

APPEAL NO. 990881

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 1, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable mental trauma injury on or about _____, whether he timely reported the injury, whether he had disability, and whether he made an election of remedies which would bar him from pursuing workers' compensation benefits. The hearing officer determined that the claimant did not make an election of remedies and that issue is not on appeal and has become final. Section 410.169. The hearing officer also determined that the claimant did not sustain a compensable mental trauma injury on or about _____; that he failed to timely report the injury, without good cause; and that he did not have disability. The claimant appeals a number of the hearing officer's findings of fact and conclusions of law, citing evidence he urges supports his position that he sustained a compensable mental trauma injury, that he timely reported the injury once his doctor advised him his injury was severe and that it was a new injury, and that he had disability. The respondent (self-insured) urges that there is sufficient evidence to support the findings of fact made by the hearing officer and that the conclusions of law are supported by the facts, and that the decision is correctly based on those conclusions of law.

DECISION

Affirmed.

The Decision and Order of the hearing officer fairly, thoroughly, and in detail sets forth the pertinent evidence in this case and is adopted for purposes of this review. Very briefly, the evidence shows that the claimant had post-traumatic stress disorder (PTSD) diagnosed in 1996 but apparently having its origin during his career in the United States Air Force when he was, according to histories provided in medical reports, subjected to a traumatic event and other traumatic circumstances. A number of other stressful circumstances during the last couple of years concerning his wife's and son's health problems and his personal financial condition were mentioned in reports. Also, the medical evidence, as well as the claimant's testimony, showed that he had periodic "flare ups" of the PTSD over the last couple of years leading to events on _____, which serve as the basis for this claim.

It was developed in the evidence that the claimant started working with the (employer) in 1995 as a food service supervisor at one of the correctional facilities. The claimant testified and other evidence showed that he had been the subject of disciplinary actions on five occasions starting shortly after he was employed. Medical records show that the claimant was under ongoing treatment for his PTSD right up to the date of the incident claimed to be a new injury. Evidence showed that in the days leading up to _____, there had been discussions between the claimant, as the supervisor of the kitchen, and another corrections officer, CS, who was involved with security at the facility, concerning an inmate improperly being in the kitchen. There was evidence to the effect

that CS was assured that the inmate would no longer be permitted to work in the kitchen without institutional approval which involved health concerns. On _____, when CS observed the inmate attempting to enter the kitchen, he asked who authorized him to be there and was told the claimant had. CS was angry about the breach and went into the claimant's office, confronted him about lying to him and stating to the effect that he would "have his job." The claimant called a warden on the phone to complain and then gave the phone to CS who after talking to the warden left the claimant's office. The claimant claims that this was a traumatic event which exacerbated or aggravated his PTSD and was a compensable injury in and of itself. An August 24, 1998, report from his psychotherapist states that the claimant indicated he had "ups and downs" during the last two weeks. Claimant also mentioned the confrontation with CS and stated that "instead of just not doing anything about it, I filed a grievance against this Captain, and I felt better after taking the action." The claimant continued at work until September 11, 1998, when he was put on administrative leave for disciplinary reasons involving having an unauthorized offender (inmate) working in the food services department. Claimant saw his doctor on September 24, 1998 (apparently the first appointment he was able to arrange), and his doctor took him off work at that time. The next day, the claimant reported a work-related injury to the employer. The claimant stated that his doctor has not released him to work. An investigation of claimant's complaint was conducted by the warden and resulted in findings of no harassment or wrongdoing on the part of CS in making security rounds in all areas and the grievance was denied. An appeal by the claimant did not result in favorable action.

The hearing officer made a number of foundation findings of fact based on the evidence, and contrary to the assertion on appeal citing other evidence and possible inferences, we find that there is sufficient evidence to support the findings made by the hearing officer. However, of core importance is the determination that the actions of CS were not outside his authority in maintaining security and that his actions in "chastising the claimant and threatening him with the loss of his job, were legitimate personnel actions necessary under the circumstances." While the history and course of claimant's PTSD, the activities leading up to August 20th, and his actions and medical reports following shortly thereon would tend to discount a compensable injury based on repetitive mental trauma (Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979)), we find that there is sufficient evidence to support the determination that this is a situation of legitimate personnel actions necessary under the circumstances. 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." Whether CS's conduct was somewhat aggressive and was considered by the claimant to be abrasive does not result in a compensable mental trauma injury. Texas Workers' Compensation Commission Appeal No. 960026, decided February 12, 1996; Texas Workers' Compensation Commission Appeal No. 931176, decided February 1, 1994. We affirm the determination that the claimant did not sustain a compensable trauma injury on or about _____.

The hearing officer also determined that the claimant did not give timely notice of his injury and that he had not shown good cause. The claimant asserts that his injury was on

_____, when confronted by CS but that he did not know he sustained a serious compensable injury until told so by his doctor on September 24th and that he then gave notice. Given the claimant's history of ongoing treatment and occasional "flare ups" of his PTSD, it is apparent the hearing officer did not find the claimant credible on his claim of good cause. We cannot conclude from our review of the evidence that the hearing officer's determination was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). To the contrary, we conclude there was sufficient evidence to support untimely reporting of the injury without good cause.

Regarding disability, since a compensable injury was not sustained, there can be no disability. Section 401.011(16). However, although a claim of disability fails on that ground, we also agree with the hearing officer's determination that the claimant's inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage from his September 11, 1998, administrative leave for disciplinary reasons, would militate against a finding of disability from September 11, 1998, to at least the date of September 24, 1998, when he was taken off work by his doctor.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge