

APPEAL NO. 001557

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 18, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) was not in the course and scope of employment when he was injured on _____ (all dates are 2000), and that the claimant had no disability. The claimant appeals, contending that he did not curse his assailant and that his injury is work related. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The appeals file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The claimant was employed as a sanitation worker, driving a truck and "throwing trash." On _____, prior to beginning his route, the claimant was at work talking to one of the supervisors when a coworker came up and said words to the effect of "What's up boy?" The claimant took offense at the word "boy" and the exchange escalated. Two supervisors attempted to separate the claimant and the coworker but the coworker got away and shoved the claimant to the floor, allegedly causing the complained-of injuries. What was said to whom and whether curse words or racial epithets were used is in dispute. The hearing officer found that the "Claimant was not in the furtherance of the affairs of the Employer in that Claimant was shoved for personal reasons as the result of using curse words regarding family members of the assailant." (Finding of Fact No. 1D which actually should probably be Finding of Fact No. 2.)

Section 406.032(1)(C) provides that a carrier is not liable for compensation if 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 hearing officer found that the claimant was shoved for personal reasons as a result of using curse words regarding family members of the assailant. The hearing officer is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. Section 410.165(a).

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Because we are affirming the hearing officer's decision that the carrier is not liable for compensation pursuant to Section 406.032(1)(C), the claimant is not entitled to disability.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge