APPEAL NO. 982583
FILED DECEMBER 17, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 28, 1998, a hearing was held in (City), Texas, with (hearing officer) presiding. Her decision that appellant (claimant) was compensably injured when sexually assaulted on each of three successive days at work in (1995) and that such repeated assaults were not done for personal reasons was reversed and remanded. The hearing officer's decision on remand indicates that no hearing on remand was held; she further states that while the parties provided briefs, the "facts and evidence" did not change. The hearing officer again found that the assaults did not occur because of personal reasons and that the injuries were compensable. Claimant asserts that there was insufficient evidence to support the finding of fact that claimant was sexually assaulted on three successive days in the course and scope of employment and points out that a finding of fact was made that the sexual assault "was a matter personal to the assailant" and not a personal matter "between the assailant and claimant." Claimant also commented upon six questions which had been posed for the hearing officer to consider on remand, said that the injuries were not compensable, and asked that findings of fact be made showing that claimant was assaulted on three successive days in 1995 for personal reasons by (Mr. A) and that the injury was not compensable. A question appealed by claimant concerning respondent's (carrier) decision not to question compensability after initially denying it was not part of the remand and will not be considered. Carrier replied that the decision should be affirmed.

DECISION

We reverse and render.

Claimant worked for (employer) on (date of injury), on (day after date of injury), and on (two days after date of injury), 1995. The evidence from the May 1998 hearing showed that claimant was sexually assaulted each day by the same co-employee, Mr. A. The hearing officer also found that claimant had been assaulted by the same co-employee in 1976. After the 1976 assault, the employer moved claimant to a different shift away from Mr. A, who remained as an employee. About one week before the sexual assault on (date of injury), on (day after date of injury), and on (two days after date of injury), 1995, claimant, who cleaned restrooms, was moved to a shift which included Mr. A. While the facts as recited in Texas Workers' Compensation Commission Appeal No. 981553, decided August 21, 1998, will not be completely repeated in this review, especially since no new evidence was considered on remand, we do note that claimant had polio as a child and is mildly retarded; there is no dispute that she was sexually assaulted on each of three successive days by Mr. A while cleaning restrooms for employer. According to claimant, Mr. A threatened her and her family if she reported his actions.

The initial determination was remanded because the hearing officer stressed that there was no contact between claimant and Mr. A in their private lives to such a degree that the standard for determining whether the sexual assaults on three successive days were directed at claimant for personal reasons was too narrow; *see* Section 406.032.

Appeal No. 981553 posed six questions for the hearing officer to consider; they asked:

1. Whether claimant and Mr. A worked together or were at the same site but did not work together;

2. If the sexual assaults occurred because of some dispute between the two over the way either did the job assigned to him or her;

3. Whether Mr. A's sexual assaults on claimant on (date of injury), (day after date of injury), and (two days after date of injury), 1995, were directed at her personally or would have been made against any female employee cleaning a restroom at the time on (date of injury), (day after date of injury) and (two days after date of injury), 1995;

4. Whether Mr. A had "antecedent feelings" toward claimant (which could include claimant's condition of mild retardation);

5. Whether claimant's job as a restroom cleaner increased the risk of assault; and

6. Whether the personal aspect of the sexual assaults on three successive days or the employment aspect weighed more heavily.

The hearing officer addressed the first question raised by finding that claimant and Mr. A "worked together at the same site but with different duties in different sections"; this statement is accurately based on the evidence, except for the word, "together" for which there is no evidence, and is therefore stricken from the finding of fact.

The hearing officer addressed the second question raised by finding that there was "no confrontation between claimant and Mr. A regarding work performance of either party"; this statement is accurately based on the evidence.

The hearing officer did not make a specific finding of fact addressing the third question but did provide Finding of Fact No. 11, which said, "the only personal motivation for the assault was rape, which was a matter personal to the assailant and not a personal matter between the assailant and Claimant." (Emphasis added.) (We note that there was not one assault but that claimant was sexually assaulted on (date of

injury), (day after date of injury), and (two days after date of injury), by the same co-employee who assaulted her in 1976.) Even in the Statement of Evidence, the hearing officer only mentions the question of whether "those assaults would have been made against any female employee cleaning the restroom" but did not answer it; there was no finding of fact that Mr. A would have sexually assaulted any female employee who happened to be cleaning the restroom on (date of injury), (day after date of injury), and (two days after date of injury), 1995, notwithstanding that he had previously assaulted claimant in 1976 and notwithstanding that there was no evidence presented that he had sexually assaulted any other female restroom cleaner (including no female cleaner of "average" intelligence who had not had polio) during the 20 years that claimant and Mr. A had not been assigned to the same shift at this worksite.

The hearing officer did not make a specific finding of fact addressing the fourth question; she did mention the question of whether Mr. A had antecedent feelings toward the claimant in her Statement of Evidence, but did not answer it, except by noting that Mr. A said they were neither enemies nor friends and that he did not have "special" feelings toward claimant. While a finding of fact was made that Mr. A had assaulted claimant in 1976, that finding did not address whether such assault, together with the lack of evidence of any other assault for 20 years, indicated that Mr. A selected claimant to sexually assault on (date of injury), (day after date of injury), and (two days after date of injury) because of some prior feeling (which could include that he expected to get away with these assaults on claimant in view of his past experience).

The hearing officer addressed the fifth question by finding, in Finding of Fact No. 8, that "the nature of Claimant's work cleaning the restroom increased the risk of assault." There was no indication as to the period of time in which cleaning the restroom increased the risk of assault. (We note that claimant cleaned restrooms for 20 years without assault by anyone except claimant, when they worked the same shift, and that the record shows no evidence of any other female employee having been sexually assaulted while cleaning a restroom, whether by Mr. A or anyone else.) The evidence only establishes that claimant's cleaning of restrooms in (date of injury) 1995 provided an opportunity for Mr. A to sexually assault her on three successive days.

The hearing officer did not address the sixth question in a finding of fact and did not make any specific comparison of the "personal aspect" as opposed to the "employment aspect" in regard to the sexual assaults on three successive days. She did, as stated, make Finding of Fact No. 11 which said that the only personal motivation "for the assault" was rape, "which was a matter personal to the assailant and not a personal matter between the assailant and Claimant." (Emphasis added.)

The decision on remand provides no findings of fact that Mr. A's assaults would have been made on any female cleaning a restroom at the time or on any other female worker doing anything on (date of injury), (day after date of injury), and (two days after date of injury), 1995. The decision does provide findings of fact that claimant and Mr. A did not work together but were at the same worksite in different areas and that no

dispute arose from the manner in which either did his or her job. While no finding of fact was made that Mr. A had antecedent feelings for claimant at the time of the sexual assaults in 1995, a finding of fact was made that he had assaulted claimant in 1976. The hearing officer did find that cleaning the restrooms increased the risk of assault, but this finding was reformed, as stated. Most important, the hearing officer found that Mr. A's personal motivation was rape which was a "matter personal to [him]."

We agree that "a matter personal to [him]" could conceivably include that Mr. A was antagonistic toward employer for some reason and decided to take it out on another employee–but there is no finding of fact that Mr. A had, or even indicated, any such feelings toward the employer; if there was such an animosity by Mr. A for employer there is no finding as to why Mr. A chose to express his contempt for employer by sexually assaulting claimant on three successive days in (date of injury) 1995, as opposed to some other female employee on, perhaps, just one day at some other time in the last 20 years. (As stated, the hearing officer has made findings of fact which reject that claimant was assaulted because of some dispute over the way she did her work or some dispute, which she initiated, over the way Mr. A did his work.) We are therefore left with the "matter personal to [him]" portion of the finding of fact, which can only be read consistently with the other findings of fact and the evidence to indicate that this "matter" was a personal reason.

We also note that the hearing officer, in Finding of Fact No. 11, appears to place emphasis on her statement that there was "not a personal matter between the assailant and Claimant." Section 406.032(1)(C) does not require a mutuality between the parties, but addresses an act of "a third person intended to injure the employee because of a personal reason . . . ." *See* Texas Workers' Compensation Commission Appeal No. 952202, decided February 7, 1996, which affirmed a determination of assault for personal reasons when an employee used racial slurs to tell another employee to stop sitting on his newspaper and then hit the employee as he left his sitting position. That case quoted from Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850 (Tex. Civ. App.-Amarillo 1958, no writ), which said, "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 . . . the voluntary act of the assailant, and not as an incident of the employment." (Emphasis added.) We note that this quote made reference to "one" employee and did not indicate that there had to be some "personal matter between the assailant and claimant."

We believe that Mr. A's conduct toward claimant in 1976 and on three successive days in 1995 is more comparable to the assault based on racial prejudice, with claimant's employment having done nothing to give rise to the basis for the assault, than it would be to a situation such as was found in Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex 1987), wherein that employment encouraged Nasser to talk to customers, which later resulted in a stabbing by the husband of a customer. The court found the assault therein was incidental to a duty of Nasser's employment. While the hearing officer in the case under review made a finding of fact that the assaults were in

the course and scope of employment, she did not indicate that they were incidental to or arose from any duty imposed on claimant (there was not even evidence that claimant was cleaning a restroom used by claimant, but rather, was cleaning a restroom used by customers.) As noted, the hearing officer found that cleaning restrooms increased the risk of assault, but the evidence shows only that such work provided an opportunity for Mr. A to sexually assault claimant. *See* Highland Underwriters Ins. Co. v. McGrath, 485 S.W.2d 593 (Tex. Civ. App.-El Paso 1972, no writ).

We reverse that part of Finding of Fact No. 11 that states a "personal reason" exception must always contain a "personal matter between" a claimant and the person assaulting. Without the latter part of Finding of Fact No. 11, the conclusion of law, which states that claimant's injury did not arise from an act of a third person intended to injure the claimant for personal reasons, has no basis in a finding of fact. The finding of fact that claimant was injured in the course and scope of employment does not support a conclusion of law concerning how the injury arose. We do, however, reform Finding of Fact No. 2 to more accurately reflect the evidence; it should state:

FINDING OF FACT

> 2. Claimant was assaulted and injured in the course and scope of her employment on (date of injury), on (day after date of injury), and on (two days after date of injury), 1995,

rather than "Claimant was assaulted and injured in the course and scope of her employment on (date of injury), (day after date of injury), and (two days after date of injury), 1995."

Having found insufficient evidence to support some findings of fact, having found no findings of fact indicating that the actions of Mr. A resulted from the manner of doing the work or any argument about the way the work was done, and having concluded that part of a finding of fact indicated an erroneous requirement that there be a "personal matter between the assailant and Claimant," which we reverse, the determination that claimant sustained compensable injuries on (date of injury), (day after date of injury), and (two days after date of injury), 1995, is reversed.

A new decision is rendered that claimant did not sustain a compensable injury on either (date of injury), (day after date of injury), or (two days after date of injury), 1995, and that her injury did arise from the act of a third person for personal reasons, an exception to liability under Section 406.032(1)(C).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge