APPEAL NO. 93601

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts 8308-1.01 through 11.10 (Vernon Supp. 1993). On June 21, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) failed to prove that the sexual assault upon her was causally connected to the employment. Claimant asserted that the criteria for this case is set forth in Nasser v. Security Ins. Co., 724 S.W.2d 17 (Tex. 1987), that it was acceptable practice for employees to go outside the building, and her immediate supervisor was aware of her departure. Respondent (carrier) replied that the hearing officer should be affirmed stating that claimant was outside the course and scope of employment.

DECISION

We affirm.

At the hearing the issue was agreed by all parties to be whether claimant was injured within the course and scope of employment. The appeal asserts that the hearing officer erred in determining that the sexual assault was not causally connected to the employment.

The Appeals Panel determines:

That the decision of the hearing officer that claimant did not prove that the sexual assault was connected to the employment was sufficiently supported by the evidence and was not error.

Claimant was 16 years old on (date of injury), when she was working from 11:00 p.m. to 4:30 a.m. at (fast food employer). Working with her were three other people described as (J1), a team leader who functioned as a supervisor, (J2) a co-employee who had married claimant's cousin, and (R) another co-employee. Prior to that night, (A) had bought food from claimant through the drive-through portion of the establishment. That night, A made another purchase and asked claimant for her telephone number; A then was in the building talking with J2 and R. J2 encouraged claimant to go into the parking lot and listen to A's sound system. Claimant at first demurred, but later decided to go to A's car. She stated that she reconsidered and went out to A's car because J2, her cousin by marriage, encouraged her to do so. Upon her entering the car, A started the engine and drove off, committing a sexual assault away from the premises; he then drove her back to work. Claimant reported the incident, but testified that she was told to keep working. A policeman later drove through to order and she told him; with his encouragement she filed a report of the incident. (Article 8308-3.02(4) of the 1989 Act provides that a carrier is not liable to pay for injury when it arose from an assault for personal reasons and was not directed at the employee as an employee or because of the employment.)

Claimant testified that she had not been instructed to stay inside the building when she first went to work; she did see some videos that instructed her how to do certain work.

She also said that she told J1 that she was going outside, and he said to hurry up. She was not on break at the time of the incident. There is a break area within the building. She also testified that employees went outside the building "a lot." At the time in question, she voluntarily went outside and voluntarily got into A's car. She was not doing any work for the employer when she went outside.

(Mr. G), the manager of this location, testified that new employees are instructed through video presentations not to go outside--for safety reasons. An employee's handbook is also provided. He alluded to the dangers of the location. He was not aware that employees went outside and said that there was no "company reason" to go out. He had had no disciplinary problems with J2 or R. J2 and R were now gone from the fast food employer but not because of this incident. Claimant, when she came back to work after a period of time, was put on the day shift.

Claimant asserts that the language in Nasser, *supra*, "whenever conditions attached to the place of employment or otherwise incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment." The Nasser opinion also quoted, however, from Williams v. Trinity Universal Ins. Co., 309 S.W.2d 850 (Tex. Civ. App.-Amarillo 1958, no writ) as follows: "if the assault is incidental to some duty of employment, the injuries suffered thereby arise out of the employment." In addition, when the 14th District Court of Appeals then reviewed the case on remand, Security Ins. Co. v. Nasser, 755 S.W.2d 186 (Tex. App.-Houston [14th Dist] 1988, no writ) said that, "[t]he rationale is that Nasser was carrying out a duty of his employment--being friendly with a customer--and this was an important factor in the chain of events that led to the assault and injury." (emphasis added) The Nasser case involved a restaurant employee who had talked with a female customer several times in the restaurant; the male friend of customer observed this, came into the restaurant, and assaulted Nasser while Nasser was working.

While not an assault case, Roberts v. TEIA, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1970, writ refused) also provides some guidance in regard to the facts of this case. In that case R had come to work, drunk coffee, asked her supervisor for a box, told the supervisor she was going to take the box to her car, and did so. She was injured on the way. She had not clocked in, but it was during working hours. The court affirmed the trial court's issuance of summary judgment for the carrier on the basis that Rs was not in the furtherance of her employer's affairs at the time.

A line of cases allow an employee to remain in the course and scope of employment while involved in personal acts of health and comfort; Yeldell v. Holiday Hills Retirement & Nursing Cntr., 701 S.W.2d 243 (Tex. 1985) stated that a personal telephone call to family can be as essential as a rest break. A different result was reached in Ranger Ins. Co. v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ) when an employee was at

a customer's site on behalf of his butane gas employer when he observed a rabbit enter a length of irrigation pipe; he lifted the pipe and made contact with overhead electrical wires. The court held that he was not in the course of employment because this act was personal to him. This court cited Roberts, *supra*. The testimony at the hearing before us on appeal did not show that claimant's departure from the building was for health and comfort consistent with Yeldell, *supra*, and the cases that preceded it.

In Shutters v. Domino's Pizza Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ) the female employee argued that the attack upon her by a co-employee was not in the course of employment so that workers' compensation did not cover the incident. Shutters' action was brought against the employer for negligently hiring the co-employee. In this case the employer also obtained summary judgment from the trial court. This court discussed Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.) and then reversed the summary judgment and remanded for a trial on the merits saying that the attacker's motivation was a fact issue.

Even if the claimant were found to be in the course and scope of employment at the time of attack (if the deviation from course and scope of employment cases such as Roberts and Valerio, *supra*, do not control), after applying the correct legal criteria, it is generally still a fact question for the hearing officer to decide as to whether the assault arose out of the employment. *See* Texas Workers' Compensation Commission Appeals No. 91047 and 91070, dated November 20, 1991 and December 19, 1991, respectively, which said:

> Exceptions found in the 1989 Act at Section 3.02 are substantially the same as those in the prior article found in TEX. REV. CIV. STAT. ANN. art. 8309, Section 1 (repealed 1989). . . . The 1989 Act will be viewed as conveying the same meaning in this area. Walker v. Money, 132 Tex. 132, 120 S.W.2d 48 (1938). When sufficient evidence has been admitted to raise the issue, an exception generally requires the employee to prove it does not apply in showing that the injury arose out of and in the course and scope of employment. (citations)

Also see Texas Workers' Compensation Commission Appeal No. 91019, dated October 3, 1991, which cited Shutters, *supra*, in stating it was a question of fact whether an assault was personal or not. *See also* Article 8308-6.34(e) of the 1989 Act which provides that the hearing officer is the sole judge of the credibility and weight of the evidence.

Finding that the conclusion of law that claimant had not proved a causal connection between her employment and the injury was sufficiently supported by the evidence, the decision of the hearing officer was not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge