APPEAL NO. 960515
FILED APRIL 26, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 11, June 6, and September 27, 1995, a hearing was held. [The hearing officer] determined that claimant was compensably injured performing "work-related duties", but did not have disability. Appellant (carrier) asserts that claimant was injured in a social activity that was not required, from which employer derived no benefit, and the injury did not take place at or near the job. Claimant replied that decision should be affirmed, emphasizing the nature of claimant's work as a recruiter of personnel for various jobs. Claimant did not appeal that no disability was found.

DECISION

We reverse and render.

Claimant worked for (employer) as a locator of skilled employees for clients. He began work for employer on June 13, 1994, and was injured while twisting and falling to avoid an errant basketball prior to a game on (date of injury). There had been an issue of disability at the hearing, but disability was not raised on appeal; it was found that employer kept paying claimant during the entire time he was unable to go to work.

Claimant testified that when he was interviewed for his position there was no inquiry as to whether he engaged in sporting activity and there was no mention that employer sponsored a team in a basketball league. Claimant further said he first heard that employer sponsored a basketball team about a week before the first game he played, in which he was hurt. Claimant heard about the team by overhearing a conversation between his supervisor, (Mr. C), and one or more other individuals. Claimant said he continued on his way, but upon his return by the area, he stopped and he inquired about playing. He was told that games were played at the YMCA. Claimant testified at some length about the need to be outgoing as a recruiter of employees for companies. He added that "you never know who you'll meet". He agreed that he had played basketball before joining this employer.

Claimant added that in his opinion, having been a recruiter of personnel prior to joining employer and having had his own small recruiting company, his employer "reasonably expected" him to join "things", (apparently such as teams or associations). He said he had taken part in a walk-a-thon in connection with his employer and the employer "encouraged" other activities such as softball and golf tournaments. He

mentioned that employer procured tickets to professional sports activities for employees to use in entertaining clients.

On the other hand, claimant said he voluntarily joined the team. He could not recall if he had even heard the team mentioned before the conversation he overheard, previously described. No one from the employer told him to cultivate any work contacts at the game and he did not attempt to determine if there were any potential recruits or clients at the game. He did say that the employer conducted monthly strategy meetings at which, claimant stated, it was made clear that to stay on top of their profession employees had to participate in the community, but he could give no specifics and did not relate these meetings to the basketball team or its league. He said that his opinion as to employer's expectation of him did not result from anything employer said. Claimant did not know if one had to be an employee of employer to play on the company sponsored team.

There was no dispute that claimant hurt his neck in the warm-up of the first game he played and subsequently had surgery therefore. He testified that he played after the injury because there were only five players present. He added that he was not doing his job at the time and that no business or recruiting took place at the game. There was also no argument that employer paid claimant $2000.00 a month with added amounts in commissions for success in recruiting. Claimant agreed that in the approximately two and one-half months he could not report for work, he continued to receive the monthly $2000.00.

Claimant's documentary evidence included six documents from the YMCA, which included one letter about various sports and the consumption of no alcohol at games, two forms, one flyer as to volleyball, basketball, and softball, one page of rules, and one page listing teams and dates games would be played. Under subpoena to the YMCA, claimant also obtained and provided another listing of teams and copies of receipts for $355.00 registration fees for the teams, including that of employer. One of the teams so listed was from employer; others included corporations such as (company A) and (company B), plus the (company C), and (company D).

Claimant offered no memos; flyers; bulletins; evidence of personnel actions or information about raises, promotions, expectations, demotions, or other personnel actions or inactions; or statements from anyone employed by or connected with employer.

Carrier provided the statement of Mr. C which confirmed claimant's testimony that he had overheard Mr. C talking of a basketball game. Mr. C stated, "and he heard us talking about it...and said...hey, do you need anybody to play?" Mr. C's statement also discussed people that claimant would recruit, saying, "we...he...he worked in our

telecommunications division. He recruited telecommunications professionals around the country for...for our...our telecommunications client base." In addition, carrier called (Mr. G) to testify. Mr. G is the comptroller for employer. He testified that he knows employer's practices and said no one was required to participate in basketball. He said there was never anything said at meetings about joining the basketball team. In his opinion there was no "implied expectation" that people should join the basketball team. He added that of approximately 45 recruiters employed by employer, there are three or four on the basketball team. This is consistent with claimant's statement that when he hurt himself at the first game he played, he had to keep playing because there were only five people there, including him, to play. Mr. C also pointed out that some people on the team were not employees; friends and family could play on the team.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. When the correct legal criteria are applied, the appeals panel will only overturn a decision when it is against the great weight and preponderance of the evidence. Two appeals panel decisions, Texas Workers' Compensation Commission Appeal No 93843, dated November 3, 1993, and Texas Workers' Compensation Commission Appeal No. 951718, dated November 30, 1995, did reverse findings of compensability in injuries in voluntary activities off work. In Appeal No. 93843, *supra*, a teacher's aide was injured at a (holiday) party given for children attending the private school. There was no speculation that the school was cultivating continued or increased enrollment by providing this function. In reversing and rendering, it was said that there was no substantial direct benefit to the employer resulting from this function. There was no evidence showing a "reasonable expectancy" that people attend or that such was impliedly required. The claimant therein was voluntarily participating in an activity that was not part of her duties. There was no evidence that business was conducted there or that the activity was used to aid the employer's business.

Similarly, Appeal No. 951718, *supra*, said that a school cafeteria worker who was injured at a weekend fund raiser for an "Association" held at one of employer's schools, was not compensably injured, reversing the decision of the hearing officer. While that claimant testified that one had to be a member of the association to be "certified", other evidence showed that no membership was required for certification. There was evidence, other than claimant's testimony, that the employer encouraged workers to join the association. This case stressed that while there was evidence of an implied requirement to join the association, there was "virtually no evidence regarding attendance at the activity ... where the injury occurred". (Emphasis as written.) In addition, that case pointed out an erroneous finding of fact that employer impliedly required membership in the association through its "hiring and incentive pay practices" because of the "undisputed fact that there were cafeteria workers who did not belong to the Association".

Appeal No. 93843, *supra*, cited Mersch v Zurich Ins. Co., 781 SW2d 447 (Tex. App.-Fort Worth 1989, writ denied). In that case a worker "felt an obligation" to attend a company-sponsored picnic. The facts showed that attendance was voluntary; there was no coercion; there was no punishment for those not attending; no business was conducted there. The case cited the three possible ways in which injury at a recreation event could be compensable, which are, express or implied requirement, employer benefit (other than health and morale), and injury at or near the work site with workers in readiness to work. Claimant also said, in addition to her feeling of obligation, that if she had not been present she would not have been injured. The court affirmed the summary judgment granted to carrier, saying that no employees were "required to attend the picnic".

These cases show that when an "expectancy" is considered as to a claimant's participation in off-work activities, it is a reasonable expectancy that emanates from the employer, not the conscience of the claimant, such as in Mersch, *supra*. Similarly, as shown both in Appeal No. 951718, *supra*, when the question of requirement went to the activity, not membership, and to a lesser extent in Mersch, when the court talked of "the picnic", none of these cases indicate that a general encouragement to take part in some activity or join some group is sufficient to show an implied requirement that a particular event be attended.

With claimant showing no evidence emanating from the employer, either documentary or in statement/witness form from which even a reasonable inference could be drawn that claimant was impliedly required to participate in the basketball game in which he was injured, the case must be reversed. Claimant himself testified that he volunteered, that employer said nothing to indicate an expectation that he participate in this basketball game, that no business was conducted, and that the players did not hold themselves in readiness to go back to work. He characterized the YMCA gym as containing other teams' players with very few other people in attendance. Only through speculation and claimant's own belief that it is important to success in his business that he be "involved" (even this belief did not indicate a particular benefit from basketball, as opposed to softball, boy scouts, or some other civic organization for that matter), could a question be raised that this injury was compensable.

We reverse and render that the injury was not compensable and the carrier is not liable for benefits.

Joe Sebasta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge