

APPEAL NO. 011896
FILED OCTOBER 2, 2001

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 July 17, 2001. The appellant (carrier) appeals the hearing officer's determinations that the respondent (claimant) sustained a compensable injury on _____; that the injury was not caused by the claimant's willful intention to injure another person, relieving the carrier of liability for compensation; that the carrier waived the right to contest the injury on the basis of "no injury" as a result of its failure to do so; and that the claimant has disability beginning on January 5, 2001, and continuing through April 22, 2001. The claimant has filed no response.

DECISION

Affirmed.

Section 406.031(a) of the 1989 Act provides that an employer's insurance carrier is liable for compensation if the injury arises out of the course and scope of employment. Certain injuries, however, are expressly excluded from coverage. These include an injury caused by the employee's willful attempt to injure himself or to unlawfully injure another person. Section 406.032(1)(B).

Whether a claimant was acting in the course and scope of his employment when he received an injury is a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. Civ. App.-El Paso 1981, no writ). In the case before us, the hearing officer was confronted with conflicting testimony. A disagreement arose out of the manner of doing work and a fight ensued between the claimant and a coworker. The claimant testified that his coworker was the aggressor, and the hearing officer determined that the coworker attacked the claimant over an employment-related issue. The issue was purely one of credibility, and the hearing officer's ultimate resolution of this conflict is supported by the evidence. The carrier's side of the case is not without support; however, we cannot say that such evidence so outweighs the contrary evidence that it requires the hearing officer's decision to be reversed.

In general, the carrier is limited to and bound by the grounds set forth in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) it files unless the new defense is based on newly discovered evidence. Section 409.022(b); Texas Workers' Compensation Commission Appeal No. 960949, decided June 28, 1996. The hearing officer was therefore faced with analyzing whether the carrier was limited in offering other defenses to the claim. The hearing officer specifically relied upon Texas Workers' Compensation Commission Appeal No. 990724, decided May 24, 1999, wherein the Appeals Panel concluded that the carrier was limited in its right to contest compensability to the specific grounds set forth in the TWCC-21. The carrier in Appeal No. 990724 asserted the defense of intoxication, essentially agreeing that an injury had

occurred but availing itself of the Section 406.032(1)(A) exception to liability when the employee was injured while intoxicated. Likewise, in this case, the carrier has asserted the specific exception found in Section 406.032(1)(B), arguing that the carrier is relieved of liability because the injury was caused by the claimant's attempt to unlawfully injure another person. The hearing officer was properly applying our precedent in Appeal No. 990724 when he determined that the carrier waived the right to contest the injury on the basis of "no injury," and we discern no error in that determination.

The hearing officer resolved the conflicting testimony and medical opinions that were provided by determining that the claimant was injured and had disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer's decision on the injury and disability issues is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **FIREMAN'S FUND INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**DORTHY C. LEADERER
1999 BRYAN STREET
DALLAS, TEXAS 75201.**

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge