

APPEAL NO. 93843
FILED NOVEMBER 3, 1993

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. art 8308-1.01 *et seq.*), a contested case hearing was held on July 15, 1993. [The hearing officer] determined that the respondent (claimant) was injured in the course and scope of her employment and awarded benefits under the 1989 Act. Appellant (carrier) appeals urging that the decision of the hearing officer is insufficiently supported by the evidence and is against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Claimant asks that the decision be affirmed.

DECISION

Determining that the application of Sections 401.011(12) & 406.032(1)(D) to the facts of this case renders the decision insupportable in law and fact, we reverse.

Section 401.011(12) in pertinent part defines course and scope of employment as "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."

Section 406.032 provides:

An insurance carrier is not liable for compensation if:

(1) the injury:

[omission]

- (D) arose out of voluntary participation in an off-duty recreational, social, or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment

The facts in the case are not largely in dispute. The claimant had worked one year for the employer, a private school for young children, as a teacher's aide. Every year for the last several years, and according to the testimony of the employer, primarily because of the scare of tainted treats given to youngsters expressed by one of the parents, the school made its facilities available for a (holiday) party for the school's

children and parents although the owner stated it was not a school function. According to the uncontradicted testimony of the employer (owner of the school) this was purely a voluntary activity conducted outside regular duty hours (11:00 a.m. to 2:00 p.m. on Saturday, (date of injury)) and for which no one had ever been paid a salary or wage. She agreed the event also built a good relationship between the parents and the school, was "sort of a public relations effort" and was non-profit. Parents as well as teachers volunteered for various aspects of the function. Preceding the function, a sign-up sheet had been posted at the school where volunteers could sign up to help at the event. Only about one half of the teachers signed up and attended the function. The school's extended care coordinator, Mrs. G, was one of the persons organizing the function. She testified that before the function, the claimant had asked if they would be paid for the function and was told "no" and that it was a volunteer event that was done for the parents. Mrs. G testified that the claimant never requested compensation for helping out at the function. Mrs. G assigned different volunteers to cover the various activities on the day of the event. The claimant apparently arrived at about 11:00 a.m. Mrs. G stated that the claimant brought her sister to the event (her sister had apparently attended other non-duty functions at the school) and that both had helped at the children's games. Although, according to the testimony of the claimant, she had signed up to work at the "duck pond," Mrs. G later asked her if she would help out at the "water relay." She did so while her sister apparently stayed and helped at the "duck pond." While helping at the "water relay," the claimant testified that she heard and felt a "pop" in her back while bending over to pick up a two liter bottle of water. Her sister called on (two days after date of injury) to tell the employer the claimant had hurt her back. She subsequently underwent surgery on her back.

The claimant denied that she had asked Mrs. G if she would be paid for the (holiday) function, stated that she "assumed" she would be paid to work at the function, which was on a Saturday, since she had been paid when she came in on some Saturdays in the past when they had "clean up" days at the school, and acknowledged that she was not performing any of her regular duties at the function. She also stated that her sister did attend some social functions at the school but did not come with her when she performed her usual work-related duties.

In a nutshell, the carrier's position was that the evidence established that the claimant was not in the course and scope of her employment but was performing a social, voluntary activity that was not in furtherance of her employer's business. The claimant's position was that the (holiday) function was a legitimate business activity of the employer because it built public relations with the parents (it was not open to the public) and that "happy parents are paying parents," that participation by teachers was necessary for the function to be put on, and that claimant was there to further the business interests of the employer.

The hearing officer found that the function was organized and conducted for the benefit of the employer's customers and not the employees, that claimant had not been informed she would not be paid, and that without the voluntary participation of a substantial number of the teachers and aides, the function could not have been held. He concluded that the claimant was injured in the course and scope of her employment and that the claimant's voluntary activity when she was injured was not excluded from coverage based upon the statutory exceptions because the activity in question was not for the benefit of the employees and because the activity was a reasonable expectancy of her employment.

We first observe that there is no evidence supporting the hearing officer's conclusion that the claimant's activity on the date of injury was a reasonable expectancy of her employment. Indeed, the hearing officer notes in his discussion of the evidence that "it is concluded that she volunteered to participate" and so states in his conclusions of law and the uncontroverted evidence is that less than half of the teachers or aides elected to volunteer for the activity. While it may be true that to accomplish the function a certain number of volunteers, either among the parents, teachers, aides or others, was necessary, such does not give rise to an inference that the claimant's participation thereby became a reasonable expectancy of her employment. And, although she denied that she ever inquired or was told that she would not be paid, the uncontradicted testimony is that she never did seek compensation for her activity on [date] and that compensation had never been paid to anyone for the activity in issue. Therefore, a reasonable expectancy of employment position cannot be reasonably premised upon the claimant's stated assumption that she would be paid for her activity.

The finding and conclusion that the [holiday] activity was organized and conducted for the benefit of the customers and not the employees finds some inferential support in the testimony of the owner that the function built a good relationship between the parents and the school and was "sort of a public relations effort." However, she also testified, and was uncontradicted by any other evidence, that the teachers and employees could also bring their children or relatives to participate in the (holiday) function. The hearing officer appears to conclude that if there was some benefit flowing to the employer and not to the employee, then Section 406.032(1)(D) would not apply. We find no authority for such an interpretation of this section, which is new in the 1989 Act. By its very terms, liability of a carrier does not apply if the injury "arose out of voluntary participation in an off-duty recreational, social or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment" There is simply no condition or provision for benefit, tangential or otherwise, flowing to an employer or employee which necessarily triggers or defeats the application of this provision, although benefit may be one of a number of factors that may be considered in

an overall evaluation of the applicability of this exception. See generally 1A Larson, Workmen's Comp Law, § 22.23. Regarding the factor of benefits from an activity, Larson, *supra*, states in evaluating whether the activity is in the course and scope, thusly:

did the employer benefit from the event not merely in a vague way through better morale and good will, but through tangible advantage.

In concluding that the injury occurred within the course and scope of employment and that no exception applied because the activity was not for the benefit of the employees, the hearing officer apparently focused on the employer's testimony in response to questions of the claimant's counsel concerning "good relationship" and "public relations" and discounted any benefit flowing from attendance by employees and their relatives. Was this enough to establish that the activity occurred in the course and scope of employment and that it also was not within the exception set forth in Section 406.032(1)(D) for the voluntary participation in the activity? We hold that it was not. In Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992, reversing the hearing officer on other grounds, we opined (but did not decide) that a policeman suffering an injury during his lunch hour playing racquet ball and who indicated that he was performing physical conditioning which was a necessary part of his job was not in course and scope even though his employer may have benefitted from the better physical condition of the policeman. The hearing officer in that case had determined that the policeman's participation in an off-duty physical conditioning program was a reasonable expectancy of, or was expressly or implicitly required. In Texas Workers' Compensation Commission Appeal No. 93212, decided April 26, 1993, we reversed a decision that a claimant suffered an injury in the course and scope of her employment when she gave blood based upon the hearing officer's determination that the sponsoring of the blood drive by the employer was a community service on the part of the employer and that it was in the furtherance of its business affairs. In that case, we equated the claimant's voluntary participation in the blood giving event to the line of authority which denies benefits when an injury is sustained while engaged in public service activities. We also concluded that any tangible benefits to the employer from the claimant's activity were much too attenuated under the circumstances. In Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, we upheld a determination that an injury was not sustained in the course and scope of employment where it occurred while voluntarily attending a luncheon on "Bosses Day" where business was discussed. We stated:

The appellant argues that the case of Mersch v. Zurich Insurance Co., 718 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 (business related aspects). 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 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.

Even were we to hold, which we do not, that there was some benefit flowing to the employer, under the circumstances of this case, that could be determined to be enough to show that the activity was performed by the claimant "while engaged in or about the furtherance of the affairs or business of the employer," there is clearly insufficient evidence to remove this case from the exception from liability provided in Section 406.032(1)(D). The evidence overwhelmingly established that the claimant was voluntarily participating in an off-duty recreational or social activity that did not constitute part of the claimant's work-related duties. Further, there is no evidence to show (or for that matter a finding of fact) that the activities were a reasonable expectancy of or were expressly or impliedly required by the employment. Clearly, the claimant was not performing any work-related duties and was not being paid for her voluntary efforts (her stated assumption that she would be paid is not a significant factor) and, although there may have been some benefit flowing to both the employer and employees, there was no substantial direct benefit to the employer that would control the disposition of the case. There is no evidence that business was conducted or that the event was used to promote or aid the employer's business. Mersch, *supra*. It is unfortunate that the claimant was injured during her voluntary and perhaps generous participation in the (holiday) function; however, the 1989 Act does not attach workers' compensation liability for such off-duty, voluntary activities as occurred here. As stated above, prior decisions and other authority establish that any tangential benefit to the employer under this type of circumstance would not legally or factually support a determination of injury in course and scope. Accordingly, we reverse the decision of the hearing officer and render a new decision that the injury the claimant sustained on (date of injury), falls within the exception from liability of the carrier provided in Section 406.032(1)(D) and that the claimant is therefore not entitled to benefits under the 1989 Act.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge