APPEAL NO. 92571

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 September 21, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant's (claimant herein) injury did not arise out of his employment and denied benefits to him. Appellant asserts that certain findings of fact were in error, states that the fight that caused the injury was related to the employment, and cites two cases in his argument. Respondent, carrier herein, states that the hearing officer was correct in his decision.

DECISION

Finding that the decision of the hearing officer is supported by sufficient evidence of record, we affirm.

Claimant worked for his employer, a construction company, about one month when he was injured by another employee. On (date of injury), claimant came to work late. The superintendent, BS, sent him to his foreman, JP, to begin work. Claimant did not see his personal sunglasses in the company truck in which he left them and asked JP about them. JP told claimant that another employee, MD, was the only other person he knew who had driven the truck. Claimant, accompanied by JP, went to MD to see about the glasses. Claimant testified that he asked MD about his glasses and MD said he did not know where they were. Claimant said he then related to MD that JP had said he was the only one who had driven the truck since the glasses were left in it; to this MD responded by kicking claimant in the groin. Later that day BS came to the scene and fired both participants.

MD did not testify nor did he submit a statement.

JP testified that when claimant arrived at work that day, he asked JP about his sunglasses. JP said he told claimant that MD had driven the truck in which the glasses had been left. JP also said claimant then said, "I'm going to waste (MD's) ass." JP said he was present when claimant asked MD about the glasses and got a negative reply; claimant then added that MD better give them to him or he would whip him. JP said that MD again said he did not have them. According to JP, claimant repeated that if MD did not give them to him, he would whip him. JP then said that MD became angry; MD got up and slapped claimant once and kicked him in the stomach. After a brief interval MD kicked again, but claimant tried to stop the kick with his hand and injured his hand.

A written statement provided by another employee at the scene, JG, said that claimant accused MD of taking his sunglasses. This statement said that claimant repeatedly accused MD of taking the glasses. JG described the following, after claimant said that he would go tell BS, beginning with a warning by claimant, "that (MD) better present his glasses or else! (MD) then kick (sic) (claimant) once in the groan. (sic) (Claimant) folded over to ease the pain some." JG continued his statement by indicating that claimant

then appeared to go toward the truck to leave but stopped and told MD that he "was going to get it now." JG said that MD spun claimant around and kicked at his groin again but this time claimant blocked it with his hand, hurting the hand.

Claimant stressed that he needed the sunglasses because he worked outside and the sun was bright. He said they helped him to do his job. BS and JP acknowledged that sunglasses could be a comfort and as such could assist in the job, but pointed out that not all workers' used them. They added that employer provided safety glasses for anyone who wished to wear them, but did not provide sunglasses or require any worker to provide his own.

Claimant takes issue with the hearing officer's Findings of Fact Nos. 6 through 9. They read as follows:

6.(MD) kicked claimant after claimant had made several accusations and threats toward him concerning claimant's personal sunglasses.

7.Claimant's sunglasses were not required as a part of his job, nor were they provided by employer.

8.Claimant and (MD) were not involved in any duties for employer at the time their conflict arose except for being present for duty.

9.(MD) kicked claimant because of the accusations and threats, and not because of their employment relationship.

The evidence is sufficient to support the above findings of fact. While claimant stressed his need for sunglasses in his work, the facts do not reveal an argument about whether sunglasses should or should not be used. The evidence of all parties shows that the injury occurred because claimant confronted MD and accused him of taking his sunglasses. There is no indication that the two workers had argued before in the month that claimant had been on the job.

The appeals panel has dealt with three cases that have some similarity to the question now on appeal. Those were reported in Texas Workers' Compensation Commission Appeal Numbers 91070, 91105, and 92112 with dates respectively of December 19, 1991, January 21, 1992, and May 4, 1992. In Appeal No. 91070 the claimant called another employee a name, the other worker told him to stop or he would slap him, and claimant replied, "come on down." Claimant got slapped. That decision looked upon claimant as provoking the fight for personal reasons and affirmed a determination that injury was not in the course and scope of employment. Similarly, in Appeal No. 91105 (also from (city)) claimant overheard one employee say of another, "If I were supervisor, I'd fire that black ____ ____." Claimant told the second employee what the talkative one had said. After the second confronted the talker, the talker then broke claimant's jaw. Observing that

no facet of the job of either was in question and that the two were not working together, the hearing officer found that injury was not in the course and scope of employment and the appeals panel upheld that decision. Then in Appeal No. 92112, which may be closest to this case, claimant accused another, smaller, worker of putting a cartoon of him on the company bulletin board. Claimant pushed the other, who then punched claimant in the face. In that appeal the case of New Amsterdam Casualty Co. v. Collins, 289 S.W.2d 701 (Tex. Civ. App.-Galveston 1926, writ ref'd) was reviewed. If anything, Collins had more to do with the work in that Collins found that someone had smeared a job he had freshly painted. Collins accused several others of doing the act. The court labelled Collins as the aggressor in the fist fight that began. The court said that the other employee did not act toward Collins "as an employee or because of the employment" and found as a matter of law against Collins. The appeals panel also upheld the hearing officer's decision in Appeal No. 92112 that the claimant was not hurt in the course and scope of employment.

Claimant cited T.E.I.A. v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist] 1984, no writ) for the proposition that where injury occurs in a personal difficulty arising over the manner in which his work is being done, although the difficulty itself is not a part of the work, it is compensable. In that case a supervisor on one day told Campos not to give meat scraps to a truck driver. The next day after the truck driver questioned the supervisor about this, the supervisor and Campos got in a fight. That court then found that the jury had sufficient evidence before it to have found that the injury was in the course and scope of employment. Two points distinguish the Campos case from the appeal before us: Campos grew out of an order from a supervisor, and the fact finder (jury) found for Campos. The appellate court in Campos would have had to have found that the great weight of the evidence was against the decision, for Campos, in order to reverse it; just as we would have to find that the great weight of the evidence was contrary to the decision, against the claimant, to reverse it. Neither Campos nor this appeal calls for reversal.

The second case cited by claimant was Liberty Mutual Ins. Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App.-Beaumont 1967, writ ref'd n.r.e.). That case involved injury while employees were in a line to get water. That court said that employees do not step out of the course of employment each time they get water. In essence, Hopkins was one of many cases to recognize that health and comfort requirements do not cease while a person is on the job. Recent cases, such as Yeldell v. Holiday Hills Retirement and Nursing Center, 701 S.W.2d 243 (Tex. 1985) and Lujan v. Houston Gen. Ins. Co., 756 S.W.2d 295 (Tex. 1988) recognized quenching thirst and relieving hunger as necessary. Whether it would be necessary for an employee to wear sunglasses could be a question for a fact finder, but in the case before us, claimant's confrontation and accusation was not found to be necessary so as to warrant a comparison to the health and comfort cases. As stated, claimant's actions could just as reasonably be compared to those of the claimant in the Collins case described *supra*.

The conclusion of law that MD kicked claimant for personal reasons and not because claimant was an employee or because of the employment is supported by the findings of

fact and evidence of record. The decision and order that the injury did not arise in the course and scope of employment and that benefits be denied is not against the great weight and preponderance of the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge