APPEAL NO. 94183

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was convened in (city), Texas on July 19, 1993, but was recessed to allow the claimant to secure counsel. The hearing was reconvened on January 19, 1994, before (hearing officer), hearing officer. The appellant (hereinafter carrier) appeals the hearing officer's determination that the respondent (hereinafter claimant) was injured in the course and scope of his employment when he was shot and injured by another employee on (date of injury); the carrier contends the evidence does not support key findings and conclusions of the hearing officer. The claimant asserts in response that the evidence supports the decision of the hearing officer.

DECISION

We affirm the decision and order of the hearing officer.

The claimant was employed by (employer) in a supervisory capacity. He testified that on (date of injury), he was told by the superintendent to "go take over [a] jobsite" where the foreman was absent. Present at that site were (Mr. R) and another employee, (Mr. M). Claimant said that Mr. R and Mr. M had not been doing any work; that when he gave Mr. R and Mr. M instructions they ignored him, and a verbal altercation which included name calling ensued between claimant and Mr. R. Claimant contended that Mr. R never did the work claimant assigned him.

That evening between 5:30 and 6:00 p.m. claimant returned from the jobsite in a company truck, along with (Mr. B), another employee. As they pulled into the parking lot employer provided for its employees, they saw Mr. R parked in his personal vehicle. The claimant testified that Mr. R waved for him to pull over and he did so, although Mr. B advised him to just go home. Claimant said he pulled his truck alongside Mr. R's and apologized about the earlier altercation. At that point he said Mr. R pulled out a gun and shot him in the neck. Claimant managed to run to Mr. B's truck and Mr. B took him to the hospital. Mr. R was later tried and convicted of assaulting claimant.

In answer to questions on cross examination the claimant denied that he told Mr. B he was going over to Mr. R's truck to provoke him. He also denied that he knew Mr. R had a gun or that the two had intended to fight after work. He agreed that rough language had been used earlier in the day, but said that was normal at a construction job and that sometimes name calling and threats were necessary in order to get an employee to do his job.

(Mr. E), who is currently employer's jobsite project manager, testified that he had no personal knowledge of the events that occurred on (date of injury) but that he had heard via an investigation of the incident that claimant and Mr. R had had earlier confrontations, that on the date of injury claimant had wanted to know whether Mr. R and Mr. M were laughing at him, and that there was a verbal exchange and Mr. R stated he warned claimant he would "pop" him. Mr. E also said he had no knowledge of any personal matter or anything other

than the employment that would have resulted in the shooting. He stated that the injury occurred after work because once employees return to the "yard" from the jobsite they are finished with work for the day. He said the employer provides the parking lot for the use and convenience of its employees.

Mr. B testified that he was not at the jobsite with claimant and Mr. R earlier in the day but that claimant told him as they were driving back that Mr. R would not take orders or listen to claimant. He said when they saw Mr. R in his truck he said claimant asked, "Do you think I might have provoked him?" although in a signed transcribed statement to carrier's adjuster, Mr. B said claimant asked, "Do you think I ought to provoke him?" He indicated that claimant, as foreman, went to talk to Mr. R to see what the problem was.

In his statement of evidence the hearing officer wrote that:

> The preponderance of the credible evidence reflects the claimant was shot while in the course and scope of his employment, while in a company truck in a company parking lot. [Mr. R] assaulted and injured the claimant as a result of an argument about work-related matters. The claimant did not know [Mr. R] outside the work place, and there was no evidence the argument was about anything but work. The claimant was furthering the interests of the employer while exercising his duties as construction crew foreman.

In its appeal the carrier contends that the evidence was insufficient to support the finding that claimant was injured while at work, since the working day was over at the time of the shooting, as well as the finding that claimant was furthering employer's interests at the time, because claimant knew of the potential harm Mr. R posed and chose to provoke him. (The carrier also argues that due to inconsistencies in claimant's testimony, he did not establish that he was in the course and scope of his employment at the time he was shot.)

Section 406.032 provides in pertinent part as follows:

> An insurance carrier is not liable for compensation if:
>
> (1) the injury:
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> * * * * * *
>
> (C)arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment.

Texas courts have held that the mere fact that an employee is injured by a fellow employee while both are at work does not necessarily 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 Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ), "[w]here an employee is injured in a personal difficulty arising over the manner in which his work is to be done although the difficulty itself is not a part of the work of the employee, such injury is compensable under the Act."

This panel has previously held that whether an injury which is suffered under circumstances similar to this one is compensable is a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 92319, decided August 26, 1992. Upon our review of the evidence, we cannot say it is insufficient to support the hearing officer's determination that claimant's injury was incurred in the course and scope of his employment. The claimant testified that as a supervisor he issued orders to Mr. R which were ignored, and that he believed harsh words were necessary to enforce his authority; moreover, there also was testimony by other witnesses that such language, while seemingly of a personal nature, was usual at a construction jobsite. Further, he testified (and his testimony was corroborated by that of Mr. B) that he approached Mr. R at the end of the day in an attempt to smooth things over for the next workday. The hearing officer could have concluded from such evidence that the intentionally inflicted injury was directed at claimant as an employee or because of the employment. Aetna Casualty and Surety Co. v. England, 212 S.W.2d 964 (Tex. Civ. App-Beaumont 1948, no writ). To the extent that any evidence was conflicting, that was a matter for the hearing officer to resolve. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). We cannot say that the hearing officer's determination that the claimant was acting in furtherance of the employer's affairs at the time he was injured was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We are also not persuaded by carrier's contention that claimant's injury was not compensable because it occurred after work. Texas courts have approved the "access doctrine" as expanding the scope of employment to include a reasonable margin of time and space necessary to be used in passing to and from the work site, a classic example of which is parking lot injuries. *See* Nations & Kilpatrick, A Guide to Texas Workers' Compensation Law, § 3.03[4][d], *citing* Bordwine v. Texas Employers' Insurance Association, 761 S.W.2d 117 (Tex. App.-Houston [14th Dist.] 1988, writ denied) ("where the injury occurs on a parking lot owned by the employer, and at the place of employment when the employee is either coming or going to or from work and where the employee is authorized to park, the rule is almost universal that workers' compensation coverage attaches to the same extent as if the injury occurred on the main premises"). The doctrine has been held to also apply where an employer did not own, but merely leased, the parking lot. Weaver v. Standard Fire Insurance Company, 567 S.W.2d 34 (Tex. App.-Houston [14th Dist.] 1978, writ ref'd n.r.e). The evidence in this case was uncontroverted that the employer provided the lot solely for the use of its employees, that it was not available to the public generally, that it was directly across from employer's office and that claimant on the date of injury was engaging in his

usual custom of transporting himself and another employee from the jobsite to the parking lot in employer's vehicle. Under these circumstances, we do not find the hearing officer erred in his determination that claimant was injured "at work," which appears to have been used synonymously with "in the course and scope of employment." We further observe that the latter term is defined in the 1989 Act to include "an activity conducted on the premises of the employer or at other locations." Section 401.011(12).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge