APPEAL NO. 92488

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On August 7, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent, claimant herein, was injured in the course and scope of employment but has no disability. Appellant, referred to as carrier herein, asserts that the preponderance of the evidence indicates the injury resulted from another employee because of personal reasons and was not compensable. Claimant asks that the decision be affirmed.

DECISION

Finding that the decision is based on sufficient evidence of record, we affirm.

Claimant and another employee, JM, are both computer programmers who worked for carrier, a self-insured state institution. Claimant had worked there for approximately three years; JM, about half as long. Both are large men of relatively similar size. Programmer's offices were small, bounded by partitions, and in close proximity to each other. While claimant and JM had argued before, they were characterized as friends or at least friendly toward each other. Although claimant was slightly superior in position to JM, JM had been assigned to develop a particular program as a project. On October 23, 1991, after claimant had done some editing on the program, JM could not get it to work. He and claimant discussed the matter, loudly. At some point JM concluded that claimant had "messed up" the program. JM told claimant this, using the past tense of an old Anglo-Saxon sexual term, which offended claimant. Claimant loudly indicated that he had not done so, but opined that JM was to blame. At this point, claimant had followed JM into his cubicle and testified that he suggested that they go to their superior to report the matter. Claimant stated that JM declined to do this and commented that claimant always ran to superiors with his problems, or words to that effect. After some finger pointing and declarations to "sit down," claimant said that he decided to go to the superior. In departing JM's cubicle, he moved fairly quickly for a big man and came within close proximity to JM who hit him in the nose.

JM acknowledged that the two argued and that he used expressive language in saying what claimant had done to the program. He added that after claimant had called him names, claimant at first began to leave the cubicle, but then turned and charged him. JM said he had a broken finger on his right hand from playing basketball and pulled that hand to his chest, extending his left hand to ward off or keep claimant away. In doing so, JM also said he turned his head and closed his eyes--he described his hand and head movements as a reaction, saying he had no time to do anything else. JM had a small cut or gouge in his lip area, but considered it to be insignificant. He did not know whether his hand or something else bloodied claimant's nose when claimant ran into him. He emphasized that he never swung at claimant.

The supervisor said that at first he planned to fire both individuals. Then upon seeing that claimant's statement to the police varied from what claimant had told him, i.e., that JM had hit him several times on the nose as opposed to once, the supervisor decided that claimant may be less than completely truthful. JM was suspended without pay for a time. Claimant was fired. Claimant stated repeatedly that there was a plan to get him fired. The evidence, other than claimant's assertions, did not support his allegation. Two statements made by claimant did appear to be on point. He said that some supervisor should have diffused the loud argument before it reached its culmination. (The argument had been described as loud and did last at least 10 minutes.) In making his closing statement, claimant said that the record spoke for itself.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e), 1989 Act. She could believe claimant when he said that he was just trying to leave the office, hurriedly, when JM hit him. There was testimony, other than by claimant, that he was quick to go to his supervisor to settle work problems. While some evidence indicated that claimant rushed directly at JM, the hearing officer did not have to believe that claimant meant to harm JM. The evidence from both individuals to the altercation points to confusion and misinterpretation of various communications (claimant made a point of alluding to JM ridiculing claimant's damaged nose by saying that a little Kleenex would take care of it--JM said he responded to a question about his own welfare by saying that a little Kleenex would take care of the small gouge he sustained). The hearing officer's findings that claimant's quick steps in the direction of both the door and JM were open to misinterpretation and her description of the collision that then took place are supported by sufficient evidence.

The hearing officer's findings that neither individual intended to harm the other are not against the great weight and preponderance of the evidence and make the question of whether the argument arose from the work immaterial. Had a finding been made that JM intentionally struck claimant, the injury would still have been compensable because the argument grew out of the work that both men did on the same project. Security Ins. Co. v. Nasser, 704 S.W.2d 390 (Tex. App.-Houston [14th Dist] 1985, rev'd 724 S.W.2d 17 (Tex. 1987), on remand 755 S.W.2d 186 (Tex. App.-Houston [14th Dist] 1988, no writ), stated "if there is a real employment-related causative factor, the injury is within the course of employment notwithstanding that there may be some personal motivation for the third party assault." That case pointed out that Nasser was carrying out a duty of his employment and his action in doing so was an important factor in the injury. *Compare* Texas Workers' Compensation Commission Appeal No. 91105, decided January 21, 1992, and Texas Workers' Compensation Commission Appeal No. 92112, decided May 4, 1992, in which the work did not give rise to the exchange. For a discussion of injury arising from the injured party's own willful intent and attempt to harm another, *see* Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. Had the hearing officer found that claimant intentionally charged JM to harm him, the claim would not have been compensable since there was neither evidence that JM was keeping claimant from doing his work at the time nor that claimant was moving toward JM in self-defense. *Also see*

North River Ins. Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ).

The remaining findings of fact and conclusions of law are based on sufficient evidence of record and the decision and order are not against the great weight and preponderance of the evidence. Affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge