JOSEPH MILTON, Employee/Appellant, v. HENRY COMBS d/b/a PROP. NANNY, INC., UNINSURED, Employer/Cross-Appellant, and MN DEP'T OF HUM. SERVS., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 17, 1999

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF; ARISING OUT OF & IN THE COURSE OF - ASSAULT. Although the employee's injury, sustained in an altercation with the employer about the receipt of his pay check, arose out of the employment, it was not sustained in the course of the employment where it occured outside of work hours off the job site during a chance encounter at a location which was neither the business office of the employer nor a place where the employee had by custom or request come to obtain his paycheck.

Affirmed

Determined by: Wheeler, C.J., Hefte, J., and Pederson, J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's determination that the injury the employee sustained on July 1, 1996 did not arise out of and in the scope of his employment for the employer, Property Nanny, Inc. The employer cross-appeals from the compensation judge's determination that an employment relationship rather than one of independent contract existed between the employee and the employer and from her finding that the employee's injury was not the result of an assault directed against the employee for personal reasons unrelated to the employment. The employer also appeals from the compensation judge's calculation of the employee's weekly wage and from the determination that, had the injury been compensable under the workers' compensation act, the employee would have qualified for rehabilitation services. We affirm the finding that the injury was not work-related and decline to address the cross appeal.

BACKGROUND

Henry Combs has been the sole owner of a business known as Property Nanny, Inc., the employer, since some time in 1985. The employer performs construction work in St. Paul specializing in the repair and rehabilitation of single family homes and duplexes. The employee, Mr. Combs' half-brother, Joseph Milton, performed various work on a sporadic basis

during construction seasons each year for Property Nanny since at least 1992 and perhaps as early as 1988. (T. 44, 46, 96-100, 103.)

Among the job sites where Property Nanny performed work in 1996 were a duplex at 883-885 Selby Avenue ("the Selby site") and a home at 963 Beech Street ("the Beech site"). At some point after Property Nanny began working at the Selby site, Mr. Milton went there and asked Mr. Combs if he had any work for him. Mr. Combs told Mr. Milton that there was demolition work he would like him to do. According to Mr. Combs, they negotiated a price for the work, arriving at a figure of $1,100.00, and Mr. Milton was brought into the project as an independent subcontractor. These arrangements were never put in written form. Mr. Milton was not required to submit written bids nor did he provide lien waivers, unlike other subcontractors used by Property Nanny.[1] Mr. Milton, on the other hand, testified that he and his brother did not reach any prior arrangement about payment for the work and that when he worked for his brother he did not always know in advance what he would be paid, sometimes being paid by the hour and sometimes by the job. He also testified that his brother had on several occasions warned him to be careful since Property Nanny carried no workers' compensation insurance. When he was paid by the hour he generally received $7.00 per hour. He testified that he kept track of his time on the Selby job and told his brother how many hours he had worked on a daily basis. (T. 53-59, 70, 103-108, 198-199.)

Mr. Milton began working at the Selby site in April 1996. He had his own hammer, but no other tools. He testified that he used some of Property Nanny's tools, as well as other tools which were at the Selby site but which might just as easily have belonged to one of several subcontractors working there. Mr. Combs acknowledged that Property Nanny had tools at the Selby site, but did not know whether or not Mr. Milton used them. He admitted that Mr. Milton used Property Nanny's vehicle to take demolition debris for dumping. (T. 55, 68-70, 111, 114-115.)

Mr. Milton testified that he had no car and Mr. Combs usually picked him up at his home to take him to the Selby site. He also stated that sometimes when his brother did not come by 7:15 or 7:20 in the morning he walked the eight blocks to that location, as he tried to be there by 7:30 a.m. on days he worked. Mr. Combs acknowledged that he had sometimes transported his brother to the worksite, but testified that he did this solely because Mr. Milton was his brother. (T. 100, 109-110, 217.)

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[1] A lien waiver was submitted into evidence for the Selby site which bore the signature "Joe Milton" and was dated July 1, 1996 (Exh. K). However, Mr. Milton, Mr. Combs and Mr. Milton's ex-wife Linda Milton all testified that the signature on this document was not actually that of Mr. Milton. Mr. Combs testified that he had received a copy of this purported lien waiver among papers which he was later sent by the developer for the Selby site, the Selby Community Corporation, and that it also incorrectly listed a substantial number of work items which were not performed by Mr. Milton. (T. 65, 76-77, 101-102, 184-189, 214-216.)

According to Mr. Milton's testimony, in the afternoon on Thursday, June 27, while he was performing demolition work at the Selby site, Mr. Combs told him he needed him to do some roofing work on a garage at the Beech site. Mr. Combs then drove him to the Beech site, which was about five miles away. The shingles and a ladder were already there and Mr. Combs left the employee to work at that site for several hours, picking him up later to take him home. The next day, Friday, Mr. Combs picked the employee up at his house in the morning and they went briefly to the Selby site, from which Mr. Milton was sent with the Property Nanny vehicle to pick up some siding for the Selby site. After the siding was unloaded, Mr. Combs took the employee again to the Beech site, where he worked for the rest of the day. (T. 115-122.)

According to Mr. Combs, Mr. Milton had worked on roofing a front porch at the Beech site for a few days on and before Friday, June 28, 1996. In his recollection, Mr. Milton finished with the demolition work at the Selby site by some time in the last week of June 1996. He thought that there were perhaps ten days between the date when Mr. Milton finished at the Selby site and when he started working at the Beech site. He claimed that Mr. Milton had again been an independent subcontractor, and that a price of $180.00 had been negotiated for the roofing work at the Beech site. (T. 48, 66-67, 71, 77, 210.)

Mr. Milton testified that on Thursday, June 27, 1996, Mr. Combs had agreed to pay him the next day for some of his work. On Friday, June 28, 1996, the employee was in the bathroom of his home when Mr. Combs came to pick him up. When he got to the front door, Mr. Combs had left. The employee waited awhile but Mr. Combs did not return, so he called Mr. Combs' home and spoke to his wife. As a result of this conversation, it was his understanding that Mr. Combs had left town. Mr. Milton testified that he did not work that day. (T. 122-124.)

According to Mr. Milton's testimony, on Monday, July 1, he again waited to be picked up for work by Mr. Combs, but Mr. Combs did not come. As a result, the employee set off walking towards the job site at 883-885 Selby, hoping to find Mr. Combs. As he walked toward the Selby site, he saw Mr. Combs working on a lawn mower in front of 778 Selby, a building which Mr. Combs owned and in which were stored tools and supplies used by Property Nanny. The building, however, was not the office or business address of Property Nanny, which were at Mr. Combs' home. (T. 44-46, 126-127.)

Both Mr. Combs and Mr. Milton testified that Mr. Milton approached Mr. Combs and demanded the payment he had expected the previous Friday. Mr. Combs testified that he told the employee that he would have to wait until the bank opened. A fight then ensued between Mr Combs and the employee. Mr. Milton did not recall who threw the first punch; Mr. Combs testified that Mr. Milton punched him first and that, as they fought, Mr. Milton pulled out a knife. They grappled together and Mr. Combs asserts that he took the knife from Mr. Milton. In his testimony, Mr. Milton denied having a knife. In the scuffle, Mr. Milton was knocked to the pavement. The employee was injured in the fall and Mr. Combs helped him up and took him to the hospital, where he was diagnosed with a severe hip injury. Mr. Combs stayed at the hospital for about a half hour. While he was there, he spoke to the police, but did not tell them about the knife. (T. 47-48, 83-84, 128-132, 204-209.)

The employee testified that he had not been responsible for arranging for the completion of any unfinished work after the injury. Mr. Combs prepared a final check on July 6, 1996 for the work done by the employee at the Beech site. (T. 85, 137.)

The employee filed a claim petition seeking workers' compensation benefits on June 27, 1997. Because Property Nanny was uninsured, the defense of the claim was undertaken by the Special Compensation Fund, which filed an answer on February 11, 1997, denying liability. (Judgment Roll.)

A hearing was held before a Compensation Judge of the Office of Administrative Hearings on January 13, 1998. Among the issues presented were whether an employment relationship existed between Mr. Milton and Mr. Combs or Property Nanny, Inc., whether the injury sustained by Mr. Milton on July 1, 1996 arose out of and in the course of such employment, whether the employee's injury was sustained in an assault motivated by personal reasons rather than the employment such that as to be noncompensable, whether Mr. Milton qualified for rehabilitation services and the employee's weekly wage on the date of injury. Among other things, the compensation judge found that on the date of injury Mr. Milton was an employee of Property Nanny, Inc., working at a weekly wage of $280.00. She held that he was unable to return to work at his preinjury job and thus, should the injury be compensable, that he met the standard for entitlement to a rehabilitation consultation. She held that the so-called "assault exclusion" was inapplicable. Finally, she found that while the injury arose out of the employment, it was not sustained in the course of the employment. The employee's claim was accordingly denied. The employee appeals from this latter finding. The employer cross-appeals from the finding of an employment relationship, the amount of the weekly wage found, the denial of the applicability of an assault exclusion, and the findings on the prerequisites for a rehabilitation consultation.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, they "are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Factfindings may not be disturbed, even though this court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

Question of law. The issues on appeal in this matter also involve the interpretation and application of case law. While this court may not disturb a compensation judge's findings of

fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

DECISION

Injury Arising Out of and in the Course of Employment

The primary issue in this case is whether the injury sustained by the employee during the fight with Henry Combs on July 1, 1996 was an injury "arising out of and in the course of" his employment.

The term "arising out of" refers to a causal connection between the employment and the injury. The term does not refer to "causation" in the sense of a direct or proximate cause, but expresses instead an element of origin, source or contribution. Thus, "an injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." United Fire & Casualty Co., 510 N.W.2d at 244; Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, 728, 15 W.C.D. 395, 405-06 (1949). The phrase "in the course of," on the other hand, refers to the time, place and circumstances under which the injury takes place. Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). Although the "arising out of" and "in the course of" requirements express two different concepts, these requirements are not independent, but are elements of a single test of work-connection. United Fire & Casualty Co. v. Maw, 510 N.W.2d 241, 244 (Minn. Ct. App. 1994).

This case must be viewed in the context of statutory and case law principles pertaining to the compensability of an assault by a co-employee. Extensive case precedent deals with the issue of when an injury due to assault arises out of the employment. Without discussing these principles in detail, we note that an assault arises out of the employment when the provocation or motivation arises solely out of the activity of the victim as an employee. See Gibberd, supra, 424 N.W.2d 776, 40 W.C.D. 1040; Hanson v. Robitschek Schneider Co., 297 N.W. 19, 11 W.C.D. 469 (Minn. 1941). On the other hand, an injury arising from an assault which is motivated from personal reasons, and not directed against the employee as an employee or because of the employment, does not arise out of the employment. Id.; Minn. Stat. §176.011, subd. 16.

It is clear that the issue of motivation for the assault is a question of fact. Here, the compensation judge found that "the motivation for the fight arose solely from work activities." (Finding 7.) Both the employee and Mr. Combs testified that the fight was solely over the issue of payment for the employee's work. The compensation judge's finding was thus fully in accord with the substantial evidence of record.

Because it is so intertwined with the issue here under discussion, we will consider here the cross-appellant's contention that the compensation judge erred in failing to find that this

injury nonetheless fell within the so-called "personal assault" exclusion. Specifically, the cross-appellant argues that although the argument between the employee and Mr. Combs, and the physical initiation of the fight by the employee, were motivated by this work-related dispute, at some point prior to the employee's injury, Mr. Combs fought back for the "personal" reason of defending himself, and that the employee's injury accordingly should have been viewed as due to an act no longer motivated by reasons associated with the employment. Even if we were to accept an argument which depends upon a dissection of allegedly shifting motivations during the interval of a very brief and heated argument and scuffle, we conclude that such an analysis is in reality merely a proposition that despite the work-related character of an underlying confrontation, an injury resulting from a fight between two co-employees is non-compensable in any case in which the injured employee was the aggressor. Whatever merit such an approach may have from a policy perspective, such a distinction is not permissible under controlling precedent. See Petro v. Martin Baking Co., 158 N.W.2d 731, 17 W.C.D. 310 (Minn. 1953).

Although the compensation judge found that the injury arose out of the employment, she concluded that the test of whether it was sustained "in the course of" the employment was insufficiently met in this case.

Generally, an employee is within the course of employment "while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury." Minn. Stat. § 176.011, subd. 16. Because work activities are not always so clearly confined to rigidly scheduled times or clearly identifiable places, and are not always isolated from the other activities of a worker's life, there is of necessity some flexibility as to what this means in terms of time, place and activity, and a considerable body of case law has identified various so-called exceptions to the rigid construction of terms of this statute. These exceptions include the so-called "traveling employee," "special errand," "meal break," "horseplay," "parking lot," "employer-furnished transportation" and "special hazard" exceptions, among others. Each such exception has its own specific rules and the test pertaining to one may not necessarily apply in the case of another. In a very broad sense, however, the question of whether an injury was sustained within the course of the employment may be said to turn upon whether, given the specific nature of the work relationship and the work-related activity the employee engaged in at the time of injury, the circumstances of time, place and activity were ones which might reasonably have been anticipated by the employer.

In the case at hand, at the time of the injury, it is undisputed that the employee was not performing his primary work duties as a construction laborer for the employer and the anticipated hours of his workday had not yet begun. On the other hand, the work-related activity was that the employee was attempting to obtain the pay he had been promised. The receipt of pay or other forms of compensation, including benefits, is a fundamental incident of the employment relationship, and where an employee either by custom or the employer's request comes to a specified location to receive payment and sustains injury there, the injury has been found to have been sustained in the course of the employment even though it occurred outside the usual hours of work at a location where no other services were generally performed. See, e.g., Johnson v. Toro Co., 34 W.C.D. 733 (W.C.C.A. 1982); Miller v. Grue's Bakery, 26 W.C.D. 496 (W.C.C.A. 1972);

Oja v. A. Guthrie & Co., 8 W.C.D. 34 (W.C.C.A. 1933); 2 Larson's Workers' Compensation §§ 26.30 - 26.34.

On the other hand, requests for and disputes over pay or benefits may occur unexpectedly in settings in which an employer and employee coincidentally meet outside of the hours and site of work, and we do not think that the work-relatedness of the issue alone is sufficient to bring all such encounters within the scope of the workers' compensation act.

Here, there was no evidence that the employer had directed or expected the employee to come to 778 Selby, where the dispute took place, to receive payment or resolve pay issues. There was no evidence that 778 Selby was a site where the employer maintained its offices or from which payroll checks or cash payments were customarily prepared or disbursed. The employer had not requested that the employee meet him there to receive payment. Nor was there evidence that this site was by custom or request of the employer one at which the employee might be expected to seek instructions about his scheduled work activities for the day. The encounter was essentially coincidental, notwithstanding either the fact that this location was one in which tools and supplies were stored for Property Nanny, or that the employee may have anticipated that he might find the Mr. Combs there. The employee was not engaged in a work errand to obtain tools and materials at the site. As such, the encounter was no different than a chance encounter in a restaurant or public park.

The question whether the employee was within the course of his employment when he quarreled with Mr. Combs about his pay at 778 Selby is a mixed question of law and fact and here rests upon the factual findings of the compensation judge. (See Finding 5; Mem. at 6.) This was a close case and, on slightly different facts a compensable injury might have been found. The factual findings made by the compensation judge, however, are supported by substantial evidence. Under the specific factual circumstances as determined in this case, we conclude that the compensation judge did not err in finding that the employee's injury was not sustained "in the course of" his employment for Property Nanny.

Matters on Cross-Appeal

The employer has cross-appealed from the determinations that Mr. Milton was an employee of Property Nanny, Inc., that his average weekly wage was $280.00, that he was unable to return to work at his preinjury job and thus, would have met the standard for entitlement to a rehabilitation consultation, and that the so-called "assault exclusion" was inapplicable.

We have already briefly addressed the cross-appeal from the denial of a "personal assault" exclusion. Our affirmance of the finding that the employee's injury was not sustained in the course of his employment with Property Nanny is dispositive of the employee's claim of entitlement to workers' compensation benefits, we do not reach the remaining issues raised on cross-appeal, which are accordingly moot.