APPEAL NO. 040798
FILED MAY 28, 2004

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 March 3, 2004. The hearing officer determined that the respondent (claimant) sustained a compensable injury (as defined in Section 401.011(26)), on _____; that the claimant had disability from August 14 through September 29, 2003; and that the appellant (carrier) is not relieved of liability based on the personal animosity exception of Section 406.032(1)(C).

The carrier appealed, contending that the personal animosity exception did apply (based on the claimant's own testimony); that the hearing officer erred in failing to properly apply the exception; that the period of disability was not supported by medical evidence; and that the hearing officer erred in admitting certain claimant's exhibits. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant, a warehouse man, testified that he was filling out paperwork by his forklift when he was assaulted and struck in the back by KF, a coworker. KF, in a recorded statement, denies striking or assaulting the claimant. The incident was not witnessed but there was objective medical evidence of bruising and an injury as defined by Section 401.011(26). It is undisputed that about a month prior to the incident at issue the claimant and KF had a disagreement and verbal confrontation about removal of a bulletin board item and that about a week or two prior to the incident at issue there had been a forklift bumping incident where both the claimant and KF were given warning letters. There is no evidence that the claimant and KF socialized or had nonwork-related issues.

The carrier cites Texas Workers' Compensation Commission Appeal No. 001802, decided September 15, 2000, as being controlling in this case. In Appeal No. 001802, *supra*, two workers had a work related dispute and after an hour of muttering and taunting each other they "left the house to challenge each other and to finally engage in a fight" where one worker was injured. The hearing officer, in that case, applied the personal animosity exception and the Appeals Panel affirmed. We distinguish Appeal No. 001802, from the instant case on its facts.

The carrier contends that once the exception of Section 406.032(1)(C) is raised through sufficient evidence, the burden of proof shifts to the claimant to prove the exception did not apply. While we do not disagree with that general proposition the hearing officer commented that there was "no probative evidence . . . to conclude that the co-employee injured the Claimant for a personal reason" and found (in Conclusion

of Law No. 5) that the carrier "has not raised a defense to liability under the personal animosity doctrine in [Section] 406.032." The carrier's contention of "overwhelming evidence" to the contrary notwithstanding, the hearing officer's determination is supported by sufficient evidence. When considering all of the claimant's testimony in context and viewed as found by the hearing officer, it is clear that the claimant's position was that he did not know why KF hit him.

The carrier contends that the hearing officer erred in admitting certain of the claimant's exhibits. It is true that the carrier timely objected to the exhibits at the CCH on both a lack of timely exchange and relevancy basis. After some discussion regarding the relevancy basis the hearing officer overruled the objection on relevancy. The hearing officer did not rule on the lack of timely exchange and the carrier did not renew its objection or request a ruling on the lack of timely exchange objection, thereby failing to preserve its objection on appeal. In any event, our review of the challenged exhibits indicates marginal relevance and does not meet the standard of Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ) to require a reversal.

The carrier challenges the disability period on the ground that the medical report had a prospective return to work (which the hearing officer accepted). The doctor's report dated September 16, 2003, under the heading of "PLAN," has "2. Return to work on the 29th." We further note that the Work Status Report (TWCC-73) in Part II allows a doctor to list a prospective return to work date. The hearing officer did not err in accepting the September 29, 2003, return to work date as an end date to disability.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not incorrect as a matter of law and 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).

We affirm the hearing officer's decision and order.

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

VAN WAGNER COMPANY
1100 JUPITER ROAD, SUITE 121
PLANO, TEXAS 75074.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Edward Vilano
Appeals Judge