APPEAL NO. 950168

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. 401.001 *et seq*. (1989 Act). On November 21, 1994, a hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) had a mental trauma injury at work on (date of injury), when he was not given a merit pay increase, which was found to be not a legitimate personnel action. Appellant (carrier) appeals asserting that any injury resulted from repetitious mental trauma and that the denial of a pay increase was a legitimate personnel action. Claimant replied that the appeal was untimely and that the decision should be upheld.

DECISION

Finding that the appeal was timely filed with the Texas Workers' Compensation Commission (Commission) and that the great weight and preponderance of the evidence show that any injury resulted from repetitious mental trauma and that the great weight and preponderance of the evidence show a legitimate personnel action, we reverse and render.

The decision of the hearing officer in this case was distributed to the parties on January 19, 1995, by cover letter dated January 18, 1995. The appeal is dated February 1, 1995, and was received by the Commission on February 1, 1995. It is timely filed. *See* Section 410.202.

Claimant worked for (employer) in the area of safety and health. The day set forth as the date of injury was (date of injury).

Claimant and his wife both testified that they had put their house up for sale in April 1994 as part of a decision to move. Claimant's wife further testified in answer to a question of why a decision was made to sell the house, "I could see what this job was doing to my husband." Claimant agreed that he had asked for a "severance package" long before (date of injury). He added that he was "advised by (Dr. B) in February to leave the employment where I was because of the stress that it was having on me; and basically the -- well, just the stress." In claimant's opening statement, claimant stated, "all I wanted to prove today is that because of the trauma and stress that we were under at [employer], my work place, I suffered physical injury, basically high blood pressure or hypertension and stomach disorder . . . ."

During his testimony claimant attacked the reasons why he was denied a merit pay increase by his supervisor on (date of injury) (which will be described more fully later), but in his closing statement, claimant said, "what we've proven here today is that an incident took place on (date of injury), that was, in reality, a summation or a focal point of a great deal of stress that occurred over a long period of time. Had we had an opportunity, there were other incidents we could have referred to."

Claimant testified that on (date of injury) his supervisor, (Mr. M), told him he would get no merit raise until he improved his relationship with other safety managers. Claimant testified that the other managers were really disenchanted with Mr. M and his supervisor (Mr. Man) because of practices they, not he, had followed in dealing with those managers. Claimant referred to himself as a "scapegoat" and stated that the denial of a pay increase was "grossly unfair".

He stated that (date of injury) was a Friday; he felt sick at home over the weekend after being denied a pay increase and went in to work on the following Monday but told (Ms. G) in human resources that he was angry and sick and was going home. Ms. G testified that claimant did come to see her on (date) saying that he had insomnia and could not eat. She stated that on (date), claimant talked about stress and "he again asked if there was any type of package that he could get at that time." She was asked about claimant's discussion with her concerning (date of injury):

Q.Did he mention any specific incident occurring on (date of injury), which led to his decision that he informed you about on (date)?

A.What we talked about were just the stresses on the job.

Q.He did not mention a specific incident occurring on (date of injury)?

A.No.

Ms. G said that claimant first talked to her about his stress complaints on May 3rd or 4th. When claimant asked Ms. G on cross-examination whether she contended that he did not tell her about the (date of injury) incident on (date), she replied that she did not remember him telling her anything about that, but did say it was possible -- in reply to his question of that nature.

A statement claimant had written, undated, and from which he read earlier in the hearing, was introduced by the carrier without objection from claimant. It said, in part, "[t]he greatest stressor in my work environment was the fact that anytime our notations or observations of unsafe conditions or improper procedures in the field brought our department managers any scrutiny or adverse comment from the management of the other segments of the company, our managers would hold us responsible for it." He also said, "Project priorities were constantly shifted and often I was forced to work through lunch and after hours to get the work done." He added, "[i]n approximately April I told [Ms. G] of human resources about my workstress [sic] and asked her in confidence to see if I could obtain a severance package from the company such as those . . . ." He then said, "[l]ong term effects of the stress came to a head in an incident that occurred in May, 1994." He then discussed, not the meeting with Mr. M on (date of injury) in which he was told that he would get no pay raise, but the practices that his supervisors instituted in dealing with

other managers relative to safety, which he said were over his objection. Thereafter his statement addressed the (date of injury) meeting about the absence of a pay raise as "grossly unfair." Claimant ended his statement as follows:

> In summary, the demands of my responsibilities, the rigorous schedule and deadlines, unexpected travel assignments, lack of managerial support for actions that I was assigned by them to undertake, unrealistic deadlines and an unrealistic workload, and conflicting assignments set by three different supervisors all contributed to the high blood pressure, stomach pain and insomnia that I suffer from. Only since leaving [employer] have those symptoms begun to improve.

Mr. M testified that he had a meeting with claimant on (date of injury). He testified that he told claimant of his concern about claimant's performance for the past year and that he would not get an increase in pay. Mr. M said there was no raising of voices or any demonstrable action by either. He further stated that in February of 1994 he had a meeting with his staff in which he explained that employer was no longer going to be giving merit pay increases to those who just did their job. Mr. M said that claimant did what he asked him to do and did it well, but did not go beyond those duties, and that was not within the definition he received in regard to merit pay.

Mr. Man testified that claimant had some disagreements with him about the way the job was done. He said that the decision regarding whether claimant would receive merit pay was made sometime in October or November of 1993. He stated that merit pay increases are "traditionally" decided upon at that time for the upcoming year. In 1993 he had been told by employer that merit increases "were no longer going to be considered an entitlement." He considered claimant not to have performed in a superior way so he was not given a raise.

Claimant testified that on May 18th he was told by human resources to go see Dr. B, the company doctor. Claimant did so, seeing Dr. B on May 18 and on June 8, 1994; he has not seen him since then and has not gone to any other doctor. On May 18, 1994, Dr. B recorded claimant's blood pressure as 168/89 and also as 178/102. Dr. B notes that claimant was angry about "some event(s) related to performance rating by supervisor." Dr. B diagnosed an "acute anxiety reaction" with high blood pressure response. He also wrote that gastroenteritis was possible and said that claimant was "disabled." He prescribed medication. On June 8, 1994, Dr. B noted that claimant was more relaxed, attributing improvement to a trip he had taken to Utah. He said claimant was still "quick to anger over event and supervisor's responses." Blood pressure was noted at 120/70 and gastroenteritis was not mentioned. Medication was continued. (Dr. B wrote a letter to employer's human resources office on May 20, 1994, and provided an initial medical report on June 16, 1994, in which he referred to claimant's interests outside employment and

past employment experiences; claimant refuted these points in his letter of September 6, 1994.)

Claimant agreed that on June 22, 1994, he "signed a severance package with (employer)" and had been paid his salary from May 16 to June 22, 1994.

The facts of this case may be compared to those in Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979). While Maksyn referred to forty years of employment and claimant's wife referred to four years claimant had been in his current job with employer, both described hectic work. Both missed lunches and worked extra hours. Maksyn's physician had earlier told him he was exhausted, whereas claimant said Dr. B had told him to leave his employment. Maksyn's employer finally asked him to retire, while claimant had planned to move. Both contained no evidence of physical traumatic activity as opposed to mental stimuli. Maksyn did not state, however, that a particular culminating incident took place. *Also see* Aetna Casualty & Surety Co. v. Burris, 600 S.W.2d 402 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.), which reversed and rendered a judgment for Burris, a truck driver, citing Maksyn, who had high blood pressure, "violent onset of loss of vision", and migraine headaches after driving over 800 miles "straight through." With evidence of stress of at least two years duration, the court found that repetitious mental traumatic activities were shown and therefore no recovery was allowed. *Compare to* Bailey v. American General Insurance Co., 279 S.W.2d 315 (Tex. 1955) in which Bailey and another worker were on a scaffold that fell, killing the other worker. Bailey was able to swing over to the roof of another building. After that time, Bailey was unable to work, "freezing up", having nightmares, etc. There was no evidence of prior stress on the job. The court found a compensable injury. Similarly, in Aetna Insurance Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App.-Houston 1958, writ ref'd n.r.e.), an employee of a laundry was found to have suffered a compensable stroke after being berated by a customer. More recently, Marsh v. Travelers Indemnity Company of Rhode Island, 788 S.W.2d 729 (Tex. App.-El Paso 1990, no writ), in refusing to extend Director, State Employees Workers' Compensation Division v. Camarata, 768 S.W.2d 427 (Tex. App.-El Paso, 1989 no writ), by holding that mental injury was not compensable in a choice between demotion and retirement, stated, "[d]isappointment 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. . . ." (Emphasis added.)

Texas Workers' Compensation Commission Appeal No. 92311, decided August 24, 1992, affirmed a determination of no compensable injury for constant migraine headaches "since July 23" when claimant's boss and she disagreed. In Appeal No. 92311, that claimant testified, "she had experienced problems at work for some time, although not of the same magnitude as those which occurred on July 23rd." *Also see* Texas Workers' Compensation Commission Appeal No. 93364, decided June 24, 1993, which reversed and rendered a finding of compensable injury based on receipt of a letter of reprimand.

The great weight and preponderance of the evidence, including claimant's written statement and his declarations at the hearing, the testimony of his wife, along with the absence of medical evidence stating that the (date of injury) incident caused a particular injury, and the testimony of Ms. G that claimant discussed leaving employer three days later because of stress in general, without identifying the (date of injury) incident, indicates that injury, if any, caused by the work was a result of repetitious mental trauma.

The 1989 Act at Section 408.006 states that recovery for mental trauma injuries is neither expanded or limited by this Act. It also says that no compensable injury arises from a mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination. It does not list a failure to get a pay increase, but Texas Workers' Compensation Commission Appeal No. 92710, decided February 16, 1993, pointed out that the list is not exhaustive, stating that "reprimands or evaluations" would be included, citing Texas Workers' Compensation Commission Appeal No. 92149, decided May 22, 1992. Duncan v. Employers Casualty Co., 823 S.W.2d 722 (Tex. App.-El Paso 1992, no writ), cited City of Austin v. Johnson, 525 S.W.2d 220 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.) in saying that:

> 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. (Emphasis added.)

The Duncan case was cited favorably by Appeal No. 92710, *supra*, as indicating that a negative reaction to an undeserved reprimand would not be compensable. Texas Workers' Compensation Commission Appeal No. 93867, decided November 10, 1993, dealt with an assertion by a claimant that his firing was "illegitimate" because the employer did not follow his own handbook involving a "five phase program" in letting him go. The Appeals Panel wrote:

> 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).

We note that Section 408.006 imposes a limitation that a personnel action be "legitimate." The word "fair" is not included in that section. (*See* Duncan, *supra*, which did not differentiate between deserved and undeserved reprimands.) With claimant's assertion that the failure to give him a raise was unfair, constituting the only evidence critical of the

personnel action in the case under review, there was no showing that the decision not to give claimant a merit pay increase was contrary to law, employer's policies, or any other requirement that would render illegitimate the personnel action involved. *See* Texas Workers' Compensation Commission Appeal No. 93137, decided April 7, 1993. The finding of fact that the personnel action was not legitimate was against the great weight and preponderance of the evidence.

The decision and order are reversed and a new decision rendered that no compensable injury occurred so there is no liability for benefits.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge