APPEAL NO. 971051

This appeal after remand 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 January 22, 1997. The issues at the CCH were: (1) whether respondent (claimant) sustained an injury in the course and scope of employment; (2) whether the claimed injury arose out of an act of a third party intended to injure claimant because of personal reasons and not directed at claimant as an employee or because of his employment; (3) whether claimant had disability; and (4) what is claimant's average weekly wage (AWW). In the first decision and order, the hearing officer determined that claimant sustained a compensable injury and had disability, but that the claimed injury did not arise out of an act of a third party intended to injure claimant as an employee or because of his employment, so appellant (carrier) was relieved of liability. The hearing officer also determined that claimant's AWW was $409.00. In the first appeal, claimant was the appellant, and he contended that the hearing officer erred in determining that the assault by the third party did not arise out of the act of the third party intended to injure claimant as an employee or because of his employment. Claimant also challenged the determination that the "claimed injury arose out of the act of the third person intended to injure claimant because of personal reasons and not directed at claimant as an employee or because of his employment." The Appeals Panel noted that, in the first decision and order, Finding of Fact No. 6 and Conclusion of Law No. 4 conflicted with Findings of Fact Nos. 4 and 5. The Appeals Panel reversed Finding of Fact No. 6 and Conclusion of Law No. 4 and remanded the case to the hearing officer for reconsideration of the liability of carrier. In a decision and order after remand, the hearing officer determined that: (1) claimant was assaulted while in the course and scope of his employment; (2) the assault arose out of a quarrel between claimant and the third party, Mr. G, having its origin in claimant's work; and (3) claimant sustained a compensable injury while in the course and scope of employment on _____. On appeal after the second decision and order, carrier contends that: (1) the hearing officer abused her discretion in failing to consider four exhibits; (2) the hearing officer erred in failing to convene a CCH after remand; (3) Finding of Fact No. 6 is against the great weight and preponderance of the evidence; and (4) the hearing officer's findings and conclusions conflict. Claimant did not respond on appeal.

DECISION

We affirm.

Carrier first contends that the hearing officer erred in failing to convene a CCH after remand and in failing to permit additional argument. Carrier asserts that a letter from the Director of Hearings states that a second CCH would be held. Remand of a decision for a specific purpose will not always necessitate a full and complete development of more evidence. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996. The remand statute, Section 410.203(b)(3), does provide for a remand back to the hearing officer for further consideration and development of the evidence.

Where the error is one of a legal nature rather than one in which evidence is incomplete or has been wrongfully excluded, we do not believe that there would be error in holding that a "hearing" meeting the requirements of due process could be satisfied by the simple provision of an opportunity for the parties to respond to the Appeals Panel decision and to assert new closing arguments or motions for leave to submit new or clarifying evidence. Appeal No. 960054. In this case, the error was one of a legal nature and the Appeals Panel remanded the case to the hearing officer to reconsider the legal issues in light of the evidence developed at the CCH and to reconcile any conflicts in the findings and conclusions. The Appeals Panel did not remand the case to allow either party a "second bite at the apple" or to develop additional evidence. The parties had ample opportunity to develop evidence at the CCH. We perceive no error in this case.

Carrier asserts that the hearing officer erred in refusing to admit or consider four exhibits that it attached to its appeal after remand as an "appeals panel exhibit." The hearing officer did not list the exhibits on the first decision and order. At the CCH, claimant objected to the admission of the exhibits, consisting of several photographs, on the ground that these exhibits had not been exchanged. The hearing officer instructed carrier to send copies of the exhibits to the field office and to claimant. She also instructed claimant to send any written objections to the hearing officer. In a January 26, 1996, letter, carrier tendered the four exhibits for the hearing officer's consideration. In the letter, carrier explained that it had not exchanged the exhibits because it saw them for the first time at the CCH when Mr. G brought them. It noted that a subpoena was issued for Mr. G to appear at the CCH. The hearing officer thereafter signed the September 4, 1996, decision and order (the first decision and order).

To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, carrier did not explain why it could not have taken photographs of Mr. G's clothing and hard hat and of the road signs in question. Carrier also did not explain why it did not contact Mr. G before the CCH in order to inquire about obtaining evidence from him. Accordingly, the hearing officer could have determined that carrier was not diligent in investigating and obtaining the photographs in question and exchanging them and, thus, that the exhibits were not admissible. Even assuming that the hearing officer abused her discretion in refusing to consider the exhibits, we perceive no error. Mr. G testified that the road was closed, that there were signs and barricades, that claimant stabbed him, and that he was wearing a hard hat. We conclude that the exclusion of the exhibits was not reasonably calculated to cause nor did it probably cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided October 8, 1992. We find no abuse of discretion and perceive no reversible error. Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992.

Carrier contends that the hearing officer's revision of Finding of Fact No. 6 is not

supported by the evidence. Carrier contends that the Appeals Panel never "directed" the hearing officer to find in claimant's favor and that the hearing officer should have merely resolved the conflicts in the findings of fact. In the first decision and order, the hearing officer entered the following fact finding:

FINDING OF FACT

6. The assault and injury to claimant did not arise out of an act by [Mr. G] intended to injure claimant as an employee or because of claimant's employment.

In the decision and order after remand, the hearing officer determined as follows:

FINDING OF FACT

6. The assault and injury to claimant arose out of a quarrel between claimant and [Mr. G] having its origin in claimant's work.

In resolving the fact findings and conclusions of law, the hearing officer necessarily had to reconsider the legal issue of whether claimant sustained a compensable injury for which carrier was liable. In this case, there was evidence that claimant was driving between his employer's service centers. Therefore, there is evidence from which the hearing officer could find that claimant was furthering his employer's business as he drove. Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995. Claimant's alleged failure to drive on certain roads or in a certain manner does not necessarily mean the resultant injury is not compensable. Texas Workers' Compensation Commission Appeal No. 92169, decided June 17, 1992. We perceive no error in the hearing officer's resolution of this fact issue and determination that claimant sustained a compensable injury.

Carrier contends that claimant's employment had nothing to do with his driving on a closed road. However, the hearing officer found that claimant was acting in the course and scope of his employment. Claimant testified that he was driving between service centers and there was nothing to indicate that claimant was performing a personal errand. Carrier contends that driving down a closed road was not related to claimant's employment but was a personal decision, citing Texas Workers' Compensation Commission Appeal No. 94780, decided August 5, 1994. However, the hearing officer could and apparently did find that claimant's decision to drive down the road he chose, whether or not it was closed, was related to his work because he was driving in between service centers. There was no evidence that claimant and Mr. G knew each other or that there was personal animosity between them. The hearing officer could and did find that the animosity arose out of the manner in which claimant was performing his work (driving). Whether there was any personal motivation was a fact question the hearing officer answered in claimant's favor. We will not substitute our judgment for that of the hearing officer because the determination in question is 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 asserts that the personal animosity doctrine involves an exception to liability and not an exception to course and scope. Carrier contends that, therefore, the hearing officer's findings and conclusions in the first decision and order did not conflict. The personal animosity doctrine does create an exception to liability. Section 406.032(1)(C); Appeal 94780, *supra*. The hearing officer's findings and conclusions did conflict in that the hearing officer apparently found both that claimant was driving in furtherance of his employer's affairs and also that he was injured because of personal reasons that were not clear. Claimant's evidence showed that he was assaulted not for personal reasons, but because of the manner in which he performed his work; the attack was directed at claimant because of his driving, which was for work reasons. Accordingly, the Appeals Panel reversed and remanded for resolution of the perceived conflict.

Carrier asserts that the evidence shows that Mr. G was assaulted by claimant and that claimant did not assault Mr. G. Carrier contends that the Appeals Panel should consider "appeals panel exhibits A and B" and requests that the Appeals Panel either reverse and remand or reverse and render a decision in its favor. We have reviewed the evidence in this case 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*. Regarding the Appeals Panel's consideration of the attached exhibits, we have already addressed this issue.

Carrier also asserts that claimant entered a plea of "no contest" in related criminal proceedings and that, in a civil suit brought by Mr. G against claimant, Mr. G prevailed. These court cases referenced at the CCH involved different issues, a different legal standard, and a different fact finder. The outcome of any court proceeding does not require the hearing officer to make any certain findings but is merely evidence that she may consider in making her determinations.

Carrier next contends that Findings of Fact Nos. 4, 5, and 6 are inconsistent and do not support Conclusions of Law Nos. 2 and 3. Findings of Fact Nos. 4 and 5 and Conclusions of Law Nos. 2 and 3 are set forth below. Finding of Fact No. 6 is set forth above.

FINDINGS OF FACT

4. On or about _____, claimant was assaulted while in the course and scope of employment and suffered an injury to his neck, left elbow and depression as a result of the assault.

5. Claimant was assaulted by the foreman on a construction project for allegedly driving on a road which was under construction and not open to traffic.

CONCLUSIONS OF LAW

2. Claimant sustained a compensable injury while in the course and scope of employment on _____.

3. The claimed injury did not arise out of the act of a third person intended to injure claimant because of personal reasons, rather the act was directed at claimant as an employee or because of his employment. Therefore, carrier is not relieved of liability for compensation.

Carrier asserts that claimant was not in the course and scope of his employment because he was driving down a road that was alleged to be closed. The fact that claimant might have driven in a manner for which he might have received a traffic ticket does not automatically mean he was not in the course and scope of his employment. Again, the hearing officer determined that claimant was in the course and scope of his employment and we conclude that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. The remainder of carrier's assertions under this point of error have been addressed in this decision.

We affirm the hearing officer's decision and order.

_____
Judy L. Stephens
Appeals Judge

CONCUR:

_____
Christopher L. Rhodes
Appeals Judge

CONCUR IN RESULT:

_____
Joe Sebesta
Appeals Judge