone else) or of threatening to get claimant fired.

The hearing officer made it absolutely clear throughout the hearing that he believed the key point was Article 8308-4.02(b) (since codified as Section 408.006(b)). It is equally clear that claimant's theory is that claimant was wrongfully fired, and rehired, that this caused claimant's mental trauma injury and that because the firing was wrongful and did not comply with the employer's own personnel policies, as set out in its Employee Handbook, the employer's action was not a "legitimate personnel action." The hearing officer determined that claimant suffered a mental trauma injury and that claimant's mental trauma injury was caused or aggravated by the work related incident on [date of injury]. However the hearing officer found that the dispute between claimant and Mr. B constituted a legitimate personnel action within the meaning of the statute and that Mr. B did not do or say anything to remove the work related incident from the category of a legitimate personnel action. Claimant vigorously disagreed citing the actions of Mr. B, contending they ". . . were not in anyway a legitimate personnel action and the [employer's] policy is unquestionably laid out in a way that the employee, [claimant], relied on that policy in his employment. He was 'illegitimately' fired from the employ of the [employer] without notice or the implementation of proper [employer] policy and procedures." (Emphasis in the original.) Claimant contends that the applicable case law requires that a mental trauma injury be traceable to a particular time, date, place and cause, that claimant has proven those points, and that the code ". . . must be construed liberally in favor of claimant" citing Texas General Indemnity Co. v. Martin, 836 S.W.2d 636 (Tex. App. - Tyler 1992, no writ).

We note that although Martin, *supra*, is a 1992 case, the date of injury was 1986 and that the prior workers' compensation statutes were applicable. Further, Martin held that a particular section of the prior act ". . . must be construed liberally in favor of claimants." Claimant appears to be arguing that a reversal is in order because the 1989 Act is to be liberally construed and that any reasonable doubt as to the right of an injured party to compensation is to be resolved in the injured party's favor. In Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993, we observed there are no Texas court decisions holding that the 1989 Act is to be

"liberally construed" and that no sound basis has been found to apply the doctrine to factual determinations. In Texas Workers' Compensation Commission Appeal No. 91101, decided January 27, 1992, (timely notice being in issue) where the party urged a liberal interpretation on a factual matter, we stated that "[w]hile no court has characterized any part of the 1989 Act as subject to being liberally construed, we believe the cases cited (by the appellant) do not control for other reasons." The decision goes on to observe that, in essence, what was being urged to be liberally construed was a factual matter rather than an application of a provision of law to a set of facts. We do not believe the weight of authority extends "liberal interpretation" to questions of fact. The Texas Supreme Court in Jackson v. U.S. Fidelity and Guaranty Co., 689 S.W.2d 408, 411 (Tex. 1985), referred to the doctrine and stated "[t]herefore, the act itself offers nothing to resolve this case, and the rule of liberal construction certainly does not authorize liberally construing ambiguous fact findings in favor of the claimant." In the instant case the hearing officer made no finding whether or not claimant had been improperly fired. The hearing officer only found that "[t]he Claimant's supervisor did not do or say anything on [date of injury], to remove the work related incident from the category of a legitimate personnel action." This involved a factual determination of whether Mr. B could control the details of the job. As indicated, the hearing officer made no determinations whether claimant had been terminated or not and the phrase "I can't use you" could have a variety of meanings. Consequently the matter of "liberal" construction or interpretation is not the issue.

Generally we recognize that under the 1989 Act mental trauma can produce a compensable injury if it is the result of an untoward event traceable to a definite time, place and cause. Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979). Claimant in this case has met this basic standard. However, in Duncan v. Employers Casualty Company, 823 S.W.2d 722, 725, 726 (Tex. App. - El Paso 1989, no writ his'y) the court affirmed the basic time, place and cause test and further stated:

> 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. *City of Austin v. Johnson*, 525 S.W.2d 220, 221 (Tex.Civ.App.-Beaumont 1975, writ ref'd n.r.e.). In a more recent case in which this Court declined to extend the *Camarata* holding to mental trauma resulting from the employee's choice between demotion or retirement, we said: "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. [Citations omitted]" *Marsh v. The Travelers Indemnity Company of Rhode Island*, 788 S.W.2d 720, 721 (Tex.App.-El Paso 1990, writ denied). For the same reasons, we hold that an employee's mental distress or trauma and any injury resulting therefrom caused by a reprimand is not an injury connected with the furtherance of the employer's business.

As noted in the above quote, Duncan, *supra,* referred to Director, State Employees Workers' Compensation Division v. Camarata, 768 S.W.2d 427 (Tex. App.-El Paso 1989, no writ) (a case where an employee suffered a compensable mental trauma injury, under the then existing law, when he saw a written memo critical of his work) and characterizes that case as extending the concept of mental trauma without physical injury "to its outer limit."

Section 408.006 is the applicable provision under the present law and states:

Sec. 408.006 **MENTAL TRAUMA INJURIES.**

(a) It is the express intent of the legislature that nothing in this subtitle 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 under this subtitle. (V.A.C.S. Art. 8308-4.02)

Claimant argues that Sec. 408.006(a) means that the legislature intended that all of the "old law" cases are still in effect ". . . and that the legislature has not changed its position on Mental Trauma Injuries since the Camarata case was decided." In Texas Workers' Compensation Commission Appeal No. 93137, decided April 7, 1993, we observed that the (a) part of the cited statute allows the Appeals Panel to look to cases of mental trauma decided under the prior law. Some of these cases, such as City of Austin v. Johnson, 525 S.W.2d 220 (Tex. Civ. App.-Beaumont 1975, writ ref'd n.r.e.) and Marsh v. Travelers Indem. Co. of R.I., 788 S.W.2d 720 (Tex. App.-El Paso 1990, writ denied) have said that worry and anxiety over job loss, failure to be promoted, etc., are not sustained in the course of employment because they are not connected with the employer's business. To a certain extent, Section 408.006(b) codifies the rationale in this line of cases by excepting "legitimate personnel actions." A distinction between the prior law treatment of mental trauma and the 1989 Act with Sec. 408.006(b) in place is posited by A Guide to Texas Workers' Comp Reform, Vol 1, Sec. 4.02(b), page 4-38, note 118, Montford, Barber, Duncan, which says: "For reference to a case where

mental trauma resulting from personnel actions was held compensable which should no longer be compensable under Sec. 402.(b), *see* Director, State Employees Workers' Compensation Div. v. Camarata, 768 S.W.2d 427 (Tex. App.-El Paso 1989, no writ)." Consequently we do not consider Camarata controlling in this case. Camarata may have been good case law at the time, but we view it as having been legislatively overruled. Furthermore, in Camarata, there was no dispute that a particular personnel action occurred, namely the written memo. In this case the only personnel action that can be inferred by the hearing officer's determinations is the dispute between claimant and Mr. B involving directions given by Mr. B to the claimant for the performance of claimant's duties. This was considered by the hearing officer to be a legitimate personnel action. We decline to hold otherwise.

Claimant stresses that the employer's handbook involving "the five phase program" was "clearly not followed" and consequently argues that the "firing," (if there was one) . . . was not legitimate or was illegitimate as a personnel action . . . ." The Appeals Panel and the workers' compensation dispute resolution process is not the appropriate forum for the practice of employment law. At some point in time claimant was advised and did file a personnel grievance under the employer's personnel grievance procedure. Whether Mr. B's actions were appropriate and/or constituted a termination is a matter more appropriate for the personnel grievance procedure than the workers' compensation dispute resolution process. Even if the personnel procedures under the appropriate personnel guides were not followed, and there is no finding by the hearing officer that they were not, we do not believe that sufficient to automatically constitute that action anything other than a legitimate personnel action within the meaning of Section 408.006(b). To do otherwise would open a vast new body of workers' compensation claims resulting from real or imagined failure of an employer to follow its personnel policies whenever there is a transfer, demotion, promotion, termination or other personnel action which an employee thinks is unfair and upsetting. We do not believe that is what the legislature intended.

We do not find the hearing officer's determination to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986). Consequently there is no sound basis on which to disturb the hearing officer decision.

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge