APPEAL NO. 941269
FILED NOVEMBER 8, 1994

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 8, 1994, a contested case hearing was held. The issue was whether the respondent, (claimant), who is the claimant herein, was injured in the course and scope of his employment or while voluntarily participating in an off-duty social recreational activity that was not part of his work-related duties.

The hearing officer held that claimant was injured within the course and scope of his employment as an eighth grade teacher with the (employer), a self-insured political subdivision, which will be referred to herein as the school district. He hurt his knee on (date of injury), while participating in a school-sponsored student-faculty basketball game on the school premises in the afternoon of the day in question.

The school district has appealed, arguing that the hearing officer considered matters not in the record about school activities, and that her decision is against the evidence, which indicated that claimant was not required to participate in the game as part of his duties. No response has been filed.

DECISION

We affirm the decision and order of the hearing officer.

Claimant is an eighth grade teacher at a middle school for the school district. He stated that he was employed as a history teacher, although he had in previous years also been a coach. He testified that he regarded establishment of rapport with his students as essential to carrying out his educational mission.

Claimant testified that for four or five years, on an annual basis, the student council for the middle school sponsored a student-faculty basketball game as a fundraiser for its activities. The uncontroverted evidence was that the student council was a school-sponsored activity, as was the basketball game, which was held in the school gymnasium. The upcoming game was widely advertised through posters hung throughout the school, and prominently billed as a "student-faculty" game. Claimant said his principal did not ask or require him to participate. Recruitment of the faculty players was similar each year. Claimant said that the sponsor of the student council would set a time and date for the game and then recruit through informal conversations at the school. The proceeds from the game went for the use and benefit of the student council.

Claimant stated that the class day typically ran from 7:35 a.m. until 2:45 p.m., and that teachers generally could go home after 3:15 p.m. He stated that the basketball game in question began about 3:30 p.m., and he was injured at around 4:00 p.m. When asked if this was "after" the school day, he stated, "I don't know." Claimant agreed he did not teach history during the game, when such a question was posed during cross-examination. There was no other evidence as to whether the game in question occurred when claimant was "off duty." Claimant agreed he was not paid extra for his participation.

Claimant brought forward evidence to show that a faculty member's injury for the same game in the previous year had been covered by the school district through workers' compensation.

The hearing officer's decision has analyzed at length the elements of when participation in a recreational activity will be held to be compensable, including the analysis of the benefit derived by the school in its educational mission by such a game. As the hearing officer notes, the employer in question here is not a private business, and the activity in question was not the company softball team; the employer was part of a governmental entity in existence to carry out the public purpose of education. As such, it is governed by applicable portions of the Texas Education Code and applicable case law.

Whether a school employee's actions may fall within the scope of employment is touched upon in the Texas Education Code for purposes of tort action liability. For purposes of whether a district or its employees are liable for their actions, the Texas Education Code § 21.912(b), confers immunity as follows:

> No professional employee of any school district within this state shall be personally liable for any act incident to or within the scope of the duties of his position of employment . . . ."

The sole exception to this grant of immunity for employment-related actions is for harsh discipline.

It should be noted that teaching has been declared, by statute, to be a profession. Texas Education Code § 13.201. Teachers are not paid by the hour but pursuant to contract with the school district. Texas Education Code § 13.101 *et seq*.

Courts which have considered the personal liability of teachers or principals for actions taken at school-sponsored sporting or extracurricular events have held that such events are governmental functions within the school district's purpose. A school district's interscholastic football program has been held, <u>as a matter of law</u>, to be a

governmental function of a school district, although described by the court as recreational, voluntary, and extra-curricular. Garza v. Edinburg Consolidated Independent School District, 576 S.W.2d 916 (Tex. Civ. App.-Corpus Christi 1979, no writ). Likewise, a school district and its principal were held to be acting within the scope of their duties (and thereby immune in accordance with § 21.912(b)) for purposes of governmental immunity for injuries at a homecoming bonfire. McManus v. Anahuac Independent School District, 667 S.W.2d 275 (Tex. App.-Houston [1st Dist.] 1984, no writ).

As noted in Gravely v. Lewisville Independent School District, 701 S.W.2d 956, 957 (Tex. App.-Fort Worth 1986, writ ref'd n.r.e.), concerning a spectator injury at a basketball game: "From a reading of the cases it is hard to conceive of any school sponsored or promoted activity which would be held by courts to be proprietary in character instead of governmental." The court comments that there is "long standing" case law and policy in Texas to regard school-sponsored activities as within the ambit of the educational mission. Finally, we would note that schools have been given the right to prohibit students who have failing grades from participating in such "extracurricular," after school activities. Texas Education Code § 21.920(b). This further underscores the proposition that such activities sponsored by the school further its business as an educational entity.

For all these reasons, it is not so very clear, as it might be for another worker, when, or if, a teacher is "off duty" when participating in school-sponsored events.

Although there are no Texas workers' compensation cases precisely on point, an injury by a faculty participant in a school-sponsored charity basketball game was held in New York to be a compensable injury. *See* Zuckerman v. Board of Education, 314 N.Y.S.2d 814 (1970).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza, *supra*. This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.- Houston [14th Dist.] 1984, no writ). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In this case, claimant played

in a school-sponsored event, on school premises, in his capacity specifically as a teacher. The proceeds went to a student organization sponsored by the school. Whether claimant "taught history" on the basketball court or was required to take part does not define the sole parameter by which his participation can be factually determined to be within the course and scope of his employment. The finder of fact could consider the coverage extended to another faculty member who had been injured in the same game the previous year as evidence of whether the school district perceived such participation to be within what it defined as the course and scope of a teacher's employment. We do not agree that the hearing officer went outside the record. As the concurring opinion points out, the hearing officer's inference that such participation was a reasonable expectation of claimant's employment is supported by the evidence within this record.

The decision and order of the hearing officer are affirmed.

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Susan M. Kelley
Appeals Judge

CONCURING OPINION:

I concur with the result reached by Judge Kelley. I believe that the evidence supports a decision that the claimant's injury is compensable under the workers' compensation law of this state. Section 406.032(1)(D) provides that an insurance carrier is not liable for compensation 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. The activity in which the claimant was injured was an employer-sponsored basketball game which the employer held every year on its premises to raise funds for another employer-sponsored activity, namely the student council. The annual basketball game was between students and faculty, thus without faculty participating in the game, the activity could not have been held. Thus, it can reasonably be inferred that the employer expected faculty to participate in the activity. Consequently, I believe there is evidence that the activity was a reasonable expectancy of the employment and would affirm on that basis. Under Section 406.032(1)(D), the fact that the claimant volunteered to participate in the activity in which he was injured, does not make the injury noncompensable if the activity is a reasonable expectancy of the employment. The hearing officer does in fact conclude

that the claimant's involvement in the basketball game was reasonably expected of teachers. I believe there is sufficient evidence to support that conclusion and do not believe that the great weight and preponderance of the evidence is against it.

If the facts of this case are analyzed under case law prior to the 1989 Act, I would note that in Mersch v. Zurich Insurance Company, 781 S.W.2d 447, 450 (Tex. App.-Fort Worth 1989, writ denied), the court stated:

> Texas case law holds that an injury occurring while an employee is engaged in a recreational or social activity sponsored by his employer, is not in the course and scope of employment unless (1) participation in such activity is expressly or impliedly required by the employer; (2) or the employer derives some benefit from the activity, other than the health and morale of the employee; (3) or where the injury takes place at the place or immediate vicinity of employment while the employee is required to hold himself or herself in readiness for work, and activity takes place with the employer's express or implied permission.

In this case, I conclude that there is some evidence that the employer derived some benefit from the activity other than the health and morale of the employee, because the activity was a fundraiser for another employer-sponsored activity, the student council.

The decision in Texas Workers' Compensation Commission Appeal No. 93843, decided November 3, 1993, is readily distinguishable from the facts of this case in that in Appeal No. 93843 there was no evidence that the activity was a reasonable expectancy of the employment.

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent because I do not view the evidence as supporting the hearing officer's finding that "claimant's participation in the student/faculty game was an implied requirement of his role as a teacher," nor of her conclusion that claimant's "involvement in the after school student/faculty basketball game was reasonably

expected of teachers and was an implied requirement of his employment." As Judge Potts indicates in his concurring opinion, the 1989 Act excepts the carrier from liability for an injury resulting from an employee's voluntary participation in an off-duty recreational, social or athletic event not constituting part of the work-related duties "unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment; . . ." Section 406.032(1)(D).

The hearing officer found, among other things, that claimant chose to volunteer to play in the game and that his participation was not expressly required by management. The hearing officer also found that "teachers were expected to volunteer periodically to participate in endorsed student activities such as the game, club meetings, and student dances (social, recreational, and athletic activities)." The hearing officer's decision recites no evidence in support of this finding. Claimant, a history teacher, testified that the event sponsor sets the date and then goes around asking faculty members whether or not they are going to play. In his pre-hearing statement claimant stated that the last class bell of the day rang at 2:24 p.m., that he was designated to leave the school building at 3:15 p.m., that the game started at approximately 3:30 p.m., that his participation in this "after school" event was "strictly voluntary," and that he was not told he had to play. The statements in evidence from the school principal and two assistant principals stated that they did not play in the game themselves, nor did they direct, request, or knowingly encourage employee participation nor ask any employee whether he or she were going to participate.

I disagree with the view that the mere combination of the fact that claimant was a teacher with the fact that this annual student council fund raising event required both students and faculty supports a reasonable inference that the employer expected claimant to play or impliedly required that he play. While there may well have existed evidence sufficient to support such an inference, such evidence was not developed.

In Texas Workers' Compensation Commission Appeal No. 93843, decided November 3, 1993, the hearing officer determined that a teacher's aide at a private school sustained a compensable injury when she hurt her back participating after school hours in a (holiday) party for the students. Finding the hearing officer's decision insupportable in law and fact, the Appeals Panel reversed and rendered a new decision that the employee's injury fell within the exception in Section 406.032(1)(D). In the decision, the Appeals Panel said it found no evidence supporting the hearing officer's conclusion that the employee's activity at the time of her injury was a reasonable expectation of her employment. Noting that less than half the teachers or aides elected to volunteer for the activity, the Appeals Panel stated: "[W]hile 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." The decision went on to state that even were the Appeals Panel to hold, which it did not, that there was some benefit flowing to the employer sufficient to show that the employee's activity was performed "while engaged in or about the furtherance of the affairs or business of the employer," there was clearly insufficient evidence to remove the case from the exception to liability found in Section 406.032(1)(D). I regard the decision in Appeal No. 93843, *supra*, as controlling. I would reverse the hearing officer's decision and render a new decision that, under the evidence as developed in the record, the carrier was not liable for claimant's injury because the evidence established that the injury fell within the exception stated in Section 406.032(1)(D).

Philip F. O'Neill
Appeals Judge