APPEAL NO. 92213

On April 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), the surviving spouse of the deceased employee and the appellant herein, had not proven that fatal injuries were sustained by his wife, (Decedent), in the course and scope of her employment as director of elementary curriculum with (respondent), on (date of injury), when she was shot and killed by an assailant during lunch at a local restaurant. The respondent was also appellant's employer on the date of fatal injury. The hearing officer further found that two exceptions, set forth in the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. Article 8308-3.02(4) & (5) (Vernon Supp. 1992), applied to preclude liability of the respondent for benefits.

The appellant has appealed the hearing officer's determination that the Decedent did not sustain an injury in the course and scope of her employment, as well as the conclusion that the injury arose out of Decedent's voluntary participation in an off-duty social activity not constituting part of her work-related duties and for which there was no express or implied requirement to attend. The appellant states that he does not take issue with the hearing officer's conclusion (and supporting findings of fact) that the injury arose out of an act of violence committed by a third person with the intent to injure her because of personal reasons not related to her employment (although this conclusion, standing alone, is sufficient to preclude liability of the respondent for compensation). The appellant further complains that reversible error is demonstrated by the failure of the hearing officer to summarize all the testimony.

As to the matters appealed, appellant argues that the "Boss's Day" luncheon during which Decedent was killed was a business lunch, and that the respondent derived a benefit from the topic of discussion at the lunch such that the injury occurred within the course and scope of employment. The appellant further disputes that the Decedent was "off-duty" when the lunch occurred, noting that she was considered to be on-call to the employer during this time.

Respondent asks that the decision be affirmed. Respondent argues, among other things, that even if the luncheon were found to be in furtherance of the employer's business, that the violent injury sustained by Decedent was not an injury of the kind or character that had to do with, or originated in, the employer's work, trade, or business. Respondent also argues the applicability of the exception to compensability for non-required, off-duty social activities. Respondent notes, as part of its argument, that implications of the relief sought by appellant would be to extend workers' compensation coverage to any social gathering among colleagues at which work is, more likely than not, discussed.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

On (date of injury), Decedent attended a "Boss's Day" luncheon with five other employees of the employer, one of whom was her husband, the appellant. Decedent was, at the time of her death, director of elementary curriculum. The boss being honored at the luncheon, (Ms. B), was not Decedent's supervisor, but was her husband's supervisor. Appellant testified that he and his fellow truant officers had taken their boss to lunch on this day for a number of years. The only other person attending the luncheon who, like Decedent, was not directly supervised by Ms. B was another spouse, (Mrs. F), who was herself one of Ms. B's bosses. Both Decedent and Mrs. F invited themselves to attend the luncheon when Ms. B's employees showed up at the employer's headquarters building to pick up Ms. B for lunch. Although Decedent invited her own boss, (Mr. H), to attend, he had a prior engagement and could not come. No persons for whom Decedent had direct supervisory responsibility attended the luncheon. Tragically, during the meal at the restaurant, an assailant who was previously unknown to any of the parties entered the restaurant and shot several people at random, including the Decedent. The assailant was not an employee of the restaurant or of employer.

Appellant argues that the death occurred in the course and scope of Decedent's employment because a topic of discussion and decision at the lunch was a school district incentive program ("Bicycles for Attendance"), which has resulted in benefit to the school district. Based upon a certain level of attendance, students in each school would be eligible to win a bicycle or other premium. As the facts were developed through various witnesses, the amount of funding received by a school district depends upon pupil attendance. All school district employees were generally regarded as sharing an interest in the district's objectives, including increased attendance. Programs to increase attendance were primarily the responsibility of the section headed by Ms. B. Appellant was a senior truant officer who worked for Ms. B. He initially brought to his group the idea for "Bicycles for Attendance" that he states was Decedent's idea. Neither Decedent's supervisor, Mr. H, nor Ms. B were aware that the program had been Decedent's idea. Because Decedent had become familiar with a social organization, the Ladies' Auxiliary, through her previous job as an elementary school principal, she voluntarily asked them if they would be willing to donate money toward the attendance program. On October 7, 1991, the organization granted $2,000 toward the program. It was known to appellant and Decedent on the evening of (date), that the organization had already purchased bicycles and other items at a local retailer for pick up and distribution by the employer. Decedent's approval was not required for implementing the program; such approval would have been the function of Ms. B, Mrs. F, and Mr. H.

The program had been approved well before (date of injury). The program was ultimately implemented, according to Ms. B, in the third six-week term of school. However, a few logistical details as to who would be eligible for the prizes remained to be worked out. Ms. B testified that a good deal of a two hour staff meeting the morning of (date of injury) (which was not attended by Decedent) was devoted to discussion of these logistics. Ms. B agreed that there were still details to be worked out at the end of the staff meeting. She did not, however, have any recollection of anything discussed at the luncheon. Ms. B stated that although she felt free to solicit Decedent's input on some matters, that Decedent was not her boss. Ms. B stated that she understood that the purpose of the lunch was the

observance of "Boss's Day," not discussion of the bicycle program.

(Mr. W), one of the truant officers who attended the luncheon, stated that he was a friend, as well as colleague, of the (C). He recalled that all persons, who drove together to the restaurant in his vehicle, were excited about the donation made to the attendance program. Mr. W recalled that the group discussed the attendance program, but when specifically asked if he recalled if the mechanisms of the program were being discussed at the luncheon, he responded that "I guess the human mind does funny things, but a lot of that day has been erased as far as details."

The sole witness who stated unequivocally that a decision was reached at the lunch with regard to what students would be eligible to participate for incentives was the appellant. He noted also, however, that the topic of the funded bicycles was discussed "en route" to the restaurant. Appellant said that his wife had a cellular telephone which he had purchased for her so she could call, for example, in case she broke down on the road when working late. He stated that Decedent received a telephone call at the restaurant, and said, "I'm at a meeting, and when I get back to the office I will check on it." He stated that because his wife seldom ever took a lunch period, he rarely got to go out to lunch with her. Appellant stated that his recollection of (date of injury) differed in some respects from that of Mr. W, most notably in that he thought that less time had passed between the party's arrival at the restaurant and the shooting than did Mr. W.

(Mr. JH), the Assistant Superintendent for Business for employer, confirmed that the luncheon was not sponsored by the employer, and noted that, to the extent employees not in Decedent's direct line of supervision came to her for guidance, it was probably attributable to her as an individual, rather than to her position. He noted that while no employee was ever discouraged from talking to other employees, or from offering input into district programs, that an employee's boss was generally the person responsible for actions such as evaluations or recommending a person for employment. He stated that working lunches for official business were generally conducted on the employers' premises, and noted that a (city) meeting of the school board of trustees held for official purposes was posted as a public meeting.

All witnesses who were asked whether they ever got together for social occasions at each other's houses agreed that they did, and agreed that school business was inevitably discussed on those occasions.

We would first note that, given that the 1989 Act does not require a statement of the evidence, the hearing officer did not err by not summarizing all evidence considered. *See* Article 8308-6.43(g).

The claimant bears the burden of proving, through a preponderance of the evidence, that an injury occurred within the course and scope of employment. The 1989 Act, Article 8308-1.03(12), defines "course and scope of employment" as:

‘Course and scope of employment’ means an activity of any kind or character

> that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes activities conducted on the premises of the employer or at other locations. The term does not include: [transportation and travel].

In the case cited by both parties, Texas Employers' Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977), the claimant's burden is stated as twofold: the injury must have occurred while the employee was engaged in or about the furtherance of the employers' business; and, the injury must be of the kind or character that had to do with and originated in the employers' work, trade, business, or profession. *Id.* at page 99. An injury can be found not to be compensable if facts establish the first "prong" but not the second. *See* American General Insurance Co. v. Williams, 227 S.W.2d 788 (Tex. 1950). Whether the prongs of the test are established generally involves questions of fact based upon the case presented.

The appellant argues that the case of Mersch v. Zurich Insurance Co., 781 S.W.2d 447 (Tex. App.- Fort Worth 1989, writ denied) makes clear that a social engagement is in the course and scope of employment if the employer derives some benefit from the activity. He also points out the benefits that the employer derived from the bicycles for attendance program and increased pupil attendance. Leaving aside the conflicting evidence on whether any action was taken on that program at the lunch, it is clear from reading the Mersch case, and the authorities cited therein, that the "benefit" to the employer must be a direct substantial benefit, as opposed to intangible values of improving employee health or morale. *See also* Clevenger v. Liberty Mutual Insurance Co., 396 S.W.2d 173 (Tex. Civ. App.- Dallas 1965, writ ref'd n.r.e.), at page 182 (reciting Professor Larson on compensability of injuries at recreational and social events). The finder of fact could determine that a direct, substantial benefit did not occur to employer even if business were discussed.

Although the appellant argues, citing Texas Employers' Insurance Ass'n v. Prasek, 569 S.W.2d 545 (Tex. App.- Corpus Christi 1978, writ ref'd n.r.e.), that acts of a personal nature such as quenching thirst or relieving hunger are incidental to an employee's service and injuries sustained during such activities should be compensable, that case does not depart from the principle that an employee must still be in the course of employment during the time such activities are being performed. The employee in Prasek died while eating in employer-provided facilities at a time when his presence was required at the drilling site. As such, it is clearly distinguishable from the case *sub judice*.

In Commercial Standard Insurance Co. v. Marin, 488 S.W.2d 861, 869 (Tex. Civ. App.- San Antonio 1972, writ ref'd n.r.e.), the court of civil appeals, in agreeing that the murder of an employee who was opening her employer's business was compensable, discussed various personal assault cases at length. After discussing lines of cases where assaults were, or were not, compensable, the court focused on the causal connection between such assaults and employment:

> It is well settled that if an injury is received by an employee while he is acting within the course and scope of his employment, and such injury is a result of

> a risk or hazard of the employment, it is compensable. (Citations omitted). With specific reference to assaults this well settled doctrine, at the very least, means... that an assault arises out of employment if the risk of assault is increased because of the nature of the work, or if the reason for the assault is a quarrel having its origin in the work. It is contended that to hold that an assault is compensable if the risk of assault is increased because of the nature of the work is to adopt the "positional risk" test.... We know of no Texas case rejecting this test..... The correspondence between this test and the "street risk" doctrine is obvious. Although the risks of the street are dangers which the employee shares in common with the general public, if the performance of his duties make it necessary for the employee to be on the streets, the risks he there encounters are held to be incident to his employment. (citations omitted)." [emphasis added]

The court determined that (Mrs. M) was present at the site of the assault because of the conditions of her employment, i.e., the need for her to be on site during early morning hours.

As respondent points out in the case under consideration, however, Decedent was not exposed to an increased risk of the tragedy due to any particular feature of her employment. All evidence indicated that the shootings were random and not directed at the luncheon attendants because of their employment. The unfortunate victims of this occurrence were from all backgrounds or employments. The second "prong" of the elements for proving compensable injury has not been met in this case.

Regarding exceptions to compensability, a finding of any of the circumstances set forth in the 1989 Act, Article 8308-3.02, can preclude liability even if an injury arguably occurred within the course and scope of employment. We have held that the insurance company bears the burden of proving that any of these exceptions applies, and when an issue is raised through sufficient evidence of an exception, the burden shifts back to the claimant to prove that an exception does not apply. Appeals Panel No. 91029 (Docket No. redacted) decided October 25, 1991. The record contains sufficient evidence to support the hearing officer's Conclusion of Law No. 4 and related findings of fact:

Conclusion No. 4: Deceased's fatal injury arose out of Deceased's voluntary participation in an off-duty social activity not constituting part of Deceased's work-related duties and the social activity was neither reasonably expected of Deceased nor expressly or impliedly required by Deceased's employment with employer.

Finding of Fact No. 5: Claimant made plans several days before (date of injury), to invite claimant's boss, [Ms. B], to lunch to honor and to show respect for her on Boss's Day.

Finding of Fact No. 6: Claimant would not have made plans for lunch, nor invited

his boss to lunch, nor made the trip to [Restaurant] on (date of injury), had that date not been Boss's Day.

Finding of Fact No. 7: Deceased was the wife of claimant, and voluntarily invited herself to attend and voluntarily participate in the lunch at [Restaurant] on Boss's Day.

Finding of Fact No. 8: Deceased and claimant were not bosses of each other on (date of injury), while employed with employer.

Finding of Fact No. 9: Employer did not sponsor or require employees including Deceased to participate in the Boss's Day luncheon.

Finding of Fact No. 10: The voluntary participation of Deceased in the Boss's Day luncheon at [Restaurant] would not have impacted Deceased's job with employer.

Finding of Fact No. 11: The Boss's Day luncheon at [Restaurant] was not a business luncheon.

Finding of Fact No. 13: Deceased was voluntarily off-duty during her voluntary participation in the Boss's Day luncheon although she could have been contacted by her boss, [Mr. H], if an emergency arose.

There is uncontroverted testimony that the school district did not sponsor or require the luncheon honoring Ms. B. Further, there is uncontroverted testimony that there was no implied requirement; everyone agreed that there would be no adverse effect on the careers of those who did not attend. Two of Ms. B's employees in fact did not attend. Decedent invited herself to join her spouse and other persons who were friends, as well as co-workers, as did another spouse. Appellant testified that he was rarely able to join his wife for lunch because of her work schedule. The fact that executive employees for employer typically worked through the lunch hour does not render every lunch a working lunch. Although Decedent took a work-related call at lunch, the testimony indicates that she declined to take action on that call, and informed the caller that she would handle the matter when she returned to the office. Although appellant argues that this proves that she was not off-duty, the inference that she did regard herself as off-duty, and thereby declined to take action, is equally valid.

It is hard to envisage any social gathering among colleagues which would not involve discussion of the work place. No doubt, many of the programs discussed at such occasions are beneficial to the employers. However, the mere fact that business is discussed does not make an engagement any less of a social occasion. There was conflicting evidence as to whether action, as opposed to discussion, was taken on the attendance program. Mr. W and appellant's testimony relates pleasure of the participants over what had already transpired as a main topic of discussion. Mr. H and Mr. JH testified that working lunches

where business was deliberated were usually held on the premises of the employer or school campuses in the district. By contrast, for the lunch for Ms. B, there was no agenda, and no evidence that the luncheon was set up as a business meeting. Indeed, it was not so perceived by Ms. B, who was a person with authority to make decisions about the attendance program. There had already been a two hour staff meeting at which the implementation of Bicycles for Attendance had been the major action item, which could lead the trier of fact to conclude that no further action was needed, or that recollection of action taken relates to this meeting rather than the luncheon. And the only aspect of the program in which decedent had taken some action, soliciting of funds, had already been accomplished.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Article 8308-6.34(e) 1989 Act. It is worth pointing out that assessing the "credibility" of conflicting testimony under the facts of this case involves not so much determining its believability (for the sincerity of all persons was apparent) as the accuracy of witness' recollections of events past, given the indication that the horror of the experience at the restaurant has affected remembrance of events at the luncheon. In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). In reviewing a "no evidence" point of error, a reviewing body should consider only the evidence and reasonable inferences therefrom which support the finder of fact, and reject all evidence and inferences to the contrary. Nasser v. Security Insurance Co., 724 S.W.2d 17 (Tex. 1987). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The trier of fact is not required to accept the testimony of the claimant but may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co. , 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

Finding that the appealed determinations of the hearing officer are not so against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust, we affirm.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge