APPEAL NO. 001802

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 July 5, 2000. With regard to the issue before him, the hearing officer determined that the appellant's (claimant) _____, injuries are not compensable, as not having been incurred in the course and scope of his employment.

The claimant appeals, contending that a quarrel and ensuing fight and injuries had its origins in and arose out of the claimant's employment in the installation of "an expensive Jacuzzi tub" (tub) and should therefore be compensable. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The parties stipulated that the carrier had accepted liability for the claimant's injury; however, the respondent (employer) has contested compensability pursuant to Section 409.011(b)(4) and urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

This is a "personal animosity" case. Personal animosity has its basis in Section 406.032(1)(C) which 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[.]

In this case, the claimant was employed as a plumber by the employer plumbing contractor. Seven witnesses, including the claimant, testified and there are contradictions in the testimony and various transcribed statements with many of the facts being in dispute. It is not disputed that the claimant and PW, another coworker plumber, had a history of arguments from other jobs and "had problems working together." On the morning of _____, the employer had a job installing two tubs in a home. The claimant was soldering some pipes and was upset because PW had set one of the tubs too close to where the claimant would be soldering. The claimant refused to solder a connection because the tub was in the way. A third plumber, BW, also a plumber employed by the employer, was on site and moved the tub or helped the claimant move the tub. Exactly what happened next is somewhat unclear. Apparently, the claimant went to his car, ostensibly to get a chisel, and PW went to his car to get some keys. Some of the employees, including PW, were aware that the claimant had a gun in his car and when the claimant went to his car for the chisel set, he took a "gray sock" out of his car, which may have contained the gun. The claimant then put the sock back in his car. Depending on whose testimony is believed, the claimant challenged PW to a fight and after both the claimant and PW returned to the house, PW picked up a piece of pipe, which according to PW was to defend himself. It is undisputed that BW took the pipe away from PW. The

consensus testimony was that PW and the claimant continued to "mutter" or taunt each other. The claimant testified that he had returned to work when PW hit him in the head with a hammer. Other testimony indicates that PW and the claimant continued to taunt each other and then went to the backyard where PW hit the claimant with a hammer. The consensus testimony is that then both the claimant and PW started running toward the claimant's car with PW getting there first, getting the claimant's gun, and ended up shooting the claimant in the foot. PW testified that he was attempting to unload the gun when it went off. As indicated, much of the testimony is disputed and there are inconsistencies between some of the transcribed statements and the testimony at the CCH.

Here, the question is whether the assault and shooting arose out of conditions of the employment or due to personal reasons not directed at the employee as an employee. In Texas Workers' Compensation Commission Appeal No. 94868, decided August 18, 1994, and Texas Workers' Compensation Commission Appeal No. 971538, decided September 18, 1997 (Unpublished), the Appeals Panel quoted extensively from Nasser v. Security Insurance Company, 724 S.W.2d 17, 19 (Tex. 1987), that the purpose of the personal animosity exception to compensability was to exclude from coverage:

> those injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment. . . . Whenever conditions attached to the place of employment or otherwise incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment.

A claimant has the burden of proving he sustained an injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Once a carrier, or in this case employer, produces probative evidence of the personal animosity exception to liability, the claimant then has the burden to establish by a preponderance of the evidence that the coworker's assault was directed at him as an employee or because of his employment. Texas Workers' Compensation Commission Appeal No. 970484, decided April 28, 1997; Texas Workers' Compensation Commission Appeal No. 93134, decided April 2, 1993. We have further observed that whether there was a personal motivation to an assault that causes injury is a question of fact to be decided by the hearing officer. Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997.

The hearing officer, in the "Discussion" portion of his decision, commented:

> Where a fight arises from personal reasons, the resulting injuries arise outside the employment. Here the parties had adequate cooling off time after any specific disagreement about how the work was being performed, and in fact left the house to challenge each other, and to finally engage in a

fight. The invitation to mutual combat here was an extracurricular activity and was a deviation from employment.

The claimant's appeal, among other things, challenges the hearing officer's use of the term "cooling off time" as being unsupported by the evidence. We agree with the claimant to the extent that the term "cooling off time" or "cooling off period" was never used in the testimony or documentary evidence but rather was the hearing officer's interpretation of the period of time after the tub was moved and the long-standing hostility resumed, when the claimant and PW went out to their cars and subsequently went out to the backyard to fight. The hearing officer apparently accepted the testimony of PW and BW that the fight and first blow from the hammer occurred outside in the backyard where the challenge to fight was accepted, and that those events constituted "an extracurricular activity" and was a deviation from the employment. There was sufficient evidence that the fight and ill feelings between the claimant and PW had a long-standing history and were not only related to the installation of the tub. The hearing officer apparently believed that the annoyance related to the installation of the tub had been resolved when BW moved the tub and the claimant continued his soldering. The hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. Section 410.165(a). As such, he determined that when PW and the claimant "left the house to challenge each other, and to finally engage in a fight" was an extracurricular activity and a deviation from the employment. There is sufficient evidence to support that conclusion.

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.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge