APPEAL NO. 93635

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On July 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) was injured in the course and scope of his employment. Appellant (carrier) asserts that findings of fact that claimant and (JH) had not had difficulties with each other prior to the day of injury and that JH kicked claimant because claimant was loitering on the job were incorrect; carrier states that as a matter of law, the decision and order are against the great weight and preponderance of the evidence. Claimant did not reply. (employer) states it also appeals the decision.

DECISION

We affirm.

At the hearing the issue was whether claimant was compensably injured.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

Carrier on appeal takes issue with only those findings of fact that state that claimant and JH did not have any difficulties prior to the incident of (date of injury), and that JH kicked claimant because of claimant's loitering on the job. (Findings of fact that JH kicked claimant, that JH was disciplined at work for his conduct on (date of injury), that JH and claimant did not socialize, that claimant did not willfully attempt to injure himself or JH, and that claimant was not engaged in horseplay at the time of injury, were not appealed.)

The appeals panel determines:

That the findings of fact and conclusions of law are sufficiently supported by the evidence and the decision and order are not against the great weight and preponderance of the evidence.

Claimant worked for employer as an unskilled laborer. JH was a skilled laborer, who regularly relayed instructions from the supervisor to other employees, including claimant. (The duties of JH and claimant placed them together in the pouring of concrete and preparation of forms therefor.) On the day in question the supervisor, (PE), asked JH where claimant was. PE and JH walked around the site and found claimant talking in the vicinity of a water cooler. PE told claimant to go back to his area of work, which claimant did. JH, at a point along the way back to claimant's work area, pulled claimant's shirt and kicked him twice on the right foot. Claimant's ankle was broken.

While at the hearing carrier argued that the injury was the result of horseplay, the finding that there was no horseplay was not appealed. Carrier does state that claimant's

injury occurred because of personal animosity between JH and claimant. In regard to the past experiences of these two, (AHA), in an unsigned statement, indicated that after the February 12th incident in which claimant's ankle was broken that JH said claimant "won't work for me." (DH) testified that he is the general superintendent of the employer and interviewed various employees after claimant's injury.

DH stated that from the interviews he conducted he believed that JH and claimant did not get along in the past. He related that JH had told PE that claimant would not work for him. At one point on cross-examination DH stated that it was "possible" that JH and claimant did not get along. DH also said, in answer to the claimant's inquiry, that there had been no previous incident or altercation between the two. Claimant testified that he had no arguments with JH before February 12th, that he had never fought JH before, and that he had seen JH angry before but had had no problems with him.

Carrier also states in the appeal that the evidence is insufficient to show that JH kicked claimant because of the work. The hearing officer found that PE, who was the supervisor of JH, asked JH where claimant was when he came to the work area of JH and claimant. The findings of fact also showed that PE and JH went to where claimant was, and PE told claimant to return to his work area; JH intercepted claimant and kicked him. These findings were not disputed on appeal. In addition, claimant testified that when JH kicked him, JH inquired why claimant had been taking so much time to get a drink of water and stated that there was more work to do. When asked why JH kicked him, claimant testified that he thought because he was away drinking water. DH also testified that JH told PE that claimant was not doing his job. In the statement of JH (Carrier's Exhibit E) only the events of February 12th are mentioned; no reference is made to any prior problems between JH and claimant or to any reason or event that was the basis for JH's kicking claimant other than the events discussed in this opinion. JH, himself, states that just before the fight, he tapped claimant on the shoulder and "attempted to tell [claimant] to go back to the [site] and wreck forms." While JH states that claimant grabbed him, the hearing officer found that claimant did not willfully attempt to injure JH and this finding, as stated, was not appealed.

Carrier in its appeal also emphasizes that claimant testified that he did not know why JH assaulted him; carrier makes this assertion and adds that there is no indication the dispute "arose out of the work done by either party for the employer." While the evidence may indicate that claimant did not "know" why JH kicked him, the evidence also indicates that claimant had an opinion as to why JH kicked him. Even if claimant did not know, Orozco v. Tex. Gen. Indem. Co., 611 S.W.2d 724 (Tex. Civ. App.-El Paso 1981, no writ) on appeal of a summary judgment for carrier, said that only when the party seeking summary judgment has shown the elements of its case as a matter of law must the opposing party (Orozco) raise a fact issue; the court said that the carrier had not shown as a matter of law that the fight between employees, which caused injury, was based on personal reasons when Orozco did not know why he was attacked. The case was remanded to determine

the factual issue.

In Kurtz v. Liberty Mut. Ins. Co., 572 S.W.2d 766 (Tex. Civ. App.-Waco 1978, no writ) the basis of a fight was disputed. The fact finder did not find for the claimant. The court pointed to evidence from the carrier that the other party to the fight had belonged to the same church as appellant and had been voted out of that church; in affirming, the court said that the fact finder could infer from the evidence that the fight was based on reasons personal to the parties.

Carrier cites Orozco, *supra*, for the principle that the question of whether an assault is personal is usually one of fact. It also cites Shutters v. Dominoes Pizza, Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ), March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied), Nasser v. Security Ins. Co., 724 S.W.2d 17 (Tex. 1987), and Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e). Carrier also cites Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991.

Appeal No. 91070 dealt with two workers fighting. One testified that the fight was for personal reasons. In addition, prior to the fight, claimant had called the other employee in the fight "Dickhead," to which the other employee took umbrage. On the day of that fight, there was also testimony before the trier of fact that when the other party told claimant to stop calling him that name, claimant then told him to "come on down." The Appeals Panel concluded that the hearing officer had sufficient evidence upon which to find that the fight was for personal reasons. *See also* Texas Workers' Compensation Commission Appeal No. 93601, decided August 31, 1993, which also pointed out that when the correct legal criteria is applied, it is then generally a fact question as to whether an assault is personal or not. *Also see* Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991, affirming a hearing officer's decision that injury was in the course and scope of employment and in which, Shutters, Nasser, and Marin were discussed, along with Texas Indem. Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.-Amarillo 1950, writ refused); the last cited case indicated that a fight between employees of the same employer could be noncompensable when the matter did not pertain to the employment of either of them. As stated in Orozco, the question is usually one of fact for the fact finder.

The evidence in the case on appeal pointed to no past examples of personal animosity between claimant and JH which were not based on the work. On the contrary, both the statement of JH and the claimant indicated only that the work situation at the time (or claimant's appearance to JH of not working) was a factor in the broken ankle suffered by claimant. While claimant may not "know" exactly why JH kicked him, Kurtz, *supra*, pointed out that the fact finder can make reasonable inferences from the evidence provided. The evidence supports an inference that the kicks struck by JH upon claimant resulted from JH's concern for the lack of work being done by the claimant at the time. The findings of fact are

sufficiently supported by the evidence. The conclusions of law are sufficiently supported by the findings of fact and evidence of record.

The appeal set forth by the employer is not addressed because the employer was not a party to this case. *See* Texas Workers' Compensation Commission Appeal No. 92479, decided October 26, 1992, and Section 409.011(b)(4) of the 1989 Act which says that an employer has the right to contest compensability "if the insurance carrier accepts liability . . . ."

The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge