APPEAL NO. 92288

A contested case hearing was held in (city), Texas on June 1, 1992, (hearing officer) presiding as hearing officer. She determined that the assault on the respondent was based in significant part, on a job related promotion matter and concluded that it arose out of his work and occurred within the course and scope of his employment. The hearing officer awarded benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant objects in general to the hearing officer's decision and order, statement of evidence, exclusion of some witness statements, findings of fact and conclusions of law and objects to the decision and order as being improperly grounded and that it reached an improper result. Respondent's detailed reply brief addresses the thrust of the appellant's request for review.

DECISION

Finding the evidence sufficient to support the hearing officer's determinations and not finding any reversible error, we affirm.

The single issue in this case was whether or not an assault upon the respondent causing severe injury was personal in nature or whether it arose out of the course and scope of employment. The evidence established that the respondent was hit in the back of the head with an ax handle by a coworker resulting in a compound depressed skull fracture. The respondent has not been able to work since the date of the incident, (date of injury). The appellant is the workers' compensation carrier for (employer), the employer.

Our careful review of the complete record in this case discloses that the statement of evidence in the hearing officer's Decision and Order dated June 12, 1992 fairly and accurately sets forth the evidence in this case and we adopt it for purposes of this decision. In brief summary, there was evidence of some personal animosity between the respondent and (TD), the coworker who assaulted him. There had been some exchange of words between the two earlier in the evening and subsequently TD came to a "shack" where the respondent was and requested him to come outside. There was also testimony from the respondent and another coworker that TD was upset because the respondent got a promotion although TD had been an employee longer than the respondent and that TD had requested a "raise," and this was the reason behind TD's assault on the respondent. The evidence also indicated that TD and respondent did not have any relationship outside the job environment.

Without question there was some conflict and some inconsistency in the evidence; however, this was for the hearing officer to resolve. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.) The hearing officer is the sole judge of the relevance and materiality of the evidence offered and the weight and credibility to be given to the evidence. Article 8308-6.34(e), 1989 Act. Only if the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would set aside action be

appropriate. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). This is not the case before us. As the trier of fact, the hearing officer could believe or disbelieve the testimony of the respondent, an interested party. *See* Highlands Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). There is sufficient evidence to support the determination that the assault perpetrated on the respondent was a compensable injury and was directed at the respondent as an employee or because of his employment and not the sole result of personal reasons. Article 8308-3.02(4); Texas Workers' Compensation Commission Appeal No. 92246 (Docket No. redacted) decided July 27, 1992; Texas Workers' Compensation Commission Appeal No. 91019 (Docket No. redacted) decided October 3, 1991. In Nasser v. Security Insurance Co.. 724 S.W.2d 17 (Tex. 1987), the Texas Supreme Court observed that the "personal animosity" exception applies to injuries resulting "from a dispute which has been transplanted 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." The court goes on to say that "whenever conditions attached to the place of employment or otherwise incident to the employment are factors (emphasis ours) in the catastrophic combination, the consequent injury arises out of the employment."

Respondent objected to testimony or statement of witnesses offered by appellant because of a failure to comply with the discovery requirements of the 1989 Act (Article 8308-6.33) and Commission rules, Tex W. C. Comm'n., TEX. ADMIN. CODE §142.13. After lengthy argument, the hearing officer determined from the evidence, or lack thereof, offered by the parties that the appellant failed, without good cause, to provide all witness statements to the respondent in response to requests by counsel and the requirements of the act and rules. The record supports her ruling. In denying a request for a continuance requested by the appellant, the hearing officer stated that the contested case hearing record would be kept open to accept and consider statements submitted by appellant which could be established as having been previously provided to the respondent prior to his being represented by counsel. Respondent's counsel objected to the requested continuance claiming prejudice to the respondent and citing the fact that no benefits were being received. The record was kept open for the purpose of receiving statements and four such statements were subsequently considered by the hearing officer. We have reviewed those statements and the rulings of the hearing officer and, under the circumstance, do not find any error or prejudice to the appellant or any abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92007 (Docket No. redacted) decided February 21, 1992. We have considered the remaining assertions of error in the request for review and reply and do not find them to have merit.

The decision and order of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge