APPEAL NO. 91105
FILED JANUARY 21, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 through 11.10 (Vernon Supp. 1991). On November 14, 1991, a hearing was held in (City 1), Texas with (hearing officer) presiding. He found that claimant (appellant herein) was not injured in the course and scope of employment. Appellant asserts that the incident in question relates to the job climate, that there was no evidence of personal animosity between appellant and (NW), who struck appellant, and that findings and conclusions that support the decision against appellant are in error.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Appellant was employed by (employer) from August 1990 to _____. His supervisor is stated to be "pipefitter leadman" but the record does not describe what appellant's work entailed or even list his job title. Prior to _____, appellant heard an employee, (NW), (who was not a supervisor) say negative things about another employee, (TH) to (GO), appellant's supervisor. According to GO, the words in question by NW were to the effect that if he (NW) were leadman, he would run off the lazy ones, which included TH.

Appellant agreed that he told TH that he heard NW say "if I were supervisor, I'd fire that black _____ _____" or words to that effect. An investigation by a safety official, (RG), for (employer) found that TH asked NW if he had said "If I were supervisor, I'd fire that black _____ _____." NW apparently denied using those words and made inquiry of TH as to the identify of the source. NW thereafter confronted appellant about this. NW pushed appellant first. Appellant stated he gave TH an account of events that he knew would lead to a problem.

We accept appellant's recitation of events since NW was not called to testify and other witnesses did not see the fight. NW pushed appellant more than once pushing him down and purposely stepping on his glasses. Appellant called out to a leadman and thereafter NW walked away. For some reason NW decided to come back. Words were exchanged and NW struck a blow with his fist breaking teeth and the jaw of appellant. Appellant spit in NW's face. There was no evidence of any relationship between the two outside their place of work.

Their supervisor, GO, testified that they worked on opposite sides of the yard. He purposely put them at a distance from each other since he knew they did not like each other. As stated previously, appellant did not say he was performing any task when approached by NW; he merely said the incident occurred "at work." There is no evidence that NW had been called over to appellant's area, unknown to the supervisor, to help out on any work prior to the fight.

The situation before us is characterized by appellant's cunning and irresponsibility. A different fact question would present itself had TH himself overheard NW's statement to his supervisor and then confronted NW about it. If appellant had wanted to assist TH in

regard to NW's derogatory remarks, he could have gone to the supervisor and vouched for TH's good character or he could have merely told TH that a supervisor had heard his character questioned so TH would be on notice to "shape up" from now on. Appellant chose neither and then inflamed the situation by his scurrilous words and attribution of them to NW. Notwithstanding that NW sought out appellant, the fact situation borders on meeting the criteria of Article 8308-3.02(2) (wilful intent to cause injury) of the 1989 Act. Nevertheless, the hearing officer correctly viewed the situation as being most appropriate for consideration under Article 8308-3.02(4). 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(4). 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 had 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. 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 (act of a third person for personal reasons), 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), required the carrier to introduce evidence of the excepted conduct. The claimant then had the burden to prove the exception did not apply.

Appellant's own testimony raised the issue of an exception under Article 8308-3.02(4) when he said that he and NW did not work together, that he expected a problem to result when he told TH, and that he used the words "I'd fire that black _____ _____" or similar ones in communicating with TH.

Texas Indemnity Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. App.-Amarillo 1950, writ ref'd), considered whether the "personal reasons" exception could apply to co-workers. In finding that the injury arose when Prather hit Cheely, at work, after Chism told Prather that Cheely said he was "yellow" or a coward, the court found that the fight between co-workers did involve personal reasons and was not compensable. It concluded that their dispute did not pertain to the employment of either employee.

TEIA v. Cecil, 285 S.W.2d 462 (Tex. Civ. App.-Eastland 1955, writ denied) was cited by appellant and that case did find death resulting from an assault to be compensable. It, however, described men working at the same belt that moved tiles to be placed in a wagon; one worker greased a tile so the other could not pick it up. The fellow trying to work (claimant) took offense at this interference and told the other to stop in colorful language - whereupon the worker with the grease struck the claimant. Cecil does not control the case before us in which there is not even a reference to the work that either appellant or NW did.

The decision as to whether an injury is in the course of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ) and Shutters v. Dominoes Pizza, Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ). The hearing officer is the sole judge of weight and credibility.

Article 8308-6.34(e). While Nasser, supra, presents a liberal interpretation in regard to employment, ". . . if there is real employment-related causative factor, the injury is within the course of employment notwithstanding that there may be some personal motivation for the third party assault," such standard appears to weigh the personal aspect against the employment aspect. In viewing the evidence that appellant and NW did not like each other prior to the incident leading to the fight, that appellant repeated and exaggerated what he overheard about TH's character to TH knowing it would cause trouble, that appellant and NW were not working together, and that no facet of the job of either was in question as a contributing cause of the fight, the hearing officer had sufficient evidence to find the appellant had not met his burden of proof.

The hearing officer's findings of fact and conclusions of law are sufficiently supported by the evidence. The decision and order are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

_____

Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge