APPEAL NO. 971538

This appeal is brought 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 9, 1997. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that the appellant (carrier) was not relieved of liability for this injury under the so-called "personal animosity" doctrine contained in Section 406.032(1)(C). The carrier appeals the determination of liability on the grounds that the claimant failed to meet his burden of proving by a preponderance of the evidence that the personal animosity doctrine did not apply in this case. The determinations that the claimant was injured, and the extent of those injuries, in the course and scope of employment have not been appealed.

DECISION

Affirmed.

Many of the background facts of this case are not in dispute. The claimant, who was 17 years old at the time of the CCH, testified that he was hired by the employer as a helper or general laborer to assist in the installation of ducting at a construction site in (City 1), Texas. He said that he and three or four other coworkers would travel from (City 2), Texas, where the employer was located, to (City 1), where they stayed all week in a motel and returned to (City 2) only on weekends. He estimated the typical workday to last from 12 to 14 hours. He said he met his fellow workers for the first time when he was hired on July 17, 1996, and that everyone got along generally well with each other except for what, at one point, he described as friction between GF and the others. At another point, he said GF was friendly during off-duty hours, and that he and GF would frequently swim together in the motel pool, but that GF was aloof and mostly kept to himself while on the job. He also testified that the workers, including himself, generally bantered, nagged and joked with each other throughout the workday to relieve the boredom and reduce the stress of the work.

According to the claimant, on _____, toward the end of the workday but while still on duty and at the work site, GF came from behind, pushed him against a wall and knocked him to the ground. As a result, the claimant said and the hearing officer found, he sustained neck and lumbosacral injuries and fascial pain. The claimant described the day of the assault as hot and stressful, with constant moving and noise from the other construction. He said he had no personal problems with GF, went swimming with him the night before the assault, associated with him while off duty, had no other fights or arguments with him, and he knew of no reason why GF would be mad at him or why he attacked him. The claimant, on the other hand, also testified that there were "problems" with GF at work that day and GF had taunted him, told him to "watch his mouth" and threatened to "kick butt" but he, the claimant, just walked away when GF came up to him from behind. The claimant said he did not know why GF made the "kick butt" comment,

but speculated it may have been the result of a practical joke played on GF by other coworkers who told GF that one of them had been fired, which was not true. The claimant said that after the assault, GF told him he was sorry and having a bad day. They again went swimming together the evening after the assault. Both the claimant and GF were later terminated from employment.

Mr. H, a site manger, testified that the crew was working at the time of the assault and there was a lot of "poking fun" among the workers. He said that just before the assault there was an exchange of words and some pushing between the claimant and GF. He described it as a momentary flare-up which subsided when he told them to quit. He said that GF told him he was sorry and did not know what happened. Mr. H also testified to the usual bantering and kidding at the work site to keep the monotony down and that the workers generally knew the limits to such conduct. He said the verbal exchange between the claimant and GF had nothing to do with the work, but that the struggle just happened and "snowballed." He described the work as intense and tempers got short, which he possibly attributed to the employees being "cooped up" at the motel. No evidence from GF was produced.

It was not disputed that the claimant sustained injuries in the course and scope of his employment. *See* Section 401.011(12). Pursuant to Section 406.032(1)(C), a carrier is not liable for injuries in the course and scope of employment if the injuries "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." This has been described as the "personal animosity" exception to liability.[1] *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. In Texas Workers' Compensation Commission Appeal No. 952202, decided February 7, 1996, the Appeals Panel quoted at length the "assaultive injuries rule" contained in Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850, 852 (Tex. Civ. App.-Amarillo 1958, no writ) as follows:

> In the case of injuries inflicted by assault, the rule is that if one employee assaults another solely from anger, hatred, revenge or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to rise out of the employment. . . . The vital question seems to be: was the accident connected with the employment? If it was, then it arose out of the

[1] It was never contended that the exception to liability contained in Section 406.032(1)(B) for the willful attempt to injure oneself or to unlawfully injury another person was applicable in this case or relied on by the carrier as a defense to liability.

> employment, provided it occurred in the course of the employment. And the fact that the injury was deliberately and intentionally inflicted does not remove the injury from the category of an accident as contemplated by the statute.

In Texas Workers' Compensation Commission Appeal No. 94868, decided August 18, 1994, the Appeals Panel quoted extensively from Nasser v. Security Insurance Company, 724 S.W.2d 17, 19 (Tex. 1987), 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, 1997; 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.

As noted above, in the case we now consider it was not disputed that GF assaulted the claimant as the claimant was engaged in performing work for the employer. Thus, it was conceded that the claimant sustained his injuries in the course and scope of his employment. In its appeal, the carrier essentially contends that the claimant failed to meet his burden of proving that the personal animosity exception did not apply or that the assault was connected to the employment. For the sake of precision, we observe that the claimant's burden was to prove that the assault was connected with the employment. He was not required to establish a negative fact, that is, that the assault was not motivated by personal animosity. This distinction is critical, we believe, not only because of the inherent difficulties in proving any negative, but also because a fight or assault may arise at the workplace without anyone knowing why. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 962146, decided December 9, 1996, and Texas Workers' Compensation Commission Appeal No. 960594, decided May 6, 1996 (unpublished), a

case expressly relied on by the carrier in its appeal. In addition, we have noted that a claimant's lack of knowledge about the reason for an assault does not prove as a matter of law that the assault was for personal reasons. Texas Workers' Compensation Commission Appeal No. 94845, decided August 11, 1994, citing Orozco v. Texas General Indemnity Company, 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ).

Both the claimant and Mr. H testified to the near constant banter, joking and taunting at the workplace as a stress and monotony reliever. There was also evidence that the taunting somehow became particularized between the claimant and GF immediately before the assault, but the claimant was unable to equate this with personal animosity and said that GF never related the assault to personal animosity, but to a "bad day." According to Mr. H, GF told him that he, GF, did not know why it happened. With the evidence in this posture, we have serious reservations that the carrier produced anything more than mere speculation that the cause of the assault was personal animosity and question whether the carrier effectively shifted the burden to the claimant to prove that the exception contained in Section 406.032(1)(C) did not apply in this case.

Regardless of whether the burden shifted, we believe that the evidence was sufficient to affirm the conclusion of the hearing officer that the assault was at least to some degree, if not solely, connected to the employment. That evidence consisted primarily of the testimony of both the claimant and Mr. H that the work was monotonous and stressful, the workdays were long, the workers commonly bantered and joked among themselves to relieve the tension and monotony of the work, and, according to the claimant, he and GF met only as a result of the employment and had cordial relations off duty both before and after the assault. Specific findings to this effect were made by the hearing officer. Under these circumstances, we do not perceive the claimant's failure to identify a precise cause for the assault to be fatal to his case. *See* Texas Workers' Compensation Commission Appeal No. 950722, decided June 22, 1995, and Texas Workers' Compensation Commission Appeal No. 94084, decided March 1, 1994. We distinguish our decision in Appeal No. 960594, *supra*, cited by the carrier as analogous to the case we now consider, because in that case, which affirmed a hearing officer's finding of no compensable injury, the claimant failed to prove that he was in the course and scope of employment when the fight broke out. Without such an injury, there was no further need to prove that the exception to compensability contained in Section 406.032(1)(C) did not apply. In this regard, Appeal No. 960594, *supra*, is similar to the facts of Appeal No. 970484, *supra*; Appeal 952202, *supra*; and Texas Workers' Compensation Commission Appeal No. 951223, decided September 8, 1995. *Compare* Appeal 950722, *supra*.

The hearing officer's factual determinations that the claimant's injuries in this case were connected to his employment and not caused by personal animosity are subject to reversal only if they are so against the great weight and preponderance of the evidence as to be clearly erroneous and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex.

1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the evidence discussed above, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Christopher L. Rhodes
Appeals Judge