APPEAL NO. 93802

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held on August 16, 1993, in (city), Texas, before hearing officer (hearing officer) to decide the issues of whether claimant's injury of (date of injury), was caused by claimant's horseplay or the act of a third party directed at claimant for reasons unconnected with his employment, and whether the claimant has sustained any disability as a result of such injury. The appellant, hereinafter carrier, appeals the hearing officer's determination that the assault upon claimant occurred in the course and scope of his employment; it also appeals the hearing officer's determination that claimant had disability from (date), to June 30, 1993. The claimant, who is the respondent, contends the hearing officer's decision should be upheld.

DECISION

We affirm the hearing officer's decision and order.

The claimant was employed as a carpenter with (employer). On (date of injury), claimant was working at the refinery, building sheds; his workday began around 7:00 a.m. He testified that shortly after the foreman left that morning a co-worker, (WB) went into the portable toilet to take a nap. After WB had been in the toilet for some time, claimant and another coworker, (LG), tried to get WB to come out; claimant said they wanted him to get back to work, and stated that he was concerned that a supervisor would see what was going on and they would lose their contract. LG knocked on the door of the toilet and when there was no response, he and claimant shook the toilet. WB finally came out and shouted and cursed at claimant, who responded by also cursing and calling WB an alcoholic and a drunk. Claimant said things cooled off when the crew took their break around 9:00 a.m., but when the crew resumed work there was further exchange of words between WB and claimant, and among the crew as a whole. Claimant said that it was standard practice for the crew to "give everybody a hard time," including calling each other names.

At lunch break, claimant, WB, and other crew members went to lunch together without incident in claimant's car. After lunch, claimant and WB were working together, putting a roof on a shed. Claimant contended WB was sitting and observing claimant and telling him how he should be doing his work, and said that the two got into an argument about how the pieces of plywood should be lined up. WB was also sitting on a piece of plywood claimant said he needed to use, and refused to get up. A verbal altercation which included use of profanity ensued, along with a shoving match and WB's raising a hammer at claimant. Shortly thereafter, as the crew was preparing to go to another job, WB went into the trailer to speak to the superintendent, (RP), about not wanting to work with that crew any more. As claimant was sitting in a pickup truck with other crew members, WB came up, grabbed a two-by-four, and hit claimant in the head twice before he was restrained.

A coworker, (DL), testified that WB was in the portable toilet "a while," that LG and claimant leaned the toilet against a utility pole, and that afterwards WB and claimant were

arguing; however, DL could not recall any specifics. He said that profanity among crew members was common. After lunch, DL said WB was sitting on a piece of wood and claimant kept telling him he was "working against us" and that he needed to get up so they could finish. He said that finally WB said he was going to "knock [claimant] out" because he had had enough; however, in the exchange between the two he said claimant was "dogging [WB] out a little better." DL also testified that while WB was talking to RP about a transfer claimant stuck his head into the trailer and said something to the effect of "You going to work with us some more, punk?" He said when WB hit claimant with the two-by-four he said, "Now who's the punk?"

(MS), who was claimant's and WB's foreman, said he was the one who broke up the fight but that he had not been present for the earlier incidents. He also said he was in the trailer when WB was complaining about claimant's actions, and that he had heard about the toilet tipping incident. He said that it was possible WB could have been fired had he been caught sleeping on the job.

RP, the superintendent, said WB came to the trailer upset and irate over the toilet incident and said he could not work with this crew. While WP was discussing putting him on another crew he said claimant stuck his head in, "talking and agitating," calling WB names, and saying, in effect, that he was going to work WB into the ground. He said it was common for the crew to "rag each other," and speculated that it could create problems for employer if a man caught one of employer's crew sleeping on the job. He said he was aware that shaking the portable toilet was a common practical joke among the crew.

Another coworker, (AN), stated that claimant and LG shook and leaned the toilet while WB was inside. He also went to lunch with WB and claimant and confirmed that there was no animosity between the two. He witnessed the verbal exchange between claimant and WB when the latter sat on the piece of plywood, and estimated that the assault on claimant occurred 15 to 20 minutes later.

Transcriptions of telephone conversations with two coworkers, LG and LC, were admitted into evidence. Both men essentially stated that WB was interfering with claimant's work, and that claimant then began cursing WB and shoved him.

WB did not testify at the hearing, but his transcribed statement was also admitted into evidence. He said he worked on one of the sheds then went into the portable toilet to smoke a cigarette when claimant and LG leaned the toilet over, bruising his ribs. With regard to the roofing incident, he said claimant was cursing him and hitting him and was about to push him off the roof when LG grabbed claimant and restrained him. WB said he told RP he had a problem with claimant because he had turned him over in the toilet and had tried to push him off the scaffold.

As a result of the attack, claimant said he suffered an injury to his ear which required plastic surgery, along with broken bones in his face and broken fingers. He said his doctor had released him to return to work in June 1993, and that at the time of the hearing he had

a job.

The appropriate statutory provision with regard to the first issue in this case is Sec. 406.032 (formerly Article 8308-3.02), which provides in pertinent part as follows:
An insurance carrier is not liable for compensation if:

(1) the injury:

* * * * *

(C) arose out of an act of a third person intended to injure the employee because of a personal reason and not directed a the employee as an employee or because of the employment . . . or

(2) the employee's horseplay was a producing cause of the injury.

The hearing officer determined that WB's assault upon claimant was based in part upon a dispute between the two regarding the method of roofing a shed and was not motivated by wholly personal reasons; therefore, she held that the assault arose out of and in the course and scope of claimant's employment. The carrier disputes that the claimant proved by a preponderance of the credible evidence that the assault was motivated in part by a dispute concerning the method of roofing the shed. Citing case law which requires that, to defeat a claim of injury based upon the horseplay exception, evidence must show an unbroken chain of horseplay events, the carrier contends that the evidence in this case showed that claimant's verbal assaults were constant and persistent during the work day, were a deviation from the course of the employment relationship, and culminated with the two-by-four incident. Carrier further contends that the evidence shows WB struck claimant after being harassed all day with verbal assaults on his person and his character, so that the attack was for reasons that were clearly personal to WB.

The theory behind the horseplay exception to liability under the 1989 Act and its predecessor statute is that if an employee willingly engages in an act of horseplay which results in injury to the employee, then the horseplay is a deviation from the employee's course of employment. *See* Calhoun v. Hill, 607 S.W.2d 951 (Tex. Civ. App.-Eastland 1980, no writ) and cases cited therein. As the carrier points out, the evidence must show an unbroken chain of events leading to the injury. The case of United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex. App.-Amarillo 1982, no writ) concerned an employee, later deceased, who clearly was engaged in incidents of horseplay (such as throwing water) directed at the coworker who was driving the pickup truck in which the employee was riding in the back. However, the court found evidence to support a finding that the horseplay had ceased at the time the employee fell from the back of the truck and was fatally injured.

Likewise, in this case the hearing officer wrote in her discussion that "In order for claimant's horseplay to constitute a producing cause of his injury, claimant would have to

have been injured while manipulating the outhouse or while shoving [WB] on account of the roof; neither of these events occurred." (While the hearing officer did not make a finding of fact or conclusion of law on horseplay, we believe that such can be implied given the statement in her discussion and based upon her ultimate decision that claimant's injury occurred in the course and scope of his employment.) Although we do not necessarily share the hearing officer's opinion that the roof incident, as opposed to the toilet incident, was an act of horseplay, we nevertheless hold that there was sufficient evidence to support an implied finding that claimant's claim was not barred by the horseplay exception, as the evidence shows no injury resulted directly from the toilet incident, and that any bad feelings between the two individuals appeared to have resolved by lunchtime. As this panel has ruled, the question of whether or not there has been a deviation from employment as a result of horseplay is generally a question of fact for the hearing officer as trier of fact. *See* Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993.

Turning to the "personal animosity" exception, Texas courts have held that the mere fact that an employee is injured by a fellow employee while both are at work does not ipso facto give rise to a compensable injury. The controlling point is whether there was a causal connection between the assault and the employment of the claimant. As the court stated in Texas Indemnity Insurance Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.-Amarillo 1950, writ ref'd):

> Where men are engaged in a common enterprise and are working in close contact with each other, it must be expected that, upon occasions, they will disagree as to the manner in which their work should be performed and, if a difficulty arises concerning the method of doing the work or is the result of the manner in which it is being performed by one or more of them is injured in the difficulty, his injury is compensable because it arises out of the employment and the work being performed for his employer. It has been just as consistently held, however, that an injury inflicted by a third person . . . and the intention arises from some cause personal to him and not directed against the employee as such or because of his employment, he cannot recover for the injury sustained in such a difficulty.

The hearing officer's discussion of the case reveals the reasoning behind her ultimate determination that claimant's injury was compensable:

> [To invoke the exception] it must appear that the disagreement between claimant and [WB] was wholly personal in nature, and did not, even in part, arise out of the employment . . . . Carrier has presented three possible motivating factors for [WB's] assault on claimant, all of which it contends do not arise out of the course and scope of claimant's employment: The incident involving the portable toilet, the incident involving the plywood on the roof, and claimant's ongoing verbal battle with [WB]. Clearly, if no event arising out of the course and scope of claimant's employment was a motivating factor for [WB's] assault upon claimant, then carrier must prevail. However, the evidence supports

> the proposition that the incident involving the plywood on the roof of the shed was a factor in the assault, and this event clearly arose out of the course and scope of claimant's employment, in that it was a dispute regarding the manner of performing the work.

We find that there is sufficient evidence to indicate that the roofing incident constituted a dispute over the manner in which the work was to be done. Claimant testified that WB was criticizing his work and the two argued over how to line up the plywood. Both claimant and DL, an eyewitness, testified that WB was interfering with claimant's work by refusing to get up off a piece of wood which claimant needed to use to finish the job. As a result of this incident, tempers flared to the point of shoving, raising a hammer in a threatening manner, and WB's threat to "knock [claimant] out." Testimony further indicated that WB's request to be transferred followed the roofing incident, and that WB assaulted claimant very shortly after his request was granted. By the same token, there was much evidence to indicate that claimant, both throughout the day and during the incident on the roof, heaped verbal abuse upon WB. The carrier argues that this constant harassment caused WB to strike claimant for reasons that were clearly personal. However, the carrier has cited no authority for the proposition that evidence of the verbal harassment will defeat claimant's claim where there is also sufficient evidence to support a finding that a dispute over the manner of performing work was also a causative factor.

In this regard, the facts of this case are somewhat similar to those in Texas Employers Insurance Association v. Cecil, 285 S.W.2d 462 (Civ. App.-Eastland 1955, writ ref'd n.r.e.). In that case when the employee (later decedent) discovered that the tile he was supposed to load had been greased, he expressed anger toward whoever had done it in a manner "calculated to cause resentment." The perpetrator considered the language to be directed toward him, and he struck the employee, fatally injuring him. In affirming the trial court's holding that the death was compensable, the appeals court noted that the employee had used similar language to his attacker earlier in the day, and had been warned by the attacker not to do so again. However, the court added:

> it is also true . . . that when [employee] used the language described . . . [h]e was, at the time, engaged in work which was in the course of his employment and the greased tile was an interference with his work. Under these circumstances we cannot hold, as a matter of law, that the assault on [employee] did not have to do with and originate in his employer's business . . . . The altercation here involved arose over [employee's] complaint about an interference with his work and it is immaterial that in making such complaint, he used the language shown by the evidence or that [his attacker] objected to his use of similar language. Id. at 466.

We also find support for the hearing officer's determination that claimant had disability from the day following the injury (date) to June 30, 1993, which, according to claimant's testimony, was the approximate date his doctor released him to return to work.

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge