APPEAL NO. 982340
FILED NOVEMBER 13, 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 September 9, 1998, in (City), Texas, with [hearing officer] presiding as hearing officer. He determined that the respondent (claimant) was injured in the course and scope of her employment on [date of injury]. The appellant (self-insured) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as an elementary school teacher for the self-insured. It was not disputed that she injured her right knee on [date of injury], while preparing for a school carnival held that day on the school premises. The issue for resolution was whether the injury was compensable.

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). Course and scope of employment for purposes of this case 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." Section 401.011(12). Pursuant to Section 406.032(1)(D), a carrier, in this case the self-insured, 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." In Texas Workers' Compensation Commission Appeal No. 92212, decided July 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992, the Appeals Panel appears to have adopted the three-pronged, disjunctive test enunciated in Mersch v. Zurich Insurance Company, 781 S.W. 447 (Tex. App.- Fort Worth 1989, writ denied), for determining whether participation in such an activity was in the course and scope of employment. Under this test, the activity is in the course and scope of employment if (1) participation is expressly or impliedly required by the employer; or (2) the employer derives some tangible benefit from the activity; or (3) the injury occurs at the place of

employment or immediate vicinity while the employee is required to hold him/herself in readiness for work and the activity takes place with the employer's express or implied permission.

In an affidavit admitted into evidence, Ms. H, the school principal wrote that the carnival was "a joint or combined effort between the PTA and the [school]... The carnival is the major fund raising event for the school and the proceeds from the carnival go directly to various programs in the school to enhance the education of the students and to improve the quality of the school." She further wrote that the PTA existed solely to benefit the school; that participation in the carnival by the teachers "is extremely important"; and that "I strongly encouraged...the teachers to support the carnival by working at least one hour or more of extra time to help prepare for and produce this event." She also said that in the monthly staff meeting preceding the event and "on a regular basis in the morning announcements, I strongly encouraged each of our teachers to participate in the carnival and reminded them to be certain to sign-up for various booths and other carnival activities." Ms. H continued that she "in particular" asked the claimant to sponsor the Fun House based on her "special skills, experience and abilities in the design and creation of similar productions. We requested that [claimant] actively participate and we expected that she would be physically present and participate in the setup and supervision of the Fun House." She concluded the affidavit with the statement that at the time of the claimant's injury, "her activities were consistent with the activities which I had requested of her." Ms. H also testified that she approached the claimant to sponsor the Fun House which she described as the "main feature of the carnival." Ms. H acknowledged in her testimony that she used the word "expected" in her affidavit, but in her testimony declined to use this word in favor of "anticipated" that the claimant would be at the carnival and that she "strongly encouraged" teachers to participate, but never "ordered" the claimant to be present at the carnival. She also testified that no one could be disciplined for not participating in the PTA or the carnival, nor was anyone paid for participating in the carnival, nor were classes conducted during the carnival.

Mr. K, the president of the PTA, testified that the claimant was asked to be in charge of the Fun House and could have said no, but once she agreed she had to be at the carnival. He also said that the PTA would probably consider whether a teacher participated in the carnival in responding to that teacher's request to use the proceeds from the carnival for classroom activities.

The claimant testified that she was paid a salary regardless of whether she participated in the carnival. She said that the carnival chairperson asked her if she would organize the Fun House and that Ms. H then her asked if she would and was

happy when the claimant told Ms. H that she would. She further stated that Ms. H encouraged the teachers "almost on a daily basis" to sign up to participate.

The hearing officer considered the evidence and made the following pertinent Finding of Fact No. 2:

On [date of injury], Claimant injured her right knee during voluntary participation in an off-duty activity for which there was a reasonable expectancy or implied requirement for Claimant's participation and for which there was a tangible benefit to Employer in the form of funding for Employer's school needs.

He concluded that the self-insured was not relieved of liability for compensation. The carrier appeals this determination arguing (1) that there was no legal relationship between the PTA and the school; (2) that Ms. H provided only "general encouragement" to participate in the carnival which did not rise to the level of a requirement of the claimant's employment; and (3) that none of the three prongs of Mersch were met by the claimant.[1]

Much time was spent at the CCH addressing whether the benefit received by the school from the proceeds of the carnival was "substantial" or "tangential" so as to meet the second prong of the Mersch test. In a recent decision, Texas Workers' Compensation Commission Appeal No. 981313, decided August 3, 1998, the Appeals Panel analyzed the compensability of injuries that occur while participating in off-duty recreation or social activities solely in terms of the statutory elements contained in Section 406.032(1)(D) and rejected the suggestion that in addition a claimant must prove some substantial benefit to the employer. Consistent with this decision, we need not address the question of benefits to the employer, but would only note that the hearing officer's finding that a "tangible" benefit flowed to the school was compelled by the evidence. Were it necessary to address the carrier's contention on appeal that the benefit was not substantial, but merely "tangential" (without knowing precisely what is intended by this term), we would similarly conclude that the evidence would support a finding of a substantial benefit to the educational mission of the school.

The statutory elements, either of which must be proved by the claimant to make this injury compensable, are whether (1) participation in the activity of preparing the Fun House for the carnival was a "reasonable expectancy" of the employment, or (2) the participation was "expressly or impliedly required by the employment." Whether these conditions existed were questions of fact for the hearing officer to decide. Texas

[1]Though not explicitly identified as such, we construe the "three prong test" identified by the carrier to be the Mersch test.

Workers' Compensation Commission Appeal No. 941705, decided February 6, 1995. The hearing officer found that the claimant's participation met both these tests of compensability.

With regard to the reasonable expectancy test, the self-insured on appeal argues that the employer did nothing more than generally encourage the claimant to participate in the carnival and cites our decision in Texas Workers' Compensation Commission Appeal No. 951781, decided December 13, 1995, for the proposition that such general encouragement does not establish a "reasonable expectancy" of the employment. That case involved an injury at a fundraiser for an association to which the employee belonged, not a fundraiser for the employer, and there was conflicting evidence about whether membership in the association was required for the claimant's certification to work and over whether the employer encouraged membership in the association. The argument in the case we now consider presumably is that the claimant was participating in the carnival not as a teacher, but simply as a member of the PTA. There was evidence that all teachers were members of the PTA. There was also evidence that the teachers were repeatedly asked by Ms. H to participate. When read in a light most favorable to the self-insured, the evidence established that the claimant participated in the carnival as both a teacher and a member of the PTA. More importantly, however, was the evidence of Ms. H that she asked the teachers to participate and even used the word "expected" in her affidavit. While she arguably backpedaled from this word when she perhaps was made aware that it had a statutory significance, we conclude that the claimant's testimony and the evidence of Ms. H were sufficient to support the finding of the hearing officer that the claimant's participation was reasonably expected by the employment, and under our standard of review, we decline to reverse that determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).[2]

Finally, the self-insured argues that participation in the carnival was not an express or implied requirement of the employment. This too was a question of fact for the hearing officer to decide. The evidence of Ms. H and Mr. K, the president of the PTA, provides a sufficient basis, we believe, for the inference that without teacher participation there would be no carnival. *See* Texas Workers' Compensation Commission Appeal No. 941269, decided November 8, 1994. While there was no

[2] Although not raised in these terms by the self-insured, we note that Appeal No. 981313, *supra*, relying on Texas Workers' Compensation Commission Appeal No. 960515, decided April 26, 1996, required that the "reasonable expectancy" emanate from the employer, rather than from the "employee's own conscience." Mere participation in the activity does not necessarily give rise to an inference that the participation was expected of the employee. *See* Texas Workers' Compensation Commission Appeal No. 93843, decided November 3, 1993.

evidence that without the funds provided by the carnival, the school would close, there was evidence in the affidavit of Ms. H that the carnival was a long-standing event and had been held for over 50 years as a "joint production between the PTA and the school itself." Simply because refusal to participate would not in itself result in termination or discipline, does not establish that participation was not a factor that could impact how a teacher's performance was judged. Indeed, as noted above, failure to participate would be considered in whether to grant a teacher funds to enhance classroom activities and this in turn could have a bearing on how the effectiveness of the teacher was perceived. Under these circumstances, we believe the evidence was sufficient to support the finding that participation was at least an implied requirement of employment.

For the foregoing reasons and finding no legal error, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

I state at the outset that I concur with the majority's decision in the present case. I write separately to express some concern about the potential overreading of the majority decision in Texas Workers' Compensation Commission Appeal No. 981313, decided August 3, 1998, which is cited in the majority decision in the present case. First, I note that in regard to Mersch v. Zurich Insurance Co., 781 S.W.2d 447, 450 (Tex. App.-Fort Worth 1989, writ denied) (hereinafter Mersch) the Appeals Panel has on many occasions prior to the majority decision in Appeal No. 981313, *supra*, cited Mersch as controlling authority under the 1989 Act, and the majority in Appeal No. 981313 does not explicitly overrule any of these prior Appeal Panel decisions. As the majority points out in Appeal No. 981313 the test regarding compensability in Mersch is

a common law test and I am unconvinced that the legislature intended to repeal any part of the Mersch test by passage of the 1989 Act or of Section 406.032(1)(D) in particular. I certainly do not believe that the Appeals Panel has the authority to overrule court of appeals precedent and consider the test set out in Mersch still to be the law. In my view, Section 406.032 was intended at most to supplement, not to supplant, the test set out in Mersch. Thus, I believe that a claimant can establish compensability by either establishing that he or she meets either one of the three disjunctive prongs of the test set out in Mersch or by establishing that he or she meets the test set out in Section 406.032(1)(D). I am firmly convinced that any other reading of Section 406.032(1)(D) constitutes not only failure to follow prior Appeals Panel authority but failure to follow Texas Court of Appeals precedent.

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Gary L. Kilgore
Appeals Judge