

## APPEAL 010259

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 12, 2001. With regard to the disputed issues the hearing officer determined that the claimant (appellant/cross-respondent) had not sustained a compensable injury on \_\_\_\_\_ (all dates are 1999 unless otherwise noted); that the claimed injury arose out of an act of personal animosity relieving the carrier (respondent/cross-appellant) of liability; that the claimant was not engaged in horseplay; and that because the claimant had not sustained a compensable injury the claimant did not have disability. The hearing officer's decision on the horseplay issue has not been appealed and has become final. Section 410.169.

The claimant appealed, citing case law, contending that the dispute arose in the workplace and the weapon used belonged to the employer. The claimant contends that since this was a compensable injury he had disability. The carrier appeals a portion of one of the hearing officer's fact findings that the claimant "sustained damage or harm to the physical structure of his body" when he was attacked. Both parties responded to the others appeals urging affirmance on the issues on which they prevailed.

### DECISION

Affirmed.

There was dramatically conflicting evidence in this case. The claimant was employed as a maintenance mechanic and testified that on \_\_\_\_\_, as he was on his way to take a break, he stopped and briefly spoke with two coworkers, one of whom was KS, when another coworker, KJ, suddenly attacked him and hit him in the back of the neck with the blunt edge of a knife used at work. The claimant testified that he had only spoken with KJ on two previous occasions and theorized that KJ wanted his job, or a job in the maintenance department. KJ testified that the claimant had subjected him to a long course of demeaning and harassing verbal abuse (on some 15 or 20 occasions) and that on \_\_\_\_\_ the claimant was again verbally abusive. KJ testified that he told the claimant to "leave him [expletive deleted] alone" and that when the claimant turned to come toward him KJ picked up the knife and held it in the air a few inches from the claimant. KJ denied that he touched the claimant. The claimant testified that he reported the incident to his union steward on \_\_\_\_\_. However, the incident report indicates it was completed on August 31, the day that the claimant and KJ were suspended. KJ testified that he reported the matter to human resources (HR) that day but that was the first HR had notice of the incident.

One of the coworkers that the claimant stopped to speak with was unavailable, the other, KS, testified that the claimant came by and briefly spoke with him, and that KJ was nearby and that KJ "just blew up" and said "I don't [expletive deleted] with you." KS's testimony somewhat supports the claimant's testimony except that KS testified that KJ only

"laid" or "placed" the dull edge of the knife to the claimant's neck. RH, another coworker, testified that he was coming out of an office and saw the two men and "one of them was bent over, and the other had the knife to the back of his neck." RH said he thought they "were horsing around" and yelled out "I saw that."

The hearing officer gives a detailed summary of the testimony and evidence but does not really specify what testimony he believed or disbelieved, only finding that the "claimed injury arose out of an act of a third person intending to injure the claimant because of a personal reason and not directed at the claimant as an employee or because of the employment. . . ." There was varying testimony, evidence, and speculation what that personal reason might have been, and/or how the incident was work related.

In Texas Workers' Compensation Commission Appeal No. 001802, decided September 15, 2000, the Appeals Panel discussed the personal animosity exception in Section 406.032(1)(C) and cited Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex 1987), a case both parties referenced in this case, for the proposition that the purpose of the personal animosity exception to compensability was to exclude from coverage:

those injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment. . . . 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.

A claimant has the burden of proving he sustained an injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Once a carrier produces probative evidence of the personal animosity exception to liability, the claimant then has the burden to establish by a preponderance of the evidence that the coworker's assault was directed at him as an employee or because of his employment. Texas Workers' Compensation Commission Appeal No. 970484, decided April 28, 1998; Texas Workers' Compensation Commission Appeal No. 93134, decided April 2, 1993. We have further observed that whether there was a personal motivation to an assault that causes injury is a question of fact to be decided by the hearing officer. Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997.

The carrier points out that whether the incident occurred due to the claimant's taunting and verbal abuse (as KJ testified) or whether he was assaulted "out of the blue" as the claimant and KS seem to indicate, there was nothing to link the incident to the employment other than it occurred in the workplace and the knife belonged to the employer. We are not sure who the hearing officer believed, however, we have stated that we will affirm the hearing officer's decision on any theory reasonably supported by the evidence. Daylin Inc. v. Juarez, 766 S.W.2d 347 (Tex App.-El Paso 1989, writ denied). Regarding the carrier's appeal of the finding that the claimant sustained an injury (as

defined in Section 401.011(26), the claimant's testimony and the medical evidence support that the claimant sustained a cervical strain, other evidence to the contrary notwithstanding. In that we are affirming the hearing officer's decision that the claimant had not sustained a compensable injury, the claimant, by definition in Section 401.011(16), cannot have disability.

Accordingly the hearing officer's decision and order are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Robert W. Potts  
Appeals Judge