APPEAL NO. 981553
FILED AUGUST 21, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 28, 1998, a hearing was held in (City 1), Texas, with (hearing officer) presiding. She determined that appellant (claimant) was assaulted in the course and scope of employment; she also found that claimant and the assaulting employee "did not have a dispute from their private life." Claimant asserts that the respondent (carrier) did not have new evidence to admit compensability 16 months after denying the claim, and that there was a personal reason for the assault, which results in no liability for the carrier. Carrier replied that the decision should be affirmed.

DECISION

We reverse and remand.

Claimant worked for (employer). The facts were not significantly in dispute and questions about certain facts were addressed by findings of fact by the hearing officer that have not been appealed and, as a result, are final. The parties stipulated that the claimant was sexually assaulted while working for employer on _____ (day after date of injury), and (two days after date of injury), 1995. The hearing officer found that claimant had been assaulted by the same employee, Mr. A, in 1976. It was clearly shown by the evidence, and not disputed, that claimant is 45 years old, has worked for employer for 20 years, had polio as a child, and is mildly retarded, with a recent I.Q. of 63.

The evidence showed that claimant's shift was changed by employer after she was assaulted in 1976 by Mr. A. It was indicated that such change removed claimant from the workplace during the time that Mr. A worked (he continued to work for employer). Shortly before _____ (approximately one week before), claimant's shift was changed to include work in the mornings, which was also the shift worked by Mr. A; her duties included busing the dining room and cleaning the customer's restrooms. She testified that employees are not to use the customer's restroom. On _____, the same employee, Mr. A, who the hearing officer found assaulted her in 1976, assaulted her in the customer's women's restroom while she cleaned it before the cafeteria was open for business. He did it again on (day after date of injury) and again on (two days after date of injury), in the same place; claimant said he threatened her and her family if she said anything. Claimant also said that Mr. A worked as a butcher, the two never worked together, and had no dispute about work or the way to do any work on the days in question. (There was no evidence that Mr. A worked with claimant or had ever taken issue in any way with the way she cleaned restrooms or bused the dining room.) The fact that she did mention something about the assaults a few days later is not contested. A claim was filed and the carrier disputed compensability.

Claimant then filed suit against employer before the statute of limitations had run. Thereafter, carrier notified claimant that it acknowledged compensability. Claimant's mother made it clear at the hearing that she no longer believes that workers' compensation applies, while the carrier stated that it obtained "new evidence" showing the injury to be compensable. The claimant's position is that the injury is not compensable.

As can be seen, the roles of the parties are reversed in this case. In that regard, it may be compared to Shutters v. Domino's Pizza, Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ). There was no issue at this hearing as to carrier having waived its right to accept liability. We note that Section 409.021 provides only 60 days to "contest compensability"; there is no similar limitation directed to admitting compensability.

The hearing officer made certain findings of fact and failed to make other findings of fact that cause a remand of this case. She found that the claimant and the assailant did "not have a dispute from their private life which was transported into the work place" and that "the only contact claimant had with the assailant was in the work place." The Statement of the Evidence also comments four times about no contact outside the employment. As such, it appears that the hearing officer applied a standard that is too narrow to the question to be determined concerning whether the assault occurred because of a "personal reason." These are the only findings of fact upon which the conclusions of law, that claimant sustained a compensable injury and that claimant's injury did not arise out of the act of a third person intended to injure the claimant because of personal reasons and not directed at the claimant as an employee or because of the employment, are based.

While the carrier accurately pointed out that the Shutters case involved a ruling on summary judgment, that case cited decisions that should be considered by the hearing officer on remand. Those cited decisions stated that:

> although one's employment may be the occasion for the wrongful act or may give a convenient opportunity for its execution, the general rule is that an injury does not arise out of one's employment if the assault is not connected with the employment, or is for reasons personal to the victim as well as the assailant.

That statement does not limit reasons personal to the assailant to those having occurred outside the employment. *Citing* Commercial Standard Insurance Company v. Marin, 488 S.W.2d 861 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.), it said that there was a difference between attacking anyone working for employer and picking out a particular person to attack; in making this distinction, it referred to "antecedent feelings directed toward the victim personally." It did not refer to a requirement for some contact outside the work. In addition, this same case cited Texas Indemnity Insurance Company v. Cheely, 232 S.W.2d 124, (Tex. Civ. App.-Amarillo 1950, writ ref'd), which

found injury not compensable, without determining that there had been any personal contact outside of employment, when two employees, who did not work together, fought, and Cheely was injured. Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991, also quoted from Marin, *supra*, "an assault arises out of the employment if the risk of assault is increased because of the nature of the work, or if the reason for the assault is a quarrel having its origin in the work." (Emphasis added.) (It did not say "at the workplace.") In another case, Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991, two employees with a past history of having worked together fought, but there was no compensable injury because the assault was for "personal reasons." This case pointed out that exceptions in the 1989 Act are substantially the same as found in prior law. (Note that Article 8308-3.02(4) is the same basic exception as Section 406.032(1)(c).) That appeals decision also considered Security Insurance Company v. Nasser, 704 S.W.2d 390 (Tex. App.-Houston [14th Dist.] 1985, rev'd 724 S.W.2d 17 (Tex. 1987)), on remand 755 S.W.2d 186 (Tex. App.-Houston [14th Dist.] 1988, no writ) as saying that the personal aspect of the assault needs to be weighed against the employment aspect. Then, in Texas Workers' Compensation Commission Appeal No. 92112, decided May 4, 1992, an injury that resulted from a confrontation at work over a cartoon on a bulletin board, said to have been altered to disparage claimant, was not compensable. While the latter two cases were just affirmances of the hearing officer's decision, they do show that "personal reasons" involves much more than a determination of whether or not there was personal contact outside the employment. A later case, Texas Workers' Compensation Commission Appeal No. 950722, decided June 22, 1995, does not indicate that there must be contact outside of work for a personal assault exception to apply, although it does say that there was no outside contact.

The finding of fact relative to no contact outside the workplace is not reversed. The hearing officer should reconsider the finding of fact that only determined that there was no "dispute" from "their private life" and consider whether or not there were personal reasons for the 1995 assaults. Findings of fact may address:

> Whether or not claimant and Mr. A were working together or were at the same site but not working together;
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> Whether any confrontation arose over the way either performed his/her work (we note that Mr. A's statement indicates he got mad when, he said, claimant said something to him about his daughter; Mr. A did not indicate that the daughter worked at the same site);
> Whether or not Mr. A's 1995 assaults were directed at claimant personally or that those assaults would have been made against any female employee cleaning the restroom on the three successive days in 1995;
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> Whether the events show that Mr. A harbored "antecedent feelings" toward claimant personally (which could possibly include claimant's condition);

Whether the nature of claimant's work as a dining room and restroom cleaner, increased the risk of assault (we note no evidence of assault upon claimant in almost 20 years since 1976 when she worked a different, later, shift from that worked by claimant); and,

Whether the personal aspect of the assault or the employment aspect weighed more heavily in the 1995 assaults that occurred on three successive days.

In making additional findings of fact, the hearing officer may consider that the two people involved only knew each other in the workplace, but also may consider the final finding of fact that an assault occurred in 1976 that involved the same two people and the evidence of record, which includes that the claimant is mildly retarded. After making added findings of fact, the hearing officer should determine whether or not the assault does or does not fall under the personal assault exception of Section 406.032 in deciding the case.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge