APPEAL NO. 991055

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 22, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury in the course and scope of employment and whether he had disability from February 12, 1999, to the date of the CCH. The hearing officer determined that claimant sustained a compensable injury and that he did not have disability from February 12, 1999, to the date of the CCH. Appellant (carrier) appeals, contending that the evidence is insufficient to support the hearing officer's determinations regarding injury and course and scope. The file did not contain a response from the claimant. The disability determination was not appealed.

DECISION

We affirm.

Carrier challenges the sufficiency of the evidence to support the hearing officer's determination that claimant sustained a compensable injury in the course and scope of employment. Carrier asserts that it is not liable for compensation because the injury arose out of an act of a third person intended to injure claimant because of a personal reason and not directed at claimant as an employee or because of the employment.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he was working on a construction site on _____. He said a man from another company (the assailant) came to his area, asked who had taken his measuring tape, and became very angry. Claimant said the assailant attacked his coworker with n metal bar. Claimant testified that he went to pick up the coworker who had been struck and was on the ground. Claimant said he did not think the assailant was angry with him, that he thought it was safe to go and pick up his coworker, and that he did not expect the assailant to strike him. Claimant said the assailant did hit him and that he injured his arm. Medical evidence indicates that claimant complained of a shoulder and neck injury and that he had various contusions. Claimant said he continued to work light duty for two months after his injury, that he then changed treating doctors, and that the new treating doctor took him off work.

Section 406.032(1)(C) provides that 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." An employee's employment may be the occasion for the wrongful act or may give a convenient opportunity for its execution. However, the general rule is that an injury does not arise out of one's employment if the assault is not connected with the employment or is for reasons personal to the victim as well as the assailant. Highlands Underwriters Ins. Co. v. McGrath, 485 S.W.2d 593 (Tex. Civ. App.-El Paso 1972, writ ref'd n.r.e.). The legislature's rationale behind this personal animosity exception was to deny workers' compensation benefits in cases in which "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 . . . ." Vivier v. Lumbermen's Indemnity Exchange, 250 S.W. 417 (Tex. Comm'n App. 1923, opinion adopted).

The hearing officer resolved the conflicts in the evidence and determined that claimant sustained a compensable injury. The hearing officer also determined that the injury was sustained because claimant is an employee and because his of employment. We will not substitute our judgment for the hearing officer's because her determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier cites Texas Workers' Compensation Commission Appeal No. 92571, decided December 4, 1992, and contends that the personal animosity exception applies. In that case, the injured employee asked another employee whether he had claimant's sunglasses and an altercation ensued over the sunglasses. The Appeals Panel affirmed the conclusion of law that the co-employee kicked the injured employee because of personal reasons and not because of the employment or because he was an employee. In that case, there was a confrontation, and thus some personal animosity created between the two involved in the altercation. In the case before us, the hearing officer could find that claimant was helping his coworker who had been injured, which, under these facts, is a reasonable action for any worker. Claimant was not involved in an altercation and, therefore, the hearing officer could find that there was no personal animosity between claimant and the assailant. The hearing officer could infer from the evidence that the assailant in this case would have attacked any worker who came to pick up the injured coworker from the ground, and that the violence was not directed at claimant for personal reasons.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge