APPEAL NO. 000681

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 February 29, 2000, with the record closing on March 10, 2000. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____, while in the course and scope of his employment; (2) claimant had the normal use of his mental and physical faculties at the time of the incident; (3) claimant was injured by a third party and the attack was directed at claimant as an employee or because of his employment; and (4) claimant had disability from November 12, 1999, to the date of the CCH. The appellant (carrier) appeals the determinations regarding course and scope, intoxication, and personal animosity on sufficiency grounds. The file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends that the hearing officer erred in determining that claimant was not in a state of intoxication on the night of _____. Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury.

The hearing officer set forth the facts of this case in the decision and order. Briefly, claimant testified that he was out of town working in another city for employer and that he and other workers were staying at a motel. Claimant received a per diem of $50.00 and that he and Mr. B, another employee, were sharing a room to save money. Claimant said he left work around 5:30 p.m., that he went to eat and watched television in the room until around 10:00 p.m. Another employee asked him to go to a bar and get a drink, and claimant went for about one hour and consumed two and one-half beers. Claimant testified that Mr. B was at the bar. Claimant said he went back to the motel, that there was a note on his bed that said, "Just so you know I know," and that soon after he read the note, Mr. B came in and threatened him. Claimant said Mr. B attacked him and that his compensable injury was to his knee, for which he later had surgery. Claimant said he thought Mr. B might be angry with him because Mr. B was angry with Mr. P, another coworker, but that he did not know why Mr. B would be angry. Mr. B testified that he wrote the note because he knew claimant and Mr. P were talking about Mr. B and "[his] work." Mr. P testified that he indicated to Mr. B that Mr. B had not been digging in the right area at work, and Mr. B became upset. Claimant testified that when he saw Mr. B in the bar, he was saying threatening things regarding Mr. P. Mr. B also testified that another reason he wrote the note is because he wanted to let claimant know he knew claimant was smoking marijuana in the room. Claimant denied smoking marijuana and said that he has passed all of employer=s routine drug screens.

Claimant testified that he had eaten before he went to the bar for about one hour. The hearing officer determined that claimant did not drink more than two and one-half beers. Claimant said he was not "drunk" at the time of the incident and the hearing officer determined that claimant had the normal use of his mental and physical faculties. There was no blood alcohol test result in the record. There was evidence to the contrary regarding whether claimant appeared intoxicated; however, the hearing officer heard the evidence in this regard and determined what facts were established. Whether claimant was intoxicated at the time of the injury presented the hearing officer with a question of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, he resolved the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer apparently found claimant=s testimony to be credible. As an appellate reviewing body, we will not disturb the challenged factual findings because they are 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).

Carrier contends the hearing officer erred in determining that Mr. B attacked claimant as an employee or because of the employment. Carrier asserts that the fight occurred because of personal reasons. Section 406.032 provides that an insurance company 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. Whether an injury was due to an assault motivated by a personal reason was a question of fact for the hearing officer to decide. *See* Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997.

In this case, there was evidence that Mr. B thought claimant and Mr. P had been talking about him and his work. There was evidence that Mr. P had criticized Mr. B=s work, that Mr. P had gone to a supervisor, and that Mr. B was upset about this. The hearing officer could find from the evidence that claimant was injured not because of personal reasons but as an employee or because of the employment. We conclude that the hearing officer=s determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Carrier contends the hearing officer erred in determining that claimant sustained an injury in the course and scope of his employment. Carrier asserts that it was claimant=s personal choice to stay at the motel and to share a room with Mr. B. In this case, the hearing officer could find that claimant was out of town in order to work for employer and that he stayed at a motel for this reason. The hearing officer could determine that, as claimant was getting ready for bed in the motel room, he was attacked and injured. From this evidence, the hearing officer could conclude that there was no deviation from the course and scope of employment at the time of the injury. *See* Texas Workers= Compensation Commission Appeal No. 000229, decided March 23, 2000. This was a fact issue for the hearing officer to consider. We have reviewed the evidence and we conclude that the hearing officer=s determinations are not so

against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer=s decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge