APPEAL NO. 93715

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act). On July 6, 1993, a contested case hearing was held. Hearing Officer determined that (decedent) was killed in the course and scope of his employment. (Carrier) appealed the hearing officer's decision. The beneficiary (claimant) of ___ did not file a response.

DECISION

Finding sufficient evidence exists in the record to support the hearing officer's decision, and no abuse of discretion by the hearing officer, we affirm.

The decedent worked as a field technician for (employer). He was murdered on ___. (Mr. B), operations foreman for employer, provided the uncontradicted and relevant information on the decedent's job with employer. The decedent was assigned to work on the (Employers) oil lease in (County 1). Usually three employees would be assigned to work out of the field house on this particular oil lease during the week. The field house, in this matter, is a small portable building. Employer would only have one employee working on the weekends on the specific portion of the lease on which the death occurred. The employer scheduled the decedent to work on Saturday, ___, and the decedent did work that day. As part of his job duties, the decedent would often work outside on the leased land or would work in a field house located on the leased land. During the normal working hours of the decedent, an unknown assailant shot and killed the decedent while he was apparently working inside the field office.

As an employee of the (County 1) Sheriff's department, (Mr. J) actively participated in the murder investigation. Mr. J stated that the sheriff's department found the decedent shot at least two, and possibly three, times in the chest and the head by a shotgun. Mr. J testified that he did not anticipate an arrest in this case. Further, after eight months of investigation, Mr. J testified at the hearing that the murder remained unsolved at that time and that there was no intelligent reason to believe an arrest would be made in this case in the foreseeable future. Mr. J stated that the FBI and the DPS had been given evidence to test. Mr. J testified that no fingerprints were recovered from the crime scene and that there was no evidence of a robbery because everything had been accounted for after the murder. After stating "everything is kind of half-way on hold," Mr. J explained that he believed everybody had been talked to and everything on everybody had been checked out. Mr. J testified that he believed the murderer went to the field office with the intent to kill, and that Mr. J leans toward this murder being premeditated because the killer covered his tracks by not leaving fingerprints, by removing the shotgun shells, and by committing the crime at a remote location. Mr. J testified that he could not form an opinion on whether

the murderer had personal animosity for the decedent.

The issue appealed is whether the decedent was killed in the course and scope of his employment. The burden of proof is on the decedent to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.- Beaumont 1976, writ ref'd n.r.e.). Section 401.011(12) defines "course and scope of employment" to mean:

> an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations.

In the present case, the facts are undisputed that:

(1) The decedent was employed as a field technician by (Employer);

(2) He worked for (Employer) on one of its oil field leases;

(3) He was working on Saturday ___, for (Employer);

(4) His murder took place during his normal working hours;

(5) His murder took place on the land leased by (Employer); and

(6) His murder occurred in an (Employer) field office.

The decedent was clearly within his job location and within his normal work hours. To prove an injury in the course and scope of employment, the Supreme Court of Texas has held that the claimant must show:

> First, the injury must have occurred while the claimant was engaged in or about the furtherance of his employer's affairs or business. Second, the claimant must show that the injury had to do with and originated in the employer's work, trade, business or profession. [citations omitted].

Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 99 (Tex. 1977). The disputed issue raised by the carrier centers on the question of whether the intentional act of a third person took place because of personal reasons and motives between the assailant and the claimant.

The 1989 Act moved the exception to an injury in the course and scope of employment from the definition of injury to be an exception to the general rule of carrier liability for benefits. Section 406.032 contains statutory exceptions which relieve an insurance carrier from liability. Section 406.032(1)(C) states:

> An insurance carrier is not liable for compensation if the injury 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.

The exceptions found in Section 406.032 of the 1989 Act are substantially the same as those found in the prior Article 8309, Section 1 (Repealed 1989). *See* Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991; Texas Workers' Compensation Commission Appeal No. 93601, decided August 31, 1993.

The carrier argues that this personal reason exception applies to the situation in the present case. The primary question is whether the injury was connected with the employment. Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850, 852 (Tex. Civ. App.-Amarillo 1958, no writ). The evidence presented by the claimant and by the carrier did not help in trying to ascertain a specific reason for the murder.

Texas Worker's Compensation Commission Appeal No. 91100, decided January 22, 1992, points out that to shift the burden of proof to the claimant, the carrier must first present probative evidence to give rise to the intentional injury exception. The carrier, citing Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, argued that the burden is on the claimant to prove that an intentional act by a third person was not personally motivated. This argument did not clearly state the rule contained in Appeal No. 92213, *supra*. Appeal No. 92213 pointed out that:

> Regarding exceptions to compensability, a finding of any of the circumstances set forth in [Section 406.032], can preclude liability even if an injury arguably occurred within the course and scope of employment. We have held that the insurance company bears the burden of proving that any of these exceptions
>
> applies, and when an issue is raised through sufficient evidence of an exception, the burden shifts back to the claimant to prove that an exception does not apply. Texas Workers' Compensation Commission Appeal No. 91029, decided October 25, 1991.

In Appeal No. 92213, the decedent was shot and killed while voluntarily attending a social luncheon with business colleagues, and the appeal pointed out that the assailant was not

an employee of the employer or of the restaurant. In the present case, the carrier argues the exception applies, but the carrier only presented speculation as to who the murderer was. The record is devoid of probative evidence of any personal reasons behind the murder. Mr. J testified only that the killer went to the office with the intent to kill the person in the office, but not the decedent specifically. Mr. J could not even speculate on whether personal animosity led to the killing.

The Supreme Court of Texas explained the purpose of the exception:

> [T]he purpose of the `personal animosity' exception is to exclude from coverage of the Act 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. [Marin]. 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. [citations omitted].

Nasser v. Security Insurance Company, 724 S.W.2d 17, 19 (Tex. 1987). In Nasser, a man, who was a former mental patient and former boyfriend of a customer eating at a restaurant, stabbed the assistant manager who would talk with the customer as part of his job duties to be nice to the customers and who had no romantic involvement with the customer. *Id*. at 18. The only connection between the assistant manager and the assailant's former girlfriend was through her visits to the restaurant as a customer, and the court explained that the only dispute, if any, arose in the workplace or connected to a duty of the employee. *Id*. at 19. No personal connection has been evidenced between the murderer and the decedent in the present case, but the murder did take place at the workplace.

Taking into consideration the intentional injury language exception, the intentional killing of an on-duty employee for the purpose of robbing the employee, is an injury sustained in the course of employment. *Id*.; Vivier v. Lumbermen's Indemnity Exchange, 250 S.W. 417, 418 (Tex. Comm'n App. 1923, opinion adopted). In Vivier, a nightwatchman was killed by a murderer whose motive apparently was to rob the decedent of his money on his person. The fact of an unknown assailant in Vivier is similar to the assault as alleged by the decedent in the present case. In Vivier the court determined the intention of the legislature was to prohibit workers' compensation benefits from such cases "where antecedent malice existed in the mind of another causing the other to follow the employee and inflict injury upon him, wherever he was to be found, or to cases where the employee by his own initiative provoked a difficulty which caused the other party to feel a `personal' interest in assaulting him." Vivier, 250 S.W. at 418.

In the present case, if the assault indeed had occurred while the decedent was on-duty, the decedent's injury would have been suffered in the course and scope of his employment and be compensable as long as the third person involved did not have any motives personal to the decedent for murdering him. In the present case, there was no evidence introduced to suggest any reasons for the assault being personal between the unknown assailant and the decedent.

Vivier discussed the fact that employment duties may create an increased exposure to common dangers, and that this fact would cause the employment to directly contribute to the injury which would then have arisen out of the employment. Vivier, 250 S.W. at 420. The Marin court explained the "positional risk" test:

With specific reference to assaults this well settled doctrine, at the very least means.

> . .that an assault arises out of the employment if the risk of assault is increased because of the nature of the work, or if the reason for the assault is a quarrel having its origin in the work. . . . Although risks of the street are dangers which an employee shares in common with the general public, if the performance of his duties make it necessary for the employee to be on the streets, the risks he there encounters are held to be incident to his employment. Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776 (Tex. 1963).

Commercial Standard Insurance Company v. Marin, 488 S.W.2d 861, 869 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e). The evidence showed that the decedent would work by himself on weekends at the remote field office location. The hearing officer determined that the remote location of the field office put the decedent at risk of being killed.

An injured employee may raise a genuine issue of material fact about the personal motivations of an intentional assault by a third person. Shutters v. Domino's Pizza, Inc., 795 S.W.2d 800, 803 (Tex. App.-Tyler 1990, no writ). To obtain a summary judgment, a carrier must prove as a matter of law that the assault did not arise from personal matters, but rather the assault was directed against the injured employee because of reasons connected with her employment. *Id*. In Shutters, the injured employee attempted to get out of the exclusive remedy of the workers' compensation laws by raising a fact issue on the personal motivations of the third party. The carrier, in the present case, raised only speculative evidence that the murder occurred because of motivations personal between the assailant and the decedent.

When reasonable inferences can be drawn from the evidence, then the need for presumptions can be avoided. Walters v. American States Insurance Co., 654 S.W.2d 423, 426. The question with an unexplained employee death becomes whether the trier of fact, upon the basis of the proven facts, made a reasonable and logical inferential leap or

whether the trier of fact's leap was too far. *Id*. In Walters, the employee was shot and killed while accompanying his employer on a business trip. The Supreme Court of Texas found that there was evidence to support the finding that the employee was killed in the course and scope of his employment. *Id*. at 426, 427. The employee followed orders and performed his duties, and the trier of fact could make the reasonable inference that the employee was present for no reason other than to do what was expected and required from his job. *Id*. at 427. In the present case, the decedent appeared from all the evidence to have only followed orders and performed his duties.

Whether an assault is personal or not is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93601, decided August 31, 1993; Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991. In the present case, the hearing officer decided in Finding of Fact No. 5 that the "DECEDENT was not killed for personal reasons." The unsolved and unexplained murder, the hearing officer found, did not fall within the exception of Section 406.032(1)(C). In determining that the murder was unexplained, the hearing officer did have sufficient evidence to support his decision because all the evidence introduced did not provide any explanation for the murder.

In the present situation, the carrier presented no evidence to prove an exception to the claimant's prima facie case that the decedent was only performing his regular duties at his usual location within his normal work hours. The carrier only presented arguments and mere opinions and speculations about any reasons for personal animosity between the unknown murderer and the decedent. The carrier argued the issue of the exception, but the carrier presented only speculation in support of the exception. If the carrier had presented probative evidence for the trier of fact, then the burden would have been on the claimant to disprove the carrier's exception by a preponderance of the evidence.

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign their testimony, and then resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; *citing* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports a fact finder's conclusions and his findings are not

against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951). The hearing officer's conclusion that the decedent was killed while acting within the course and scope of his employment is supported by sufficient evidence.

The carrier made a motion at the hearing for an indefinite continuance to allow the murder investigation to be completed. The hearing officer granted a continuance for good cause on the same argument by the carrier on March 23, 1993, and this continued the case until May 11, 1993. The hearing officer granted the claimant's motion for another continuance for good cause on April 29, 1993, and reset this case until July 6, 1993. The hearing officer denied any further continuance.

The movant has the burden of persuasion in a motion for continuance, and the rulings on a motion for continuance are within a hearing officer's discretionary authority. Gibraltar Savings Association v. Franklin Savings Association, 617 S.W.2d 322, 327 (Tex. Civ. App.-Austin 1981, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91041, decided December 17, 1991. The carrier argues that the hearing officer abused his discretion in failing to grant an indefinite continuance. We disagree. To determine if a hearing officer abused his discretion, the determination must be made whether the hearing officer acted "without reference to any guiding rules and principles." Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986, per curiam). The carrier had already been given a prior continuance to allow more time for an investigation to be completed. The carrier's request for an indefinite delay of the case was not itself a reasonable request.

The carrier argued, in the alternative, a right to re-urge its defense under Section 406.032(1)(C). The Appeals Panel has no authority under the Act to grant such a right. *See* Section 410.201 through 410.207. Further, the carrier is not left without remedy. The carrier's right to reimbursement for overpayment of death benefits, if overpaid after a decision by the Commission, should come from the subsequent injury fund after a decision by the Appeals Panel or the court of last resort. Section 403.006 and 410.205; Rules 116.11 and 116.12. The carrier would, if later it is determined that death benefits were overpaid, have a claim from the subsequent injury fund to recover the overpayment of benefits. Section 410.205(c); Rule 116.11.

The findings of fact made by the hearing officer are supported by sufficient evidence. The hearing officer's decision was not against the great weight and the preponderance of the evidence. Pool v. Ford, 715 S.W.2d 629, 634 (Tex. 1986). The hearing officer's decision to deny the carrier's request for continuance was not an abuse of discretion.

Finding no reversible error and finding sufficient evidence to support the challenged findings, we affirm the hearing officer's decision and order.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge