

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
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EMMANUEL D KEPAS,
Petitioner,

vs.

**EBAY INC and/or AMERICAN HOME
ASSURANCE,**
Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No. 06-0439

Judge Debbie L. Hann

HEARING: Labor Commission, 160 East 300 South, Salt Lake City, Utah, on October 19, 2006 and again for supplemental hearing on December 18, 2006. Said Hearings were pursuant to Order and Notice of the Commission.

BEFORE: Debbie L. Hann, Administrative Law Judge.

APPEARANCES: The petitioner, Emmanuel D Kepas, was present and represented by his/her attorney Melvin A Cook Esq.

The respondents, Ebay Inc and American Home Assurance, were represented by attorney Carrie Taylor Esq.

STATEMENT OF THE CASE

The petitioner's May 4, 2006 Application for Hearing alleges entitled to medical expenses, recommended medical care, temporary total disability compensation, permanent partial disability compensation and travel expenses as the result of both an injury and occupational exposure causing tinnitus on August 10, 2005 and February 16, 2006 as the result of workplace stress. Adjudicative proceedings were commenced by the Commission on May 9, 2006 by issuing an Order for Answer.

The respondents' July 3, 2006 Answer denied the petitioner suffered injury or occupational exposure as alleged. The respondents also asserted the petitioner's claim is barred because the basis of the claim is a good faith employer action and that the occupational disease claim is subject to apportionment because of exposure to stress outside the workplace.

At the hearing, the petitioner amended his claim to occupational disease as the result of exposure to extraordinary mental stress over his period of employment from July 2003 through February 16, 2006. The petitioner also withdrew his claim for permanent partial disability compensation.

FINDINGS OF FACT

The petitioner was employed by the respondent, eBay, from July 21, 2003 until he was terminated from his employment in 2006. His last day worked was on or about February 16, 2006.

The petitioner was hired into the position of eWatch manager. The primary duties of the eWatch manager are to the people who work on the eWatch team. These employees work 8 hour shifts within a 24 hour day/ 7 day per week schedule. The eWatch team function was to both monitor the Ebay website and take calls and emails related to problems with website function. Depending on the severity of the problem, the eWatch manager may be contacted at home by phone and/or email. The problems monitored by the team are either resolved by the team or the team acts as a clearinghouse to involve the appropriate teams within eBay to resolve the problem. The eWatch team was responsible for ensuring appropriate communication among personnel necessary to solve the problem and also to provide status communications to appropriate upper management staff.

Because of the 24 hour nature of eBay operations, problems with website function can occur anytime within a 24 hour period so immediate response is necessary, no matter the time of day. This requires an on-call schedule for eWatch senior staff because a manager is not always present on site with the eWatch team. On call duties are rotated on a weekly basis. There is also a possibility that if the designated on call person is unavailable, the other on call personnel could be contacted. The eWatch team has one designated team member per shift who is responsible for making the on call contact.

The petitioner was in a salaried position so did not have set work hours. Although the petitioner testified he worked between 70 and 80 hours per week on regular basis, this testimony is not supported by a preponderance of the evidence.

The petitioner usually arrived to work at 8:45 a.m. although there were days when he came in as early as 6:00 a.m. and other days when he did not arrive until 9 or 10 a.m. The petitioner usually left work between 5 and 6 p.m. as he prepared the family evening meal most evenings and they ate dinner between 6:00 and 6:30 pm. This is also consistent with Will King's testimony, an eWatch employee since September 2000, and Jason Hughes' testimony, an employee since November 2005, who both observed the petitioner usually leave work at between 5 and 6 p.m.

Although Sidney Peacock, a friend of the petitioner who does not work at eBay, testified that the petitioner returned to work in the evenings about once per week, this is not consistent with the petitioner's testimony or the testimony of his co-workers. The petitioner's testimony was that he frequently got calls at home at night and on the weekends that required his time from home. This is also consistent with the petitioner's wife's testimony. Brandon Sherman, the petitioner's

witness, also testified that the petitioner came back into the office only one to two times per quarter, not the weekly return testified to by Mr. Peacock.

However, the petitioner did put in additional hours regularly from home. The petitioner had an on call schedule rotation of on call responsibilities one week every three weeks (rotating on call with 2 other employees) from July 2003 until February 2005. At that time, he was demoted as eBay manager and on call rotation was increased to 4 and then 5 people, including the petitioner. As a result, his on call duties were lessened although there were some absences of other on call personnel between February 2005 and February 2006. The on call duties resulted in the petitioner receiving calls at home. These calls lasted from 15 minutes to a series of calls over a period of several hours, depending on the nature and severity of the problem. The petitioner also was sometimes required to make calls or send email to other eBay management or to participate in conference ("bridge") calls with eBay staff or management from other teams.

The petitioner also monitored email communication at home. While this was not a stated requirement of the job, the preponderance of the evidence is that it was necessary for the manager to stay informed of events occurring during the 24 hour eBay operations and was also necessary for the assigned on call person to monitor. While this may not have required monitoring throughout the night as the petitioner did, the email did require his attention while at home, whether he chose to monitor it before going to bed and upon rising or throughout the night as he did.

Although the eWatch team increased in staff under Ms. Dutton, the staff growth reflected the growth of eBay and an increased number of customers and not an overall lessening of staff workloads. The facts relevant to the petitioner's average weekly hours worked are the number of hours the petitioner worked during his daily work schedule and his on call schedule.

The preponderance of the evidence is that the petitioner worked a 60 hour week on average until February 2005 when he was replaced as eWatch manager by Susan Dutton. Karlie Kimmerle, the eWatch manager immediately prior to the petitioner, worked 60 or more hours per week. However, she designated only one person to rotate on call weeks with requiring her to be on call every other week, unlike the petitioner who designated two other on call employees so rotated on call every three weeks. Susan Dutton, the eWatch manager assigned to replace the petitioner in February 2005, works 50-55 hours per week although she had a 4, and then 5, person on call rotation so does work on call as often as the petitioner did during his tenure as manager. In February 2005, the petitioner was demoted to an analyst position on the team and Susan Dutton was made eWatch manager. This change resulted in the petitioner being relieved of some of his management duties and lessening the petitioner's on call rotation. In November 2005, another supervisor was hired who took over more of the petitioner's duties, including some personnel supervision. The undersigned finds the petitioner worked less than 60 hours per week on average after February 2005.

Besides working long hours, the work environment at eBay was very demanding. The company was expanding quickly during the period the petitioner was employed. eBay provides a

continuous online auction service and that online environment must be continuously and correctly functioning. This puts significant strain on eBay staff and management to maintain and monitor this online environment which, at the same time, is being expanded to accommodate new services as well as being internally updated and improved. Testimony was uniform on this point: eBay is a fast paced, demanding and constantly changing work environment.

As noted above, in February 2005, the petitioner was demoted from eWatch manager to a business analyst and Susan Dutton was made eWatch manager. The petitioner still retained direct supervisory responsibility for the team. Ms. Dutton was made eWatch manager because of management concern that the petitioner did not have a good work/life balance and that he did not manage his time well. This was reflected in procedures put in place that required the petitioner to be contacted more frequently than necessary to accomplish eWatch tasks. This began a period where Ms. Dutton closely supervised the petitioner and worked to change team procedures that had been put in place by the petitioner in order to more effectively operate the eWatch function.

The petitioner has filed a discrimination claim against eBay. The petitioner's age discrimination claim is alleged to have occurred in February 2005 when the petitioner was demoted and replaced by Susan Dutton. The first event leading to the petitioner's sexual harassment/discrimination/retaliation is alleged to have occurred in April 2005 and continued until his last week of employment in February 2006.

The petitioner first complained of tinnitus to Dr. McDermott on August 10, 2005 when he was being treated for bronchitis. Dr. McDermott cleaned earwax from the petitioner's ears and suggested he irrigate them on a regular basis. Medical exhibit 19-20.

In November 2005, Jason Hughes began working as the swing shift eWatch supervisor. At that time, Mr. Hughes took over direct supervision of 6 of the employees the petitioner supervised. Mr. Hughes' shift overlapped the petitioner's shift by a couple of hours. Mr. Hughes suggested changes to staff supervision and felt the petitioner needed "development" of his skills related to documentation and technical understand of eBay function.

On November 2, 2005, the petitioner sought treatment with Dr. McDermott for bronchitis and increasing bilateral tinnitus. Dr. McDermott again notes ear wax. Medical exhibit 21-22. The petitioner returned to Dr. McDermott on November 15, 2005 for respiratory infection symptoms but made no further mention of tinnitus. Medical exhibit 23-24.

In December 2005, surveys done by team members of the petitioner's management performance were very low, not even approaching a successful performance level. The petitioner's allegation that the team understood these reviews were of Ms. Dutton and not him is not credible. The reviews had the petitioner's name on them as the person being reviewed. While there were some questions on the surveys about upper management, the bulk of the survey questions go to evaluating the employee's direct supervisor. During 2005, even though Ms. Dutton was made

manager, staff still reported directly to the petitioner. While some comments were made about Ms. Dutton on these reviews, those comments were passed on to her supervisor for review/evaluation.

Also in December 2005, a website sign on problem arose where eBay members could gain access to other members' accounts. The system problem allowed members to sign in on other members' accounts. The petitioner was on call when the symptoms of this problem arose but he did not raise it with other teams or upper management ("escalate"). The scale of the problem became apparent two days later and required continuous work by all the eWatch on call staff over an entire weekend to get the problem fixed. Upper management was concerned that the petitioner had seen the symptoms of this problem while on call but had not escalated the issue so that it could be dealt with immediately, given the impact and compromise to the eBay website and users.

Ms. Dutton met with the petitioner and informed him he would be placed on a performance improvement plan as the result of the survey results and the failure to recognize the sign on issue. She did not implement the plan in December 2005 because she wanted more detailed information about team members' concerns so she could better set performance goals for the petitioner. Ms. Dutton requested the human resources department conduct detailed interviews with the team members to gather this information. Ms. Dutton was not involved in these interviews. The petitioner was aware the team would be interviewed.

In January 2006, Ms. Dutton again reduced the number of employees on the team who were directly supervised by the petitioner. Ms. Dutton had not yet implemented the petitioner's performance improvement plan because she was waiting for additional information from the employee surveys being done by human resources.

On January 23, 2006, the petitioner filed an anonymous ethics hotline complaint against Susan Dutton complaining of sexual harassment. The petitioner filed a second anonymous complaint as a follow up to the first because he did not believe the first complaint had been acted upon. The petitioner filed a third complaint, this one not anonymous, complaining of a hostile work environment as the result of actions by Ms. Dutton and Wendy Jones. The petitioner filed a fourth complaint against Ms. Dutton related to the petitioner's belief that Ms. Dutton had asked Jason Hughes to monitor him. These complaints were investigated by the human resources department and were found to be either unfounded or related to Ms. Dutton's attempts to improve the petitioner's work performance.

In early February 2006, Jeff Anderson, human resources manager, met with the petitioner and told him he was being placed on a performance improvement plan.

On February 9, 2006, the petitioner sought treatment with Mark Treuhaft, LCSW, because of extreme anxiety and noise in his head that was intensifying. Mr. Treuhaft notes:

...he is a manager at ebay and that he feels threatened and intimidated there...his boss and other co-workers at ebay are unhelpful in resolving his concerns...he is being sexually harassed...also experiencing sexual discrimination and retaliation...is extremely fearful of being fired because of his attempt to resolve these issues...also extremely distressed about the return of his boss in a week, due to her reported history of retaliation and aggression.”

Medical exhibit 65.

The petitioner spoke with human resources about the possibility of getting a short term disability leave and was referred to eBay's third party vendor who handles such requests. The petitioner reported the need for leave was family stress related to his son who has bi-polar disorder.

On February 14, 2006, the petitioner reported an escalation of panic, anxiety and depression symptoms to Mr. Treuhaff. Medical exhibit 65-66.

On February 15, 2006, the petitioner complained to Dr. McDermott of worsening tinnitus, stress, poor sleep, vertigo, anxiety and multiple stressors. The petitioner was referred for an ear, nose and throat evaluation. Dr. McDermott also prepared a medical release for anxiety, vertigo and insomnia. Medical exhibit 25-28. The petitioner then went on short term disability.

On February 16, 2006, Dr. Finlayson assessed the petitioner with tinnitus due to stress and sinus congestion for the past few months. Dr. Finlayson noted the petitioner had “much stress recently on job” and that the petitioner was seeing a mental health worker secondary to tinnitus. Medical exhibit 54-55.

Dr. Daniels noted on March 2, 2006 that the petitioner “...reports that he has been unable to work due to severe tinnitus and some anxiety issues...he has been under extra stress at work due to being the victim of sexual harassment...reports that his tinnitus increased in intensity since these problems at work have happened...” Medical exhibit 76.

The petitioner filed a charge of discrimination against eBay with the Utah Anti-Discrimination and Labor Division on March 3, 2006.

Dr. Caten notes on March 6, 2006 that the petitioner “...reports recently being harassed at work starting 1 year ago. He feels that he has been sexually harassed and is fearful he will lose his job...he reports doing fairly well until 1 year ago when he felt sexually harassed by boss and then punished for it. He now reports that he can't work next to this boss [secondary] to anxiety.” Medical exhibit 71-72. On March 21, 2006, Dr. Caten writes that he is treating the petitioner for anxiety and that “[h]e reports a fear of being under the supervision or management of Wendy Jones and Susan Dutton at work and that being in this environment worsens his anxiety.” Medical exhibit 75.

On April 7, 2006, Mr. Treuhaft noted the petitioner began "...experiencing relief from his symptoms of panic, anxiety and depression...he learned that he did not have to go back to ebay given the nature of his leaving ie. sexual discrimination and age discrimination, intimidation...It is my opinion...that he exhibits symptoms of post traumatic stress disorder ie. panic, anxiety and depression due to his interaction with the co-workers at ebay." Medical exhibit 67-68.

Dr. McGarrett opined in his summary of medical record that the tinnitus the petitioner suffers from is caused by his work environment stating, "...negative reactions and stress can exacerbate the intensity of a perceived tinnitus." Medical exhibit 86. Dr. Tagge opined that noise is subjectively heard by the petitioner. He goes on to state "...significant tinnitus is often times secondary to a response of the limbic system and autonomic nervous system...stress, psychological, and social characteristics are known to be important factors in the pathogenesis of tinnitus and the ability to cope with tinnitus..."

The petitioner worked long hours in a fast paced, high pressure environment at eBay as eWatch manager. The petitioner was then demoted and believed he was the victim of age discrimination and sexual harassment while still maintaining supervisory responsibility and working much more than a 40 hour work week on a regular basis. The petitioner was then faced with low supervisory scores from those he supervised and displeasure from upper management with his handling of a system failure, all of which resulted in management placing him on a performance improvement plan because of inadequate performance and faced the possibility of losing his job. The petitioner suffered extraordinary mental stress as the result of his employment with eBay.

However, it was not until he was demoted in February 2005 and believed that he was the victim of age discrimination and then, in April 2005, believed he was the ongoing victim of sexual harassment and retaliation, that he exhibited any symptoms of stress related tinnitus. This condition worsened only after eBay management gave the petitioner a negative work evaluation and placed him on a performance improvement plan in February 2006 and also when the petitioner filed complaints of employment discrimination against eBay. Nowhere in the medical records does the petitioner report his source of workplace stress that resulted in tinnitus as being the long hours and demanding work environment of eBay. Further, the petitioner worked in as eBay manager for almost 2 years in that environment without ever having tinnitus symptoms or the need for treatment for stress. Further, the petitioner, in his claim for damages related to his discrimination claim, includes a damage claim related to tinnitus.

The workplace stress that caused the petitioner's tinnitus is the result of good faith employer personnel actions and alleged discrimination.

Because the petitioner's claim fails for this reason, discussion of apportionment for the possible contribution of non-employment stress the petitioner experienced, including the petitioner's bipolar child, the petitioner's health conditions other than tinnitus and his spouse's health conditions need not be addressed.

PRINCIPLES OF LAW

Utah Code § 34A-3-106 outlines the cause of action for occupational disease claims arising as the result of exposure to mental stress. That provision states:

(1) Physical, mental, or emotional diseases related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's disease and employment.

(2)-(a) Legal causation requires proof of extraordinary mental stress arising predominantly and directly from employment.

(b) The extraordinary nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life.

(3) Medical causation requires proof that the physical, mental, or emotional disease was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional disease.

* * *

In Wood v. Eastern Utah Broadcasting, Case No. 01-0208 (issued 3/31/06), the Commission Appeals Board outlined the legal causation standard that must be met in occupational disease mental stress claims. The first step is to "...identify the 'mental stress arising predominately and directly from employment.'" Then a comparison is made between the stress experienced by the employee and stress that the general public endures in their employment and nonemployment life to determine whether the level experienced by the employee is "extraordinary." The Appeals Board in Wood, *infra*, noted "...the proper comparison is not with either the most stressful or the least stressful situations encountered in life, but rather, the broader range that are 'generally' experienced."

Once the mental stress related to employment is identified, a determination must then be made under Utah Code § 34A-3-106(4) and (5) whether the stress from employment is related to good faith employer personnel actions or alleged discrimination. Mental stress as the result of such conditions cannot form the basis of a mental stress claim. Those provisions of the Code state:

(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter.

(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter.

If the mental stress is found to arise predominately and directly from employment and is not the result of good faith employer personnel actions or alleged discrimination then a determination as to whether there is a medical causal connection between the condition alleged and the mental stress.

If such medical causal connection exists, then possible non-employment sources of stress would be analyzed as part of the apportionment required by Utah Code § 34A-3-110 since stress is something an employee may have substantial exposure to outside employment and to which the general public is commonly exposed.

CONCLUSIONS OF LAW

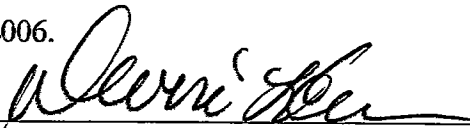
The workplace stress experienced by the petitioner while employed at Ebay is not the legal cause of his tinnitus.

The petitioner's Application for Hearing is dismissed with prejudice.

ORDER

IT IS THEREFORE ORDERED that the petitioner's application for hearing is dismissed with prejudice.

DATED this 29th day of December 2006.


Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

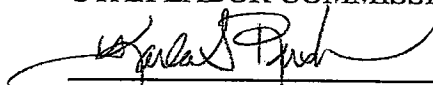
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on this 29th day of December, 2006, to the persons/parties at the following addresses:

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