APPEAL NO. 011988
FILED OCTOBER 9, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 31, 2001. The hearing officer determined that the respondent (claimant) did sustain a compensable injury on _____ (added issue); that the appellant (carrier) is not relieved of liability pursuant to Section 406.032(1)(C); and that the claimant had disability, beginning on May 11, 2001, and continuing through the date of the CCH. The carrier appealed on sufficiency of the evidence grounds, and also asserts that the hearing officer has not correctly interpreted Section 406.032(1)(C). The claimant submitted a response to the appeal, urging that the decision and order of the hearing officer be affirmed.

DECISION

Affirmed.

The claimant in this case was employed at a liquor store. Part of her duties included preparation of the paperwork for the daily bank deposit for her store and taking the deposit from the store at which she worked to another store for eventual transfer to the bank. The claimant was required to drive her car when performing this duty. On _____, as the claimant was traveling directly to the other store, she stopped at an intersection. An individual wearing a ski mask approached her car and opened the door, pointing a gun at the claimant's head. The claimant screamed, and rapidly drove forward, with her assailant running alongside momentarily. The assailant lowered the gun and fired two shots, one of which caused the injury to the claimant, a gunshot wound which entered the claimant's left thigh, traveled along her leg, and exited below her knee.

The carrier's position is that the claimant did not sustain an injury in the course and scope of her employment. Citing Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, the carrier paraphrased this portion of the opinion:

> In the case cited by both parties, Texas Employers' Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977), the claimant's burden is stated as twofold: the injury must have occurred while the employee was engaged in or about the furtherance of the employers' business; and, the injury must be of the kind or character that had to do with and originated in the employers' work, trade, business, or profession. *Id.* at page 99. An injury can be found not to be compensable if facts establish the first "prong" but not the second. *See* American General Insurance Co. v. Williams, 227 S.W.2d 788 (Tex. 1950). Whether the prongs of the test are established generally involves questions of fact based upon the case presented. [Emphasis in the original.]

The carrier asserts that there has to be a causal connection between the employment and the injury, and that the injury here was a random act of violence, having nothing to do with

the employment of the claimant. The hearing officer resolved this factual question in the claimant's favor by concluding that the claimant was injured in the course and scope of her employment. We believe that the following quotation from Appeal No. 92213 better states the legal test regarding the causal connection between assaults and employment:

> In Commercial Standard Insurance Co. v. Marin, 488 S.W.2d 861, 869 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.), the court of civil appeals, in agreeing that the murder of an employee who was opening her employer's business was compensable, discussed various personal assault cases at length. After discussing lines of cases where assaults were, or were not, compensable, the court focused on the causal connection between such assaults and employment:
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> > It is well settled that if an injury is received by an employee while he is acting within the course and scope of his employment, and such injury is a result of a risk or hazard of the employment, it is compensable. (Citations omitted). With specific reference to assaults this well settled doctrine, at the very least, means . . . that an assault arises out of 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. It is contended that to hold that an assault is compensable if the risk of assault is increased because of the nature of the work is to adopt the "positional risk" test . . . . We know of no Texas case rejecting this test . . . . The correspondence between this test and the "street risk" doctrine is obvious. Although the risks of the street are dangers which the employee shares in common with the general public, if the performance of his duties make it necessary for the employee to be on the streets, the risks he there encounters are held to be incident to his employment. (citations omitted). [Emphasis in the original.]
>
> The court determined that [Mrs. M] was present at the site of the assault because of the conditions of her employment, i.e., the need for her to be on site during early morning hours.

The "citations omitted" just above was a citation to the case of Jecker v. Western Alliance Insurance Co., 369 S.W.2d 776, 779 (Tex. 1963). In our opinion in Texas Workers' Compensation Commission Appeal No. 961345, decided August 23, 1996, we said:

> In [Jecker, *supra*] the Supreme Court considered the travel provisions of the [1989 Act] then in effect and Chief Justice Calvert wrote:
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> > But the Legislature surely did not intend to provide that an

> employee whose employment requires him to travel at his own expense in his own automobile on streets and highways, either constantly or intermittently, should be denied compensation if accidentally injured while thus exposed to risks flowing out of his employment. Any such holding would be wholly unjust to salesman, servicemen, repairmen, deliverymen, and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the [1989 Act].

The determinations of the hearing officer on course and scope of employment are supported by the evidence in the record, and are affirmed.

The hearing officer determined that Section 406.032(1)(C) does not relieve the carrier of liability under the facts of this case because the claimant was not assaulted "for any reason peculiar or personal to her, rather she was the victim of a random act of violence." Section 406.032 provides, in relevant part, that:

> 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 at the employee as an employee or because of the employment[.]

In deciding a similar case, Texas Workers' Compensation Commission Appeal No. 94868, decided August 18, 1994, we said:

> As we noted in Texas Workers' Compensation Commission Appeal No. 93715, decided September 23 [sic, 28], 1993, this provision, similar to a provision in Article 8309, Sec 1. (repealed), of the law prior to the 1989 Act, has been held to relate to some personal reasons or motives between the assailant and the claimant. In Appeal No. 93715, we cited the Texas Supreme Court case, Nasser v. Security Insurance Company, 724 S.W.2d 17, 19 (Tex. 1987), where the court set forth the purpose of the "personal animosity" principle stating that the "exception is to exclude from coverage of the Act 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." The court went on to state that "[w]henever 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." In [Marin, *supra*], the Court of Appeals refused to apply the personal reasons or "personal animosity" exception where a service station employee was raped and murdered by an unknown assailant in the early morning opening hours and there was no evidence of any prior relationship between the two. *See also* Texas Workers' Compensation Commission Appeal No. 931144, decided January 31, 1994, where the "personal animosity" exception was not applied to a case involving a rape by an unknown assailant of a school teacher who was grading papers and preparing lesson plans after school hours.
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> The application of the "personal animosity" exception cannot be made under the evidence in this case. Clearly, the assailants and the claimant were unknown to each other and there was nothing to even suggest any personal reason between them for the assault. To the contrary, the only motive suggested by the evidence was robbery, a matter personal only to the assailants and not a personal matter between the assailants and claimant.

The carrier asserted that the "personal reason" for the assault need not be mutual between the assailant and the claimant, and only needs to be a personal reason on the part of the assailant for this exception to apply. By such reasoning, a bank teller shot by a bank robber with a "personal reason" for robbing the bank would not be eligible for workers' compensation benefits. We decline to adopt such a construction. Whether there was a personal motivation for this assault was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The evidence sufficiently supports the hearing officer's determination that the claimant had disability from May 11, 2001, continuing through the date of the CCH. Section 401.011(16) provides that disability is the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The hearing officer was persuaded by the claimant's testimony and the medical records in evidence that the claimant had disability.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **NATIONAL FIRE INSURANCE COMPANY OF HARTFORD** and the name and address of its registered agent for service of process is

C T CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Michael B. McShane
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge