APPEAL NO. 92246

On April 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue was phrased as whether respondent's (claimant below) fight with a coworker on (date of injury), was job related. Appellant's (carrier below) position was that respondent was the aggressor and that as such, the fight was not job related. The hearing officer held that respondent showed by a preponderance of the evidence that he was not injured by a willful intent and attempt to injure himself or to unlawfully injure another, and that the fight was the result of respondent's employment and was not related to personal reasons outside the employment.

DECISION

Finding no merit in this appeal, we affirm the decision and order of the hearing officer.

The following evidence was adduced at the hearing. On (date of injury), respondent was employed as a truck driver for (employer). He said that on that day he had returned to the job site to pick up another load of demolition. He had backed his truck in and had gotten out of the truck; when he opened the passenger door and got up to put something in the truck, he said (Mr. A), a coworker who was operating a backhoe, swung the machine around and hit the back of respondent's truck. Respondent said the impact knocked the 18-wheeler truck two feet up, knocked him out of the door, and "pinned him in between the door," hurting his shoulders on both sides (this injury was not the subject of the instant claim). He said he reported the incident to his supervisor, (Mr. F), who said he would speak to Mr. A, but respondent said he didn't know what Mr. F said to Mr. A.

Later that day respondent came back to the job site and backed his truck in to get another load. He said Mr. A loaded a couple of buckets onto the truck, then came over to where respondent was standing, about 35 feet away. At that time the altercation ensued which resulted in the injury complained of. Respondent testified that Mr. A. "was rushing at me to hit me, but I catch him first." He said Mr. A charged into him, causing him to fall backwards and hit his head between two concrete curbs. The impact knocked him unconscious. He was taken by ambulance to a hospital, where he remained for three days. According to an employee's work limitation slip which was made a part of the record, respondent was diagnosed with a closed head injury and a cervical spine and lumbar spine injury. Respondent said there were no witnesses, only himself and Mr. A at the job site at that time.

Admitted into evidence was a written statement respondent had prepared concerning the incident. The statement said respondent backed his truck in, then waited some 15 minutes for Mr. A to load his truck. The statement said respondent asked Mr. A why the latter could not load his truck, to which Mr. A replied that respondent had to wait until he finished what he was doing first. The statement also said, in part, " I told he (sic) to load me and let me go and finish that when I gone. So he started to say I was trying to cause problems. I said you are the problem. [Mr. F] said to load us as we come so we can go. I

walked to where he push me down, and watched load (sic) two buckets, then he jumps off the machine and come over where I was and started cursing and said I haven't did anything going (sic) to call [Mr. F] and laughing at me so I hit him...and he rushed into me like a football tackle..."

Under cross-examination from counsel for appellant, respondent first said he did not hit Mr. A at all. When respondent was referred to that part of his statement that said he had hit Mr. A, he said that "When [Mr. A] was charging me I was swinging at him; that's where I said I hit him but he was already on me...When he rushed at me I was swinging at him on the way down, at his head." Respondent also said he wrote the statement when he came out of the hospital.

Respondent also said that Mr. A was mad and cursing when he came over to him and that he didn't know what Mr. F had said to Mr. A. Respondent said that he had not had any problems with Mr. A before this incident. He acknowledged that, after the earlier backhoe incident with Mr. A, he was going to "go back there and do something to him [Mr. A]," and had a pipe in his hand, but that another coworker, (Mr. JF), stopped him. He denied that he carried a sawed-off shotgun in his truck, or that he ever told anyone about it, or showed it to anyone.

Respondent denied that the reason he and Mr. A got into a fight was because Mr. A had hit his truck with the backhoe. He said he thought it was because Mr. A was angry from what Mr. F had talked to him about, after respondent reported the backhoe incident.

Mr. F testified that he is the regional manager for employer where he has been working for about 2½ years. He said he thought respondent had worked there about two or three months before (date of injury). He was not present when the fight occurred, but said he had heard what had happened. He said he could not recall whether respondent had had problems with Mr. A before, but that respondent had had problems with other people. He said respondent had a confrontation with a man who worked at a landfill, and had pulled a shotgun on that person. He described respondent as having a "Doctor Jekyll and Mr. Hyde" personality; that some days he had no problems, and on others he had difficulty dealing with different people.

Mr. F said he heard of the fight about five minutes after it happened, when Mr. A called him on the telephone. He said Mr. A told him that he and respondent had exchanged words, and that Mr. A said he was going to call Mr. F about it. On the way to the telephone, Mr. A said respondent started cursing at him, took off his hard hat and swung it at Mr. A, tried to hit him a couple of times, and tried to kick him. When he tried to kick Mr. A, the latter charged him and grabbed his leg and threw him down. Mr. F said he was not aware that Mr. A ever struck respondent, and that he felt the fight was brought on by respondent and Mr. A was only trying to defend himself.

On cross-examination by respondent, Mr. F said he fired Mr. A because he wouldn't listen or take orders, and that he had had problems with Mr. A since he had known him. He

agreed that Mr. A and respondent had never had any words before. When respondent asked why Mr. F didn't fire him, if Mr. F knew him to be the type of person to do something wrong, Mr. F answered that respondent was a good worker, but that he needed to handle himself differently in talking to people.

Mr. JF testified that on (date of injury) he was a subcontractor working for employer. He arrived at the job site after the backhoe incident, before the fight occurred, and said his role was "somewhat of a mediator." He said respondent pulled a metal pipe from his truck and came toward Mr. A with it. Mr. JF said he kept them apart while Mr. A loaded respondent's truck, and that he took respondent aside to calm him down. Mr. JF was not present when the fight occurred, but arrived shortly thereafter. He said he spoke to Mr. A later and was told that respondent "came at" Mr. A, and that Mr. A did not mean to hurt anybody but that things got out of control.

(Mr. E) testified that he was working for employer as an operator/driver/mechanic on (date of injury). He was present at the job site when the backhoe hit respondent's truck. He said he had done something similar before by accident, and suggested to respondent that it had been an accident. He said there were times that he had not gotten along with respondent, that they had had confrontations involving arguing and yelling, where it seemed like they were going to fight but they never did. He said on one occasion he thought respondent had swerved to run him off the road. He said respondent had told him about the incident at the landfill and had showed him the sawed-off shotgun.

Mr. E said Mr. A had related the circumstances of the fight to him as follows: Mr. A said he needed respondent to pull his truck out so he could get more material to load him up; respondent insisted that Mr. A load the truck up. Because Mr. A couldn't get the material he needed to load the truck, he went to call Mr. F. At that point Mr. A and respondent started fighting and respondent hit Mr. A first. Mr. A grabbed respondent's leg and pushed toward him, causing respondent to slip in the mud.

Mr. E said he also talked a little to respondent about the fight, and that respondent had said pretty much the same thing as Mr. A. He said respondent said he hit Mr. A across the back of the head and that Mr. A pushed him.

Also admitted into evidence were written statements of Mr. JF and Mr. E, which contained basically the same information as their testimony. Both said it was their opinion that respondent was the aggressor in the fight. No statement by Mr. A was offered into evidence, and he did not appear as a witness.

Appellant contests the following Findings of Fact contained in the hearing officer's decision and order.

FINDINGS OF FACT

3.Prior to (date of injury), there had not been problems at work between [respondent] and [Mr. A], and their only involvement was in connection with their employment at Mainline Contract Corporation.

4.On (date of injury), there was an incident between the [respondent] and [Mr. A], a co-worker, at the job site where [Mr. A] hit the truck occupied by the [respondent] with a backhoe.

5.On (date of injury), after the backhoe incident, the [respondent] got into a fight with [Mr. A] regarding [Mr. A's] failure to expediently load, as was his job, the truck that the [respondent] was to drive in the furtherance of his employer's affairs.

7.The [respondent] got into the fight with [Mr. A] because he wanted to proceed with his job duties. The [respondent] did not intend to unlawfully injure [Mr. A].

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), provides that an employer's insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if at the time of injury the employee is subject to the Act, and if the injury arises out of the course and scope of employment. Article 8303-3.01. Certain injuries, however, are expressly excluded from coverage. These include an injury caused by the employee's willful intention and attempt to injure himself or to unlawfully injure another person, and an injury arising 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. Article 8303-3.02(2), (4).

When sufficient evidence has been admitted to raise the issue, an exception generally requires the employee to establish it does not apply in showing that the injury arose out of and in the course and scope of employment. March v. Victoria Lloyds Ins. Co., 773 S.W.2d 755 (Tex. App.-Fort Worth 1989, writ denied). We believe the appellant presented evidence that raises an issue as to these exceptions.

Whether a claimant was acting in the course and scope of his employment when he received an injury is a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ). Furthermore, the mere fact that an injury is caused by a coworker is not controlling of the question of whether the injury is compensable. Shutters v. Domino's Pizza, 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ). While a person's employment may be the occasion for a wrongful act or may give a convenient opportunity for its execution, the general rule is that an injury does not arise out of one's employment if the assault is not connected with the employment, or is for

reasons personal to the victim as well as the assailant. Highlands Underwriters Ins. Co. v. McGrath, 485 S.W.2d 593 (Tex. App.-El Paso 1972, writ ref'd n.r.e.).

Exceptions at issue in this case are substantially the same as those found in the former law, TEX. REV. CIV. STAT. ANN. art. 8309, Section 1 (repealed 1989). Consequently, the 1989 Act will be considered to convey the same meaning and intent as to these exceptions. Walker v. Money, 120 S.W.2d 428 (Tex. 1938). The exclusion regarding acts of a third party, sometime referred to as the "personal animosity" exception, was analyzed in the early case of Vivier v. Lumberman's Indemnity Exchange, 250 S.W. 417 (Tex. Comm. App. 1923), in which a night watchman was killed in the course of a robbery. The court found the death compensable, holding that the exclusion involving an act of a third party was applicable only where there existed in the mind of the assailant "antecedent malice...causing" him "to follow the employee and inflict injury upon him, wherever he was to be found, or...where the employee by his own initiative provoked a difficulty which caused the other party to feel a 'personal' interest in assaulting him." *Id.* at 418.

Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850 (Tex. App.-Amarillo 1958, no writ) stated the rule this way:

> [i]n the case of injuries inflicted by assault, the rule is that if one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment...The vital question seems to be: was the accident connected with the employment? If it was, then it arose out of the employment, provided it occurred in the course of the employment. And the fact that the injury was deliberately and intentionally inflicted does not remove the occurrence from the category of an accident as contemplated by the statute." *Id.* at 852.

An assault and injury which results from a controversy over interference with an employee's work has been held to be connected with the performance of his work and thus a risk incidental to his employment. In Texas Employers' Insurance Association v. Cecil, 285 S.W.2d 462 (Tex. App. - Eastland 1955, writ ref. n.r.e.) an employee, later decedent, was removing brick from a conveyer belt and placing it on a rail car when he picked up a brick or tile that had been greased. He made an angry statement concerning the person who had done this, after which another employee went over to decedent and punched him, an injury which resulted in his death. The court found that the language used by decedent was of a nature to cause resentment, and that the other employee had in fact warned decedent on earlier occasions not to speak to him that way. The court concluded, however, that decedent was at the time engaged in work which was in the course of his employment and that the greased tile was an interference with his work.

Likewise, injuries which resulted from assaults over the manner in which work was to be done have been held compensable. In Texas Employer's Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ), a fight arose between claimant and his foreman over the claimant's setting aside scraps of meat from the packing house for another employee. The court said that "[w]here an employee is injured in a personal difficulty arising over the manner in which his work is to be done although the difficulty itself is not a part of the work of the employee, such injury is compensable under the Act." *Id.* at 289.

Applying the law to the facts of this case, we believe the evidence is sufficient to support the hearing officer's findings of fact and conclusion of law holding that respondent's fight with Mr. A was the result of respondent's employment and was not related to personal reasons. There was nothing to indicate the two men had had any preexisting difficulties other than the earlier incident with the backhoe. However, on both occasions respondent was clearly engaged in the work required by the nature of his employment, and the fight itself arose over an argument concerning Mr. A's failure to load respondent's truck so he could proceed with his job duties. As the Supreme Court said in Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987), "[w]henever conditions attached to the place of employment are factors in the catastrophic combination, the consequent injury arises out of the employment," at 19.

The "wilful intention to unlawfully injure" exception is not as frequently found in case law. A Supreme Court opinion reversing the appeals court's finding of compensability interpreted the exception contained in the former statute as follows: "It says, in effect, that if an employee covered by insurance under our Workmen's Compensation Law is injured in the course of his employment, said injury is not compensable if it is caused by the employee's wilful intention and attempt to unlawfully injure some other person. Simply stated, the above statute means that if an employee receives an injury in the course of his employment he cannot recover compensation therefor if such injury results from his making an unlawful assault upon another person with the intention of injuring him." Federal Underwriters Exchange v. Samuel, 160 S.W.2d 61 (Tex. 1942).

In that case, the claimant and another coworker, (T), were working at their jobs in a sawmill when a fight broke out between them. Later, after the two were separated, claimant got an iron bar and a knife and was advancing on (T) when the latter struck him. The court analogized the law's exception to the Penal Code definition of assault, which included "any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery..." *Id.* at 63 (citation omitted).

In an even earlier case, Cherry v. Magnolia Petroleum, 45 S.W.2d 555 (Comm. of Appeals, 1932), decedent and another employee had words over the operation of a steam boiler. Decedent knocked the other employee down and pulled a knife. The employee also pulled a knife in self-defense and fatally stabbed decedent. The court upheld a finding

of noncompensability, saying that an employee is not injured in the course of his employment "when he turns aside therefrom to commit an unlawful and unjustified assault on another, and as a consequence and reasonably to be expected result thereof receives injuries, which are inflicted upon him while the person assaulted is acting in his own necessary self-defense. *Id.* at 559.

In a more recent case, North River Ins. Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ), the court quoted with approval the following charge to the jury: 'Employee's Intention to Injure Another' means an injury caused by the employee's

> willful intention and attempt to injure some other person is not in the course of employment unless the injury results from a dispute arising out of the employee's work or in the manner of performing it and the employee's acts growing out of such dispute are done in a reasonable attempt to prevent interference with the work or in reasonable self-defense.

This charge grafts onto this exception certain considerations--such as performance of work and attempts to prevent interference--which have been applied by the courts with regard to the "personal animosity" exception.

The decision and order below contained fact findings that respondent threw the first punch in the fight, but that the fight originated because respondent wanted to proceed with his job duties, and that he did not intend to unlawfully injure Mr. A. The evidence before the hearing officer regarding the details of the fight were not uncontroverted; however, there was evidence in the record, including respondent's statement that he struck at Mr. A when "he was already on me," which would allow the hearing officer to reach these conclusions. We note also the particular circumstances of the case, in which none of the other witnesses at hearing had seen the incident. The hearing officer as trier of fact is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). The hearing officer must weigh all the evidence and decide what credence should be given to all or any part of the testimony of each witness. Gonzales v. Texas Employer's Insurance Association, 419 S.W.2d 203 (Tex. App. - Austin 1967, no writ).

Cf. Texas Workers' Compensation Commission Appeal Decision No. 91070 (Docket No. redacted), decided (date of injury); Texas Workers' Compensation Commission Appeal No. 91032 (Docket No. redacted), decided October 30, 1991.

The decision and order of the hearing officer are thus affirmed.

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Lynda H. Nesenholtz

Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge