APPEAL NO. 962472

On September 30, 1996, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether the appellant (carrier) timely contested the compensability of the respondent's (claimant's) injury; (2) whether the injury was caused by the claimant's wilful attempt to injure himself or to unlawfully injure another person; (3) whether the injury occurred while the claimant was in a state of intoxication; (4) whether the claimant sustained an injury to his right knee on _____; and (5) whether the claimant had disability resulting from the injury sustained on _____. There is no appeal of the hearing officer's decision that the carrier timely contested compensability of the injury and that the injury did not occur while the claimant was in a state of intoxication. The carrier requests review of the hearing officer's decision that the injury was not caused by the claimant's wilful attempt to injure himself or to unlawfully injure another person, that the claimant sustained an injury to his right knee on _____, and that the claimant had disability from the injury sustained on _____, from June 15, 1996, to the date of the CCH. The claimant requests affirmance.

DECISION

Affirmed.

Prior to _____, the claimant and the claimant's foreman had had several disagreements over the way work was to be done. On _____, the claimant was in a ditch cutting PVC pipe. The foreman told the claimant how to cut the pipe. The claimant told the foreman that the pipe could not be cut in that manner. The foreman said he would show the claimant how to cut the pipe and jumped into the ditch. The claimant said the foreman grabbed his arms and attacked him and that he, the claimant, defended himself by punching the foreman in the face and putting him in a headlock or chokehold. Another worker told the claimant to let go and he did. The foreman then picked up a hammer and hit the claimant in the head and the neck. The claimant initially testified that he was uncertain if he was also struck in the right knee, but later testified that the foreman hit him in the right knee with the hammer. One witness said the claimant's left knee was hit and another witness said the claimant's knee was hit, but did not state which knee. The claimant was taken to a hospital on _____ where he was diagnosed as having a closed head injury, a head contusion, and cervical muscle spasm. The claimant said he felt right knee pain on June 15th and that on June 16th his right knee collapsed while stepping off of a step at home. On June 17th he went to a hospital and was diagnosed as having a right knee sprain. The claimant testified that he has been unable to work since _____ because of injuries suffered during the fight with the foreman on that day. The foreman testified that the claimant started the fight and that he, the foreman, was defending himself. The foreman also said he had no relationship with the claimant other than their work. One witness testified that it was a "mutual" fight when he was asked who the aggressor was. Another witness stated that the claimant started the fight. Another

witness said he could not tell who hit who first, but he saw the claimant raise his hands first. Three witnesses said that the claimant told them on June 17th that he had injured his knee at home.

Section 406.032(1)(B) provides that a carrier is not liable for compensation if the injury was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person. That exception was an issue at the CCH and the carrier contends that the evidence supports the application of the exception. The hearing officer found that the claimant's injury of _____, was not caused by the claimant's wilful attempt to injure himself or to unlawfully injure another person. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. There is no evidence that the claimant tried to injure himself. As the fact finder, the hearing officer could believe the claimant's testimony that he was defending himself against an attack by the foreman over the foreman's contrary testimony. In addition, there is evidence from the claimant's testimony that he had ceased fighting when he let the foreman out of the headlock or chokehold and that the foreman attacked him with the hammer at that point and that that is when he incurred his injuries. We conclude that sufficient evidence supports the hearing officer's findings and that the findings are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Section 406.032(1)(C) provides that a carrier 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. The carrier contends in its appeal that this exception applies to the facts of this case. However, what the courts have referred to as the "personal animosity" exception was not an issue at the CCH and thus the hearing officer made no findings on that exception. At the CCH, the carrier did not contend that the personal animosity exception applied as it does in its appeal. Since the personal animosity exception was not an issue at the CCH, we will not consider it for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. We note that there is ample evidence that the altercation between the claimant and the foreman arose out of the manner in which the claimant was performing his work and was not due to personal reasons.

With regard to the issue of whether the claimant sustained an injury to his right knee on _____, the hearing officer found that the claimant sustained an injury to his right knee in the course and scope of his employment on _____. There is conflicting evidence on which of the claimant's knees, if any, was hit with the hammer on _____. The hearing officer resolved the conflict in the evidence in favor of the claimant. The claimant's testimony was somewhat inconsistent on this issue and there

were witnesses who gave testimony contrary to the claimant's testimony. When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). As previously noted, there is evidence that the fight between the claimant and the foreman arose out of the manner in which the claimant was performing his work. In Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289 (Tex. App.-Houston [14th Dist.] 1984, no writ), the court stated that "[w]here an employee is injured in a personal difficulty arising over the manner in which his work is being done, although the difficulty itself is not a part of the work of the employee, such injury is compensable under the act." We conclude that sufficient evidence supports the hearing officer's finding on the right knee injury and that that finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The carrier contends that the injury suffered by the claimant on _____ was not in the course and scope of employment because the claimant testified that, before the foreman jumped into the ditch, he, the claimant said he was leaving and that he was "out of here." The carrier states that those words show that the claimant voluntarily quit employment before the fight started. The carrier made no such argument at the CCH. The claimant's words are ambiguous. He may have simply meant that he was intending to leave work for the day and not intending to terminate his employment. In any event, the evidence reflects that the claimant was still in the ditch when the fight started, the fight was over the manner in which the claimant was doing his work, and the owner of the company testified that although the claimant has not shown up for work following the _____ altercation, except for going to the office on June 17th, he believes the claimant is still an employee. In addition, it has been stated that "it is not required that the injury should have occurred during the hours of actual service . . . ." Insurance Company of North America v. Estep, 501 S.W.2d 352, 354 (Tex. Civ. App.-Amarillo 1973, writ ref'd n.r.e.). We conclude that the carrier has not shown that the hearing officer erred in determining that the claimant was injured in the course and scope of his employment.

It has been held that in workers' compensation cases the issue of disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The claimant testified that he has been unable to work since his injury of _____, that his knee still collapses, that the doctors at the veterans administration hospital still have him off work, and that the doctors have told him he may have a tear of the medial meniscus of the right knee. The hearing officer found that the claimant was unable to obtain and retain employment as a result of his injury of _____, from June 15, 1996, to the date of the CCH. We conclude that sufficient evidence supports the hearing officer's finding on disability and that that finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge