IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

LUMBERMENS MUTUAL CASUALTY INSURANCE COMPANY and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.	)	
Plaintiffs/Appellants,	)	**SHELBY COUNTY**
VS.	)	**HON. D'ARMY BAILEY, JUDGE**
WILLIE GWEN SMITH,	)	
Defendant/Appellee.	)	**No. 02S01-9511-CV-00110**

FILED

October 23, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, JUSTICE
HEWITT TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

REVERSED **CLARK, SPECIAL JUDGE**

This worker's compensation appeal has been referred to the special worker's compensation appeals panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Plaintiffs filed suit seeking a determination that defendant is not entitled to workers' compensation benefits. They appeal from the trial court's finding that she is entitled to benefits.

The only issue in this appeal is whether the injury sustained by defendant in an altercation with a fellow employee grew out of, and was incurred in the course of, her employment. We find that it was not, and reverse the judgment of the trial court.

Willie Gwen Smith ("defendant") was employed as a carton finisher in the printing department for Schering-Plough Health Care Products, Inc. ("plaintiff"). On August 3, 1993, defendant was working the 3:00 p.m. until 11:30 p.m. shift. Employees working this shift were entitled to a thirty-minute lunch break at 7:30 p.m. It was customary for one employee to agree to leave the work site and go to the cafeteria to pick up lunch for all employees on the shift. The person who volunteered for this duty was normally allowed about fifteen extra minutes in which to obtain the lunches.

Between 5:00 p.m. and 5:30 p.m. on August 3, the shift employees began planning lunch, discussing which employee would volunteer to pick up and bring back lunch that day. It is undisputed that defendant and her supervisor, Kenny Cox, exchanged remarks about picking up lunch. It is essentially undisputed that Cox asked defendant if she were going to pick up lunch that day and that defendant replied that her husband was going to bring her lunch instead. It is also undisputed that Cox's next statement was an unflattering reference to defendant's husband, and that defendant responded with an unflattering remark about Cox's wife. The witnesses differed in their testimony as to the exact language used. Defendant

testified as follows:

> Yes, it was about 5:30. Kenny Cox asked me was I going to pick up lunch, and I told him no, I wasn't, because my husband was going to pick me up some lunch. Then he proceeded to call him names, and I proceeded to call his wife names back. He knocked me down. . . .
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> * * *
>
> He asked me, Gwen, are you going to get lunch? I said, no my husband was coming to get me. He said, that little short, pea-headed "MF". I said, well, your little short black wife. He said, you don't talk about my wife, and that's when he knocked me down. I got up and said, if you can't take it you shouldn't dish it out. He grabbed me by the neck and said, bitch, I'll slap you. I said, I don't think so, and that's when the phone rang.

Kenny Cox testified as follows:

> And I walked in there and leaned on top of the cases and asked her what we were going to have for lunch, which was an everyday thing. She turned and looked at me and said, my husband is going to bring me some shrimp. Well, I told her, I said, well, you know, we like to eat shrimp too, just like that, sitting there laughing and joking and what have you. Then she turned around and told me that he wasn't going to bring me any, and I called him a little pea-headed rascal, you know, just jesting. She turned around and said, I ain't said nothing about that fat black ass wife to you. And I turned around and commented my wife is neither fat nor a black ass, like that. And I gently pushed her on the shoulder and said, girl, I don't play that mess like that.

Fellow employee Joann Hollingsworth testified as follows:

> She -- Kenny walked, up, Kenny Cox walked up and asked her was she going to go and get our lunches because at that particular time they were eating, they were both eating. They were eating cold cuts. And he said, you're filling your face, are you going to go get lunch today, she said, yes, I'm going to get the lunches today, but I think I will call my husband and ask him to bring me some shrimp. And he said, are we going to have to look at that henpecked MF out here on this parking lot today, and she said, yes, how would you like it if someone said something about your black A wife.
>
> And at that particular time he shoved her. And she composed herself and got back up. It was a stack of boxes to her left that he shoved her up against. And she composed herself and got back up. And she said, if you can't take it, then you shouldn't dish it out. And they were talking about the language that they was carrying on between one another. If you can't take it, you shouldn't dish it out. And at that time he shoved her again. And at this particular type (sic) he had his hands pressed around her neck, holding her in that

position where she couldn't get back up at that particular time.

Fellow employee Carolyn Lee testified as follows:

Q. . . . Did you hear the subject that they began to discuss just before Mr. Cox did what he did?

A. Yes.

Q. What was that subject?

A. Well, it was about going out for lunch, getting some food for lunch.

* * *

Q. And then what did you see after that -- those words were spoken?

A. After that it was some words passed and a little shoving.

Q. What did you see Mr. Cox do?

A. He shoved her. He shoved her back on the boxes.

* * *

Q. What words were passed, what words were passed?

A. Well, he had said something about her husband, called him some name. It's been so long. And she called his wife a name then, and that's when the pushing and the shoving started.

Q. Okay. The pushing and shoving started immediately after words were exchanged about the spouses?

A. Right.

Fellow employee James Pipkin testified as follows:

A. Well, we were working as usual and we were planning what we wanted to eat during this time. And so we was planning as usual, you know, kidding around like we usually do. I mean, we felt -- we got along pretty good, so we all kidded around, jived each other if that's what you want to say, and we were talking about our lunch, going to eat. So me and Kenny -- of course he was on my line at the time. We were discussing what we were going to eat, and we were still joking and playing, and Gwen, Ms. Gwen Smith, she said she would be getting the lunch, you know. So Kenny said, okay.

So then Kenny said, well, you're sure you're going to come straight back? You know that little peanut-head husband of yours, peanut-head husband of yours might catch you and not let you come

> back in time, still jiving, you know. At this time this is when the altercation happened. She sort of cursed him out of the clear blue and talked about his wife, you know, that fat so and so and so and so. That's what you need to be concerned about, like that. Kenny said, I don't play that. We're just jiving on this job. I don't play that way what you're playing.
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> . . .
>
> And so, you know, they got kind of, you know, I guess -- I don't say they were angry. Everybody else thought they were angry, but they got into a little pushing thing, and this is nothing uncommon. You know, it done happened before. And where Gwen was standing there was a stack of cases. We usually stack cases up on pallets. So this stack of cases happened to be standing right behind her, and it was right up here to her (indicating), and Kenny, he grabbed her and said, I don't play that.
>
> Q. What was he referring to?
>
> A. Talking about his wife, because he don't bring his wife, your (sic) know, to this plant, and he do (sic) not discuss his wife or his family in the plant. So when she called his wife and -- called her that big, fat black so and so and so and so, Kenny said, I don't play that stuff.
>
> Q. Is that when the altercation came about?
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> A. That's when it came. And Kenny, just playing with her at that point, he just pushed her back on the cases just a little bit. That's all that happened. Then he had a telephone call. So he went to answer the phone call, and when he was leaving she kind of pushed him in his back.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2). This court is required to make an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

Plaintiffs argue that the injuries sustained by defendant did not arise out of and were not incurred in the course of her employment, but occurred during an argument of a purely personal nature. They cite numerous cases, including Brimhall v. Home Insurance Company, 694 S.W.2d 931, 932 (Tenn. 1985) for the rule that an injury received in a fight purely personal in nature with a fellow

employee does not "arise out of" the employment within the meaning of the Workers' Compensation Act. Plaintiffs contend that the actual assault arose solely out of the exchange of unpleasant words about the workers' spouses, and that it had nothing to do with their earlier remarks about who would pick up lunch.

Defendant contends that since the injury occurred at a work station during working hours, and since the beginning of the discussion dealt with the issue of which employee would pick up lunch for fellow employees, thereby earning an extra fifteen minutes, the argument was initiated as a result of work-related problems. The only authority she cites is Jesse v. Savings Products, 772 S.W.2d 425, 427 (Tenn. 1989), a case actually determined by application of the "street risk" doctrine to infer adequate motive for a stranger's attack. That doctrine is not applicable here.

In Brimhall v. Home Insurance Company, 694 S.W.2d 931, 932-33 (Tenn. 1985), the court said:

> It is the general rule that "an injury arising from an assault on an employee committed solely to gratify his personal ill-will, anger, or hatred, or **an injury received in a fight purely personal in nature with a fellow employee,** does not arise out of the employment within the meaning of the workmen's compensation acts." 82 Am.Jur.2d Workmen's Compensation § 330, at 128 (1976) (Emphasis added). The Tennessee cases that have addressed this issue have also consistently held that where the encounter was "personal" between the parties, the resulting injuries do not arise out of and in the course of employment. See e.g., Sandlin v. Gentry, 201 Tenn. 509, 300 S.W.2d 897 (1957); Thornton v. RCA Service Co., supra; Kinkead v. Holliston Mills, 170 Tenn. 684, 98 S.W.2d 1066 (1936); Forbess v. Starnes, 169 Tenn. 594, 89 S.W.2d 886 (1936); see also W. S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961).

The trial court in making its findings called this a "close case". After careful review of all the testimony, we cannot agree with the trial court that the plaintiff's injury is compensable. Regardless which version of the events is accepted, it is clear that the physical aspect of the encounter was a result of the exchange of personal derogatory comments about the employees' spouses. The assault by Cox

was committed to satisfy his personal ill will or anger over issues purely personal in nature. Therefore it did not arise out of and in the course of employment.

Therefore, the judgment of the trial court awarding worker's compensation benefits is reversed and the case is dismissed. Costs of this appeal are taxed to the defendant/appellee, Willie Gwen Smith.

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CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

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LYLE REID, JUSTICE

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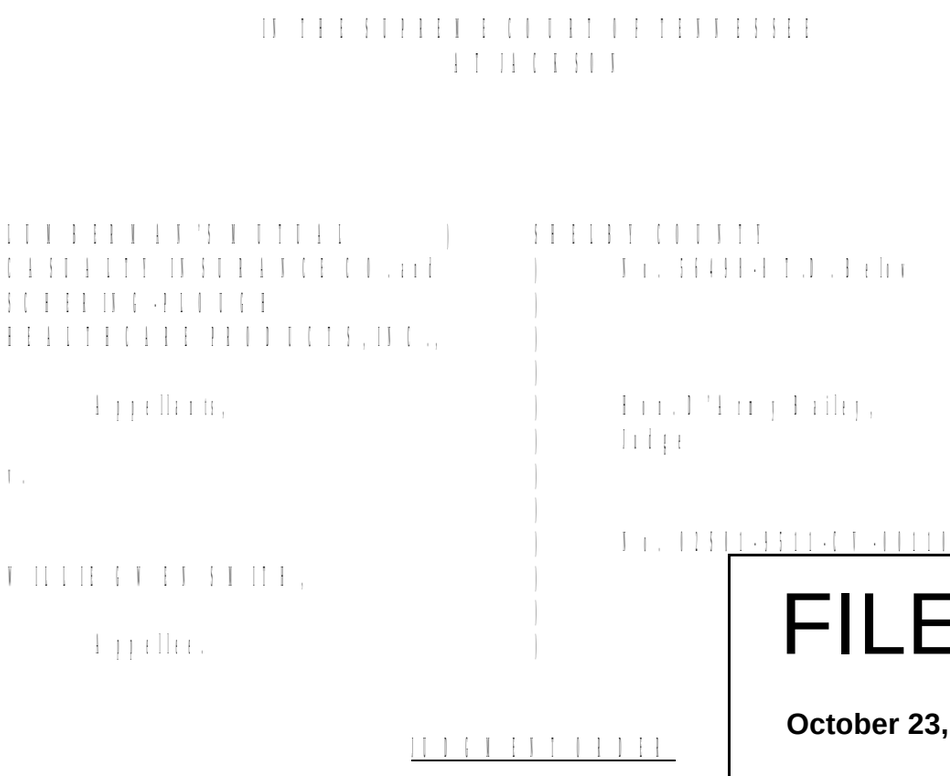
HEWITT TOMLIN, JR., SENIOR JUDGE



This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the defendant-appellee.

IT IS SO ORDERED this 23rd day of October, 1996.

PER CURIAM

Reid, J. - Not participating.