APPEAL NO. 92208

On April 21, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider whether an injury appellant sustained to his right elbow on (date of injury), while at his job at a filling station, was compensable or whether it arose outside the course and scope of his employment in a personal conflict. Appellant urged that his injury occurred in the course and scope of his employment because it happened while he was at work, on his employer's premises, at the hands of a coworker, and involved the work-related activity of obtaining lunch for the crew. Respondent contended that appellant's injury resulted from his being attacked by an off-duty coworker for personal reasons unrelated to the employment. Appellant challenges the sufficiency of the evidence to support the hearing officer's conclusion that the injury was not compensable since it fell within the so-called "personal animosity" exception set forth in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.02(4) (Vernon Supp. 1992) (1989 Act).

DECISION

We affirm the hearing officer's decision and order.

During the early afternoon of (date of injury), a Saturday, Appellant (Claimant below) was at work as a general services specialist in the mechanical bay area of an Exxon filling station when a coworker, (Mr. G), whose shift there as a gasoline pump attendant had ended at 2:00 p.m., asked him if he would go get some power steering fluid and radiator coolant for (Mr. G's) automobile. (Mr. G's) auto had been earlier repaired at the station but had no fluids and (Mr. G) wanted the fluids so he could drive home. According to appellant, he told (Mr. G) he would pick up the fluids for him when he ran an errand. (Mr. G) wanted appellant to get the power steering fluid at (Auto Parts) as it was cheaper. Appellant said that (Mr. G), while still in the bay area, then called the nearby auto parts store customarily patronized by the station to find out if they were open, discovered they were closed, and related that information to appellant. Appellant's testimony concerning the making of this phone call was not controverted. Appellant then suggested that (Mr. G) try to "salvage" some fluids from around the station. (Mr. G) then left the bay area and went into the store area of the station while appellant continued to work on a car. (Mr. G) testified he was unsuccessful in locating any fluids to salvage and decided to buy fluids at the station. A short time later, appellant, who by then was thirsty and hungry, entered the store area to obtain a soft drink and to see if any of the other employees present wanted him to pick up lunch for them when he obtained his at a restaurant. When appellant had opened the glass door separating the station's store and bay areas, he had noticed (Mr. G) standing in front of the soft drink case. Appellant then asked whether anyone wanted him to get lunch for them since he was going to get his own lunch. It was customary for employees to get lunch for each other in this manner since there were no scheduled lunch periods in their workdays. The testimony was somewhat unclear as to whether appellant's question was addressed generally to include (Mr. G) as well as the two on-duty employees, (Mr. M) and (Mr. S), or only to the latter two. In any event, (Mr. G) said he became infuriated that appellant was willing to go get lunch for

(M). (M) and (S) but had been unwilling to run an errand for him to get the fluids.

Appellant testified that (Mr. G) then commented that appellant wasn't willing to run an errand for him but could run an errand for himself and others, "got up all mad," and moved towards appellant. Appellant said he was concerned that (Mr. G), whom he perceived as aggressive and ill-tempered, was going to push him against the glass door so he retreated into the bay area. According to appellant, (Mr. G) followed him out into the bay area and began to strongly push and shove appellant around the bay area and out to and around the gasoline pump islands. This incident, which was described as a "shoving match," lasted for approximately five to ten minutes. According to appellant, he didn't fall but was bruised in his chest and his right elbow and shoulder were hurt by his being pushed and shoved by (Mr. G). Incidentally, notwithstanding that the disputed issue at both the Benefit Review Conference and the hearing was ostensibly limited to appellant's injured right elbow, after this testimony all the parties appeared to enlarge the issue to include appellant's right shoulder and the hearing officer made a finding that both appellant's elbow and shoulder were injured by the continual shoving and pushing. Neither party objected below or on appeal to this enlargement of the disputed issue. See Article 8308-6.31(a) (1989 Act) and Tex. W.C.Comm'n, 28 TEX. ADMIN. CODE §142.7 (TWCC Rules) regarding disputed issues. *See* Texas Workers' Compensation Commission Appeal No. 91016 (Docket No. redacted) decided December 6, 1991. Referencing appellant's willingness to get some food for the others, (Mr. G) said "[t]hat made me kind of furious because I had just asked him a few minutes earlier could he go get some auto parts for me when he refused to and completely ignored me. . . ." (Mr. G's) testimony was contradictory concerning his reason for going into the bay area. He testified he merely intended to put the fluids he had just purchased into his car so he could go home. However, he also testified that appellant could see he was furious and ran out of there and that he pursued appellant into the bay area. According to (Mr. G), it was appellant who first "pushed off" him. (Mr. G) pushed appellant back and the latter then grabbed (Mr. G), tearing his shirt and pulling his name tag and pen and pencil set from his shirt. At this point (Mr. G) said he "got furious" began to push and shove appellant. Neither participant actually struck blows. (Mr. G) was not a supervisor of appellant, had not known appellant prior to working with him at the station, and denied having any prior problems with appellant. (Mr. S) saw (Mr. G) pushing and shoving appellant but didn't know the reason. Richard Mullen, the supervisor, who was not present, learned of the incident the following Monday morning and turned in a report to the effect that the incident arose from (Mr. G)'s request that appellant run a personal errand for him. He said he "thought it was just a personal argument between two coworkers."

According to the evidence, appellant, who had previously filed four workers' compensation claims, first sought medical attention on the Thursday following the incident. (Mr. M) said that after the incident appellant worked a short time at the station, even though they had no light duty there for him, and was shortly later transferred to another station. Appellant stated he hadn't worked since the incident and that the district manager had told him he could go back to work later on when he is better and can cope with the job. However, his elbow still hurts.

Article 8308-3.02 (1989 Act) provides, in part, that an insurance carrier is not liable for compensation if "(4) the injury arose out of an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment; . . . " Appellant primarily relied both below and in his request for appeal on the case of Liberty Mutual Insurance Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App. - Tyler 1968, writ ref'd n.r.e.) arguing that the instant case was analogous. We have previously determined that the exception in Article 8308-3.02(4) is substantially similar to its statutory predecessor, would be viewed as carrying the same meaning, and that when a carrier presents sufficient evidence to present an issue as to such exception the employee has the burden to prove the exception does not apply. Texas Workers' Compensation Commission Appeal No. 91070 (Docket No. redacted) decided December 19, 1991. The mere fact that an employee is injured by a fellow employee, even when both are at work, does not *ipso facto* give rise to a compensable injury. Shutters v. Domino's Pizza, Inc., 795 S.W.2d 800, 802 (Tex. App. - Tyler 1990, no writ). "The controlling point is whether there was a causal connection between the assault and the employment of the claimant. (Citation omitted.)" Davis v. Maryland Casualty Company, 243 F.2d 463, 464-465 (5th Cir.1957).

Appellant, contending that "the altercation arose when [appellant] asked other employees but not [(Mr. G)] whether they wanted him to get them something to eat," finds a nexus with the employment in the fact that appellant was taking food orders for other employees--an accepted practice there--and relies on Hopkins, *supra.* In Hopkins, the injured employee stepped behind another employee to take a drink from a water fountain. The other employee, whose back had been turned to the fountain, then turned around and beat the injured employee, ostensibly for stepping around him to get to the fountain. These employees had not had prior difficulties between them. The court, while noting that "the mere fact that an employee is injured by another employee while at work for his employer does not in and of itself make the injury compensable," said that the dispute arose from the injured employee's getting a drink of water, an act which was incidental to his employment. Appellant argues that just as the drinking of water in Hopkins was work related, "[s]o to (sic) in the instant case the fetching of food was work related." The flaw in that analysis, however, is that the hearing officer did not find that (Mr. G) attacked appellant for his failure or refusal to obtain food for (Mr. G). Rather, the hearing officer found that "[(Mr. G)] was angry and pushed and shoved the [appellant] because [(Mr. G)] believed that the [appellant] had, without a good reason, refused to go to an automotive parts store to purchase transmission (sic) fluid and coolant for [(Mr. G)] to put in his car", and, that "[(Mr. G)'s] need for transmission (sic) fluid and coolant for his car was unrelated to the daily affairs of the Employer." There was ample evidence to support these factual findings and they support the hearing officer's conclusion that appellant's injury arose from (Mr. G)'s act intended to injure appellant for personal reasons and not directed at him as an employee or because of his employment. The evidence was in conflict as to whether appellant refused to run the errand for (Mr. G) or whether he was willing but unable to do so since the auto parts store was closed. In either event however, under the circumstances of this case, we do not view

appellant's running of such a personal errand for (Mr. G), let alone his failure so to do, a matter in furtherance of his employer's business or having to do with and originating in such business. *See* Texas Indemnity Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App. - Amarillo 1950, writ ref'd). *Compare* Texas Workers' Compensation Commission Appeal No. 91100 (Docket No. redacted) decided January 22, 1992; Texas Workers' Compensation Commission Appeal No. 92103 (Docket No. redacted) decided May 1, 1992; and Texas Workers' Compensation Commission Appeal No. 92112 (Docket No. redacted) decided May 4, 1992.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) (1989 Act). In reviewing a challenge to the sufficiency of the evidence we consider and weigh all the evidence and set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We may not substitute our judgment for that of the hearing officer if the challenged finding is supported by some evidence of probative value and is not against the great weight and preponderance of the evidence. Texas Employers' Ins. Ass'n v. Courtney, 709 S.W.2d 382, 384 (Tex. App. - El Paso 1986, writ ref'd n.r.e.).

The decision and order of the hearing officer are affirmed.

_____

Philip F. O'Neill
Appeals Judge

CONCUR:

_____

Stark O. Sanders, Jr.
Chief Appeals Judge

_____

Joe Sebesta
Appeals Judge