APPEAL NO. 91047

On September 10, 1991, a contested case hearing was held in (city), Texas with (hearing officer) presiding. She held that claimant, appellant herein, was not in the course and scope of employment when injured on (date of injury). Appellant asserts that the hearing officer's Findings of Fact No. 4 through No. 8 are incorrect; that Conclusion of Law No. 3 is wrong in stating that appellant wilfully attempted to unlawfully injure the foreman since "Texas Penal Code § 9.33(2) specifically authorizes . . . to use force to protect a third person."; and Conclusion of Law No. 4 is incorrect because appellant tried to stop an attack to prevent serious injury, prevent harm to the workplace, and to preserve the peace.

DECISION

We do not find merit in appellant's issues on appeal and affirm the decision of the hearing officer.

Uncontroverted testimony showed that on (date of injury), short and slight (nephew), who worked for the same window blind company as appellant, gave a ride to work to big and muscular (foreman). The foreman was not an easy man for which to work, but there was no on-going animosity between nephew and foreman. During that work day, the production line was stopped. The nephew, whose job was quality control, said he stopped the line for a quality control reason. There was also evidence that nephew's discussion of his personal life with a member of the production line stopped or slowed the line. At any rate nephew was verbally harangued by the foreman.

Uncontroverted evidence shows that the argument between the foreman and nephew moved from a worker's station several feet to the quality control area of nephew. At some point the dispute became physical (pushing, scissors in hand, pipe in hand) and appellant, who is nephew's uncle and was on the production line about 30 feet away, moved to the proximity of the altercation. Why he was hit on the head with a pipe and struck on the shoulder is disputed. He possibly injured his back as he fell across some wooden pallets.

Carrier introduced evidence, through a sworn statement of Mr. C (Employee #1) who worked next to quality control, that appellant ran to a point behind foreman and hit the foreman before appellant was pushed down. Employee #1 also said that appellant got to his feet and obtained a piece of lumbar with which to strike foreman. It was at this time that Employee #1 says appellant was hit with the piece of pipe. The assertion of Employee #1 that appellant struck foreman from behind prior to receiving any blows was corroborated by the unsigned statement (admitted in evidence without objection) of Mr. A (Employee #2). This evidence was sufficient to raise an issue of wilful intent and attempt to unlawfully injure another person as set forth in The Workers' Compensation Act (1989 Act) TEX. REV. CIV. STAT. ANN., art. 8308-3.02(2) (Vernon Supp. 1991).

Exceptions found in the 1989 Act at Section 3.02 are substantially the same as those in the prior article found in TEX. REV. CIV. STAT. ANN., art. 8309, Section 1 (repealed 1989) especially in regard to the exception at Section 3.02(2). The 1989 Act will be viewed as conveying the same meaning in this area. Walker v. Money, 132 Tex. 132, 120 S.W.2d 428 (1938). When sufficient evidence has been admitted to raise the issue, an exception generally requires the employee to prove it does not apply in showing that the injury arose out of and in the course and scope of employment. Security Insurance Co. 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); March v. Victoria

Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied); Anchor Casualty Co. v. Patterson, 239 S.W.2d 904 (Tex. Civ. App.-Eastland 1951, writ ref'd n.r.e.); and Weicher v. Ins. Co. of North America, 434 S.W.2d 104 (Tex. 1968). Under the same exception as is now before us (wilful intent and attempt to injure), Texas Employers Ins. Assn. v. Gregory, 521 S.W.2d 898 (Tex. App.-Houston [14th Dist.] 1975, ref'd 530 S.W.2d 105 (Tex. 1975), on remand 534 S.W.2d 166 (Tex. App.-Houston [14th Dist.] 1976) required the carrier to introduce evidence of suicide to counter the presumption against it. The claimant then had the burden to prove the exception did not apply.

Appellant's task in this situation was spelled out in the charge to the jury given in North River Ins. Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ).

> "Employee's Intention to Injure Another" means an injury caused by the employee's willful intention and attempt to injure some person is not in the course of employment, unless the injury results from a dispute arising out of the employee's work or in the manner of performing it and the employee's acts growing out of such dispute are done in a reasonable attempt to prevent interference with the work or in reasonable self-defense." (emphasis added)

The latter part of the above charge can be compared to Texas Penal Code Ann. § 9.33 (Vernon 1989) which reads as follows:

> A person is justified in using force or deadly force against another to protect a third person if:
>
> (1)under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the unlawful force he reasonably believes to be threatening the third person he seeks to protect; and
>
> (2)the actor reasonably believes that his intervention is immediately necessary to protect the third person. (emphasis added)

Appellant, in asserting this appeal, refers to Texas Penal Code § 9.33(2). The quotation above makes it clear that Section 9.33 is operative when both 9.33(1) and (2) apply, not when either applies alone.

Appellant's burden to show that an exception does not apply to him contrasts with the burden in a criminal setting to which the Penal Code applies. Indemnity Ins. Co. of North America v. Scott, 278 S.W.2d 347 (Tex. Civ. App.-Waco 1925, aff'd 298 S.W.2d 414 (1927) and Federal Underwriters Exchange v. Samuel, 138 Tex. 444, 160 S.W.2d 61 (1942) make it clear that proof requirements of criminal law do not apply to workers' compensation law.

While the exact sequence and kind of blow struck varied throughout the evidence, even the nephew never said that foreman struck the first blow. His testimony was that after the argument began, he walked back to his work station at quality control. He indicated that the foreman came to his table and talked "all kind of stuff" and was coming too close. Nephew then says he grabbed the scissors and after foreman took them away, he, nephew, grabbed a pipe and tried to hit foreman (but foreman took it away). This rendition is consistent in general with that of Employee #1 who said that nephew and foreman were

arguing, that nephew wanted to stab foreman but foreman pushed him back and then took scissors away from him, that nephew picked up a pipe but foreman took that away too, and that nephew called to his uncle (appellant) who ran to foreman and hit him from behind. The testimony of nephew and the sworn statement of Employee #1 coupled with appellant's own testimony (especially that in which he stated he was trying to protect his nephew) is sufficient on which to base the hearing officer's Findings of Fact No. 4 through No. 8. (These findings said appellant left his work area, participated in a fight, and struck the foreman; they also stated that nephew used scissors, pipe and shovel and that co-workers stopped the fighting.)

Even if the dispute between nephew and foreman arose out of the work, testimony of the appellant himself that he tried to protect his nephew and statements of Employee #1 and Employee #2 that they respectively disarmed nephew of a shovel and appellant of a piece of lumber (coupled with no evidence that anyone had to disarm foreman of anything) were a sufficient basis for the hearing officer to decide that appellant was not trying to prevent interference with the work.

Under Purdy, supra, the hearing officer also had to conclude that appellant's action was not in reasonable self-defense. There was no evidence that appellant had any cause to defend himself against foreman. In addition, the present circumstances do not require that we decide that a third party defense can obviate an issue under Article 8308-3.02(2). To conclude that appellant reasonably believed circumstances existed that would justify protecting his nephew from unlawful force, one must first believe appellant's own testimony that scissors were picked off a table by foreman, that a pipe was picked up and thrown by foreman at nephew, and that nephew used no shovel. Each of these points was refuted by the appellant's own nephew making appellant's testimony and his perception less than credible. The hearing officer was clearly justified in deciding that appellant did not "reasonably" believe circumstances warranted protecting his nephew.

Since the appellant could not negate the exception found in Article 8308-3.02(2), the evidence of record and the findings of fact were sufficient for the hearing officer to conclude that appellant did act wilfully and unlawfully as set forth in Conclusion of Law No. 3. Once Conclusion of Law No. 3 is made, Conclusion of Law No. 4 merely follows the process of the statute and is appropriate.

The decision that the carrier is not liable for appellant's injuries is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge