

APPEAL NO. 992042

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 July 19, 1999. The issues at the CCH were: (1) did the claimed injury arise out of an act of a third person intending to injure (decedent) because of personal reasons, and not directed at decedent as an employee, or because of the employment, thereby relieving the appellant (carrier) of liability for compensation; (2) is the Subsequent Injury Fund (SIF) a "legal beneficiary of [decedent]"; and (3) what is decedent's average weekly wage (AWW). The hearing officer determined that: (1) decedent was assaulted by a former employee over an incident that originated or grew out of the employment; (2) decedent had no legal beneficiaries; (3) death benefits shall be paid to the SIF; and (4) decedent's AWW is \$576.92. Carrier appealed, challenging the determinations regarding compensability, personal animosity, and AWW. The respondent ("decedent's estate" or "estate") responded that the Appeals Panel should affirm the decision and order.

DECISION

We affirm.

Carrier first contends that the hearing officer erred in determining that "[o]n or about _____, decedent was assaulted by a former employee over an incident that originated [in] or grew out of the employment." Carrier asserts that the evidence shows that the assault took place because of personal animosity that "arose from a work relation," but that the injury did not arise from the employment. Carrier notes that Mr. G was "fired," that there was a burglary, and then an altercation. Carrier argues that the personal reason for the attack was that decedent reported to the police that Mr. G was the burglar, and that this was not connected to the employment.

The record indicates that decedent was the president of a business that builds basketball goals and stadiums for schools (employer). Mr. G was an employee who worked for decedent. Decedent's office for the business was in his home. The record reflects that on or about _____, Mr. G assaulted decedent at his home and that decedent died of head injuries on _____. In a signed, transcribed statement, Mr. G stated:

I have worked for [decedent] in the past. . . . Me and [decedent] were working a job in [City A] and got into an argument. [Decedent] was making me look like a fool in front of the people there at the school there [sic]. [Decedent] wound up leaving me in [City B] and I had to walk all the way to [City C]. I quit working for [decedent].. . . I . . . did some side jobs for him after that but I never went back to work with him full time. . . . I had broke into [sic] [decedent's] house back about two or three weeks ago, and took

[shotguns and rifles]. I had taken the rifles to get back at [decedent] for leaving me to walk from [City B].

Mr. G then stated that decedent grabbed his throat after accusing Mr. G of the burglary. Mr. G said he hit decedent in the head with a rifle. A police "officer narrative" states that Mr. G told (Officer S) and (Officer B) that Mr. G "claimed that he had done the burglary for [decedent] having left him without transportation near [City B]. [Mr. G] had to walk a long distance and vowed that he would get back at [decedent]."

In her decision and order, the hearing officer stated that Mr. G was a disgruntled former employee and that:

[T]he injury originated in or grew out of the former employee's vow to get back at decedent for an incident arising out of the employment ("to get back at [decedent] for leaving me to walk from [City B]").

Section 406.032 provides as follows in relevant part:

An insurance carrier is not liable for compensation if:

- (1) the injury:
 - (C) 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 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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 of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

There was no testimony at the CCH. The record included medical records, police records, and criminal records regarding the assault on decedent. It is not clear why Mr. G assaulted decedent. In such a situation, determining the reason for the assault is a question of fact for the hearing officer. See Texas Workers' Compensation Commission Appeal No. 951223, decided September 8, 1995. The hearing officer determined that the assault took place as a result of the employment. See Texas Workers' Compensation Commission Appeal No. 951663, decided December 1, 1995. We do not find that the great weight of the evidence is contrary to the hearing officer's determination that the assault originated in or grew out of the employment. Accordingly, we perceive no error in the determination that decedent sustained a compensable injury that resulted in his death.

See Texas Workers' Compensation Commission Appeal No. 960235, decided March 25, 1996.

Carrier contends that Mr. G was "mad in general" and that the assault was not related to the employment, citing New Amsterdam Casualty Co. v. Collins, 289 S.W.2d 701 (Tex. Civ. App.- Galveston 1926, writ ref'd). The court found that the assailant was angry with the claimant in that case, but that the shooting was not because of the employment. In this case, the hearing officer considered the facts and determined that Mr. G's assault on decedent was an outgrowth of the incident regarding decedent leaving Mr. G in City B. From the evidence, the hearing officer could find that the employment was a contributing factor to the assault. United States Casualty Co. v. Henry, 367 S.W.2d 405 (Tex. Civ. App. - Waco 1963, writ ref'd n.r.e.). We perceive no error.

Carrier next contends the hearing officer erred in determining that decedent's AWW is \$576.92. Carrier asserts that the hearing officer should have calculated the AWW based on decedent's actual earnings during the applicable 13-week period. It asserts that the estate had decedent's financial records and had the burden of establishing the AWW.

In an August 4, 1999, letter, the attorney for carrier stated that carrier had received only the decedent's 1996 tax return and that the estate did not provide any evidence of the wages earned by the decedent during the applicable 13-week period. The decedent's 1996 tax return states that he earned wages of \$30,000.00. In its brief, the attorney for the estate stated that the income reflected on the 1996 tax return included a portion of the applicable 13-week period, since decedent was injured and died in _____. The tax return stated that decedent was self-employed and the attorney for the estate represented that decedent was the sole owner of his business. From the record, the hearing officer could determine that decedent's AWW is \$576.92 by using the "fair, just and reasonable" method of Section 408.041(c). The hearing officer arrived at the \$576.92 by dividing the \$30,000.00 in income by 52 weeks.

Normally, the "claimant" has the burden to establish the AWW. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. In this case, there were no eligible beneficiaries or claimants for death benefits, although the estate sought the payment of medical and burial expenses regarding decedent's injury and death. The parties stipulated to the amounts of these bills.

It is reasonable for the hearing officer to consider that there was likely no "same or similar" employee and that there was no evidence of a "usual wage" in this case, given the fact that decedent was self-employed and the president of his business. The hearing officer could also consider that decedent likely controlled his own business records. No evidence of decedent's exact earnings during the applicable 13-week period was before the hearing officer. We conclude that the hearing officer's AWW determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer=s decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge