APPEAL NO. 981313
FILED AUGUST 3, 1998

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 December 5, 1997. With regard to the issues at the CCH, she determined that the respondent/cross-appellant (claimant) sustained a compensable injury on (date of injury), and had disability on May 3, 1996, May 8 to May 24, 1996, July 17 to August 3, 1996, and August 5 to October 24, 1996. The appellant/cross-respondent (self-insured) appeals the decision, seeks its reversal and argues that the claimant's injury did not occur in the course and scope of his employment with the self-insured. The claimant appeals the disability determination, seeks its reversal and argues he had disability beyond October 24, 1996. Neither party responds to its adversary's appeal. Although the claimant's request for appeal was not timely filed, we consider the disability issue since the self-insured appeals the disability determination.

DECISION

We reverse and render.

The facts herein are largely undisputed. The claimant was an assistant principal at the self-insured's middle school. On (date of injury), he injured his back while playing in an annual student-faculty basketball game. The game was played at the school and proceeds benefitted a student organization. Although faculty members were not required to compete or even attend the game, 15 of the school's 55 faculty members participated in it.

The claimant testified that because he participated in the game in years past, his participation on (date of injury), "was required as far as I was concerned." He admitted that the self-insured's administration did not instruct him to participate in the game. He also admitted that the administration did not inform him that refusing to participate in the game would be considered refusing to perform his job duties and that faculty members who did not participate were not disciplined. The claimant did not specify any reward or promotion he may have received for his participation in the game.

The self-insured's middle school principal, (Mr. R), testified the game was organized by one of its coaches and not by the school itself. He said participation in the game was voluntary and that faculty members were neither required to participate in the game nor disciplined for not participating. He testified that there was no reasonable expectation by the self-insured for its faculty to participate in the game.

The claimant offered signed statements from two of the self-insured's teachers, (Ms. J) and (Ms. A). Ms. J stated therein that faculty members "are asked to participate and sponsor many school activities," and "are asked to participate in this [game]." She added that "a great portion of the faculty and staff offer their participation in most endeavors." Ms. A stated that "[w]ithout faculty participation, there would be no student-faculty games."

On March 5, 1996, the claimant's initial choice of treating doctor, (Dr. R), noted a history of back pain since 1991 and the (date of injury), injury. On April 8, 1996, Dr. R noted a history of slipping on stairs the day before. On April 9, 1996, a referral doctor, Dr. Berrios (Dr. B), diagnosed low back pain. An MRI ordered by Dr. B showed a herniated L4-5 disk. The claimant was admitted to the hospital on May 3, 1996, and had an L4-5 laminectomy surgery on May 10, 1996.

With regard to the compensability issue, the hearing officer finds as follows:

FINDING OF FACT

6. Claimant's participation in the (date of injury) student-faculty basketball game was a reasonable expectation of Claimant's employment.

An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A compensable injury is an "injury that arises out of and in the course and scope of employment for which compensation is payable . . . ." Section 401.011(10). A self-insured is not liable for compensation and an injury is not compensable 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." Section 406.032 (1)(D).

In the case under review, there is no dispute that the claimant's work-related duties did not include participating in the game, that he participated in it while off duty, that his participation was voluntary and that the participation was not expressly or impliedly required by his employment. The hearing officer decided the case solely on the basis that the activity was a reasonable expectancy of the employment. The parties disagree as to whether his participation was a reasonable expectancy of his employment as an assistant principal. The self-insured argues on appeal that the self-insured neither issued a written directive requiring faculty participation in the game nor initiated disciplinary action against faculty members who did not participate. It also points out that no one at the self-insured asked the claimant to participate in the game and he would not have been disciplined for not participating.

Under the predecessor workers' compensation statute, there was no exception to compensability for an injury occurring while the employee was engaged in a recreational or social activity. *See* TEX. REV. CIV. STAT. ANN. Art. 8309 § 1 (Vernon Pamph. 1992), *now repealed* (predecessor statute). However, Texas case law held that such injuries were not in the course and scope of employment unless (1) participation was expressly or impliedly required by the employer; (2) the employer derived some benefit from the activity other than the employee's health and morale; (3) or where the injury took place at the place of or in the immediate vicinity of the employment, the employee held himself in readiness of work and the activity took place with the employer's permission. Mersch v. Zurich Insurance Co., 781 S.W.2d 447, 450 (Tex. App.–Fort Worth 1989, writ denied). The 1989 Act codifies the "expressly or impliedly required by the employer" concept described in Mersch and adds the "reasonable expectancy" concept.

Under the 1989 Act, participation in an off-duty recreational, social, or athletic activity is a reasonable expectancy of the employment if the reasonable expectancy emulates from the employer, rather than from the employee's own conscience. Texas Workers' Compensation Commission Appeal No. 960515, decided April 26, 1996. In Appeal No. 960515, the hearing officer determined that the employee's participation in an employer-sponsored basketball team was a reasonable expectancy of his employment, and we reversed and rendered a decision that the evidence did not support a determination of a reasonable expectancy. In Texas Workers' Compensation Commission Appeal No. 93843, decided November 3, 1993, the hearing officer determined that the employee, a teacher's aide, who was injured while working at a student holiday party at the school engaged in an activity which was a reasonable expectancy of her employment. In that case, we reversed and rendered a decision that the evidence did not support a determination that the activity was a reasonable expectancy of the employment.

An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We reverse the decision and order of the hearing officer when her determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

We agree with the self-insured that since the claimant showed no evidence of a reasonable expectancy emulating from the self-insured, we must reverse. Appeal No. 960515, *supra.* There is no evidence in the record from which a reasonable inference may be drawn that the claimant's participation in the (date of injury), faculty-student basketball game was a reasonable expectancy of the employment. The claimant stated he volunteered to play in the game and the employer did not indicate any evidence of a reasonable expectancy. Only through speculation and the claimant's own belief that he should play in the annual event could an argument be made that this injury is compensable. Therefore, we conclude that the compensability determination and Finding of Fact No. 6 are so against the great weight and preponderance of the evidence as to be manisfestly wrong [or] unjust. We reverse and render a new decision that the claimant's participation in the school's (date of injury), faculty-student basketball game was not a reasonable expectancy of the employment and, therefore, the self-insured is not liable for compensation. Cain, *supra.*

We distinguish the concurring opinions in Texas Workers' Compensation Commission Appeal No. 941269, decided November 8, 1994. The employee, a teacher, was found to have participated in a faculty-student basketball game that was a reasonable expectancy of his employment. The case under review is distinguished because we have since adopted the concept that the expentancy, to constitute a reasonable expectancy under Section 406.032(1)(D), must "emulate from the employer . . . ." Appeal No. 960515, *supra*. The notion of analyzing whether there was a benefit to the employer is not codified in the 1989 Act and does not lend assistance in determining whether the carrier is relieved of liability under Section 406.032(1)(D).

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Since we reverse and render a decision that the self-insured is not liable for compensation, the claimant's injury is not compensable. Therefore, we reverse the disability determination and render a new decision that he does not have disability.

Christopher L. Rhodes
Appeals Judge

CONCUR:

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Tommy W. Lueders
Appeals Judge

DISSENTING OPINION

I respectfully dissent. Whether the claimant's participation in the basketball game was a reasonable expectancy of his employment was a fact question for the hearing officer to determine from the evidence presented. Texas Workers' Compensation Commission Appeal No. 941269, decided November 8, 1994. I cannot conclude that the hearing officer's decision is supported by no evidence. In addition to the claimant's testimony, the hearing officer could consider the written statements of his coworkers. I would not hold that the hearing officer's decision is against the great weight and preponderance of the evidence. I would affirm the hearing officer's decision

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Robert W. Potts
Appeals Judge