APPEAL NO. 931031

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq*) (1989 Act). On October 13, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue was phrased whether claimant's injury on (date of injury), was caused through his attempt to unlawfully injure another person. Claimant was employed at the time of his injury, which was sustained from an assault by a coworker, by (employer).

The hearing officer determined that the carrier was not liable because claimant's injury was sustained during his attempt to unlawfully injure another person. The hearing officer applied the exception set forth in the 1989 Act, Section 406.032 (1)(b).

The claimant has appealed, arguing that the persons who gave evidence against him were untruthful. He argues that the hearing officer erred by excluding the decision in his Texas Employment Commission (TEC) case from evidence or from his consideration. The carrier responds that the hearing officer's decision is supported by sufficient evidence, mainly on the point that even if the dispute arose over the manner in which the coworker's work was performed, claimant's actions were not taken to prevent interference with work or in self-defense and were consequently outside the scope of employment.

DECISION

We affirm the decision and order of the hearing officer.

Both parties who were involved in the altercation on (date of injury), testified, as well as the supervisor who witnessed and broke up the fight. Each party tended to portray his own involvement as relatively reasonable and unprovocative.

The claimant stated that events leading up to the altercation that afternoon were as follows: (Mr. H) and the claimant were truck drivers, with claimant being the more senior driver, and were moving rented furniture for a customer from one apartment unit to another. Claimant said that there was some delay in that the new apartment unit was not ready. Claimant said that Mr. H accepted and drank a beer from the customer, and subsequently went to sleep, and generally did not work too well. Claimant said he was upset about this, and, after the job was completed, he went to the supervisor, (Mr. J) to report on Mr. H's activities. He stated that this was around 5:15 p.m. Claimant stated that as he was relating events to Mr. J, Mr. H called him a "damn liar" and hit him in an unprovoked attack, breaking his jaw in two places. Claimant said that he could not recall anything that could be construed as an attack by him. Claimant said that he fell to the ground and Mr. H came down still hitting him and had to be pulled off by Mr. J. Claimant agreed that Mr. H offered to resign because claimant had a family to support. Claimant said that he called Mr. J from the hospital that night and was told he still had a job. However, the next day, some hours after he told Mr. J he would need time off from work, he was terminated. Claimant understood that the termination occurred by decision of the company owner, (Mr. S).

Mr. H stated that claimant was not his supervisor but that he took direction from him because he was more senior. Mr. H portrayed claimant's behavior at the apartment complex as unaccountably upset. Mr. H stated that the customer invited both of them in to "rest" during the delay, but that claimant shortly left and began moving items. He stated that beer was "forcefully" offered them, which they took but did not drink. When asked by the hearing officer why he would take a beer but not drink it, Mr. H was somewhat nonresponsive, stating that it was almost time to get off, but that the beer never moved off the counter. Mr. H stated that when he started doing his job again, claimant said nothing but just stared at him.

Mr. H stated that claimant was angry and cursing when they arrived back at the employer's location, and that claimant went to talk to Mr. J. Mr. H said that claimant just was saying that he could not work with Mr. H any longer, with no explanation given as to why. Mr. H stated that as he tried to tell Mr. J what had happened, claimant wouldn't let him talk, and approached him shaking his finger in his face and bumping him with his body. He stated that thereafter they both pushed each other (later on characterized, through a leading question from carrier's attorney, as "pushing to separate"). Mr. H stated that he never yelled but merely inquired as to what was going on. Soon thereafter, claimant put down his head and charged, from around five feet away, and Mr. H "by instinct" hit him in the head with his fist. Claimant fell, and Mr. H merely stood over him, while claimant kicked up at him. Thereafter, Mr. J broke up the altercation and discussion resumed, with both parties offering to resign. Mr. H said he offered to resign because claimant had a family.

(Mr. J), the manager, witnessed the fight, and his testimony corroborated various portions of both claimant's and Mr. H's statements. He said that the fight occurred around 5:30 that evening, and that claimant came to him first, with Mr. H coming up momentarily. He stated repeatedly that claimant was upset, but not angry. Mr. J stated that angry, as opposed to upset, meant to him the loss of control. He stated that claimant used an obscenity that he did not remember, and that Mr. H called claimant a "damn liar." The complaint that Mr. J recalled was to the effect that Mr. H was not doing his job and had fallen asleep. He did not recall being told that Mr. H had been drinking. He stated that when he asked Mr. H to respond, claimant interrupted while he was trying to answer. He stated that claimant approached Mr. H, had his finger in his face and said he didn't want to hear anymore. Mr. J stated that at that point, the parties shoved each other, action he characterized as mutual. He said that claimant backed off slightly, and then "went after" Mr. H, in a lunge. Claimant was hit, fell down, and Mr. H stood over him while claimant kicked upward. Mr. J broke up the altercation, stated it shouldn't have happened and that both were grown men, and discussion resumed with both parties offering to resign. Mr. J stated that as far as he was concerned, both parties had their job, but the next day Mr. S contacted him to ascertain what happened (he speculated that Mr. S was contacted by the hospital) and it was determined that claimant should be terminated because he "egged" the fight.

Mr. J stated that he had no doubt that claimant had charged Mr. H, and that he would have hit claimant too had he been in Mr. H's position.

EXCLUSION OF THE TEC UNEMPLOYMENT BENEFITS HEARING DECISION

Claimant submitted a TEC unemployment benefits decision that he said went in his favor and determined he was not the aggressor. Objection was made by the carrier, and sustained, on both relevance and failure to exchange. Claimant stated that he had signed a release for TEC records over to the carrier; although when the release was signed was not clearly developed in testimony, statements by claimant indicate that it was around the "1st," and that he had called carrier three days before the hearing after he got a letter indicating that carrier had not received it. Claimant confirmed that he had the decision around six weeks before the hearing. Section 410.160(5) requires that parties exchange to the opposing party the documents that will be offered at the hearing.

On the matter of excluding the decision, we cannot find error or any abuse of discretion on the hearing officer's part. First, as he correctly observed as to relevance, his decision must be based upon his record here, and not on the determinations of any other agency under their own statutory definitions and standards. Second, although we can envision that providing a release for confidential records could equal an exchange of records under some circumstances, the record here indicates that the release was provided only shortly before the hearing, at the same time that claimant had in his possession the very decision that he would have reason to believe would be part of the TEC records sought by the carrier. Providing a release to an opposing party while maintaining possession of one of the documents covered by a release is behavior consistent with nondisclosure, rather than exchange in compliance with the statute.

WHETHER THE EVIDENCE SUPPORTS THE DETERMINATION OF THE HEARING OFFICER TO APPLY THE "WILFUL INTENTION TO INJURE" EXCEPTION

The Texas Workers' Compensation Act, Section 406.031(a) 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. 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. Section 406.032(1)(B).

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 carrier presented evidence that raises an issue as to the exception under Section 406.032(1)(B) so that it was then up to the claimant to prover otherwise.

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).

Exceptions at issue in this case are substantially the same as those found in the former law, TEX. REV. CIV. STAT. ANN. article 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).

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. Texas Employers' Insurance Association v. Cecil, 285 S.W.2d 462 (Tex. App. - Eastland 1955, writ ref. n.r.e.).

The "wilful intention to unlawfully injure" exception is not frequently found in Texas 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, (Mr 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 (Mr 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 Associated Employers Lloyd v. Groce, 194 S.W.2d 103 (Tex. Civ. App.- Dallas 1946, writ ref'd n.r.e.), the court upheld a jury determination that an injured employee was not injured while attempting to unlawfully injure another. He had been knocked to the ground after a dispute with a coworker; there was conflicting testimony as to whether he held an object in his hands, at shoulder level, in a threatening manner. The assaulting coworker claimed that he did, but the jury found otherwise. This decision indicates that although one is injured in the course and scope of employment, the trier of fact may still analyze whether the employee was hurt while exhibiting wilful intent and attempt to injure another, and that the determination is a factual one, based upon the circumstances of the particular case.

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.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.- Amarillo 1980, no writ).

In the case before us, the hearing officer was confronted with conflicting testimony. Although no one disputed (and the hearing officer noted in his statement of the evidence) that the disagreement arose out of the manner of doing work, while a complaint was being made to the supervisor, Mr. J, and that as such injury occurred in the course and scope of employment, the hearing officer was then faced with determining whether an exception applied. There was evidence both for and against the fact of claimant charging in a threatening manner at Mr. H. There was no explanation from claimant about his movement because he denied that he had moved or charged toward Mr. H. The movement of claimant toward Mr. H was described by two witnesses as following a mutual scuffle, and the hearing officer evidently believed that claimant did move toward Mr. H and that the motion was not either an involuntary reaction or a self-defensive reaction on the part of the claimant. Having determined that claimant did move toward Mr. H, the hearing officer then apparently credited the testimony of Mr. H and Mr. J that this was the reason that Mr. H hit the claimant, and therefore claimant fell within the exception spelled out in the statute.

The issue was purely one of credibility, and the hearing officer's ultimate resolution of this conflict has support in the evidence. Claimant's side of the case is not without support. However, we cannot say that such evidence so outweighs contrary evidence that it requires the hearing officer's decision to be reversed.

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

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Gary L. Kilgore
Appeals Judge