APPEAL NO. 990553

A contested case hearing (CCH) was on February 17, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with hearing officer, to consider two disputed issues, to wit: (1) did the claimed injury arise out of voluntary participation in an off-duty activity not constituting part of the appellant's (claimant) work-related duties, thereby relieving the respondent (self-insured) of liability for compensation; and (2) did claimant have disability resulting from the injury sustained on March 27, 1996, through August 19, 1996. The hearing officer resolved the disputed issues by concluding that claimant did not sustain a compensable injury and did not have disability. Claimant has appealed these determinations, essentially restating her position below that her evidence met her burden of proof on the disputed issues. Claimant also complains of the denial of her request for subpoenas. The self-insured urges in response that the evidence is sufficient to support the appealed findings and conclusions.

DECISION

Reversed and remanded.

Not appealed is a finding that claimant, stipulated to have been an employee of the self-insured, "sustained an injury in an automobile accident _____ [sic, should be 1996], while on her way home from an *Algeblocks* workshop."

Claimant testified that she is employed by the self-insured as a special education algebra and geometry teacher at (the high school) in (city 1); that in March 1996 the high school was in jeopardy of being closed by the State of Texas for its low Texas Assessment of (TAAS) scores; that on March 27, 1996, just after classes ended, she and other math teachers from the high school were sent off campus to the (the building) in city 1 to attend a workshop on *Algeblocks* presented by the ETA (the company); that the workshop was attended by math teachers from all over city 1; that as far as she knows, the company is a vendor of teaching aide products such as *Algeblocks* but she does not know if the company was trying to sell products at that time; that she did not have to reserve a place at the workshop in advance, did not have to pay to attend, and does not know about any financial arrangements between the self-insured and the company; that she received a free packet of materials about *Algeblocks* at the function; that she did not receive any mileage reimbursement or per diem payment for attending; that she signed in at the function; and that she assumed she would receive two hours of teacher continuing education credit for attending but has no evidence that any such credit was granted. Claimant stated that it was her position that her attendance was mandatory because of the high school's effort to raise its TAAS scores and the self-insured's requirements for teachers to participate in continuing education as a part of staff development. Asked whether there were any repercussions for math teachers who did not attend, claimant responded that "they could get called in and be verbally reprimanded" and that "I know it goes on."

Claimant further stated that while driving home after the workshop concluded, she was involved in a motor vehicle accident and her left shoulder area was injured; that she was in the hospital for 24 hours and released; that she was taken off work on March 28, 1996, and on some subsequent dates by one or more of her doctors, as reflected in her medical records; that she was referred to Dr. B, a neurologist, who released her to return to work on April 29, 1996, but that her treating doctor did not release her at that time; that her most recent treating doctor is Dr. F; that she was not released to return to full-duty employment by Dr. F until August 13, 1996; that she was off work during the summer; and that she resumed full-time employment on August 19, 1996, when the next school term commenced.

In evidence is a March 11, 1996, letter (the company letter) from company representative Ms. W to the Math Department Chairperson, inviting that person and the algebra teachers to a March 27, 1996, presentation from 4:00 to 6:00 p.m. on using "algebra manipulatives" in the classroom. A handwritten note on this letter, only partially legible on the exhibit, appears to state: "[Ms. D] [and] Math Dept, Special Att: All Algebra teachers, let's go!" No evidence was adduced identifying the author of this note. Claimant testified that Ms. D is the math department supervisor. The letter also states that Ms. R, the self-insured's mathematics director, had scheduled a room in the Human Resources Training Center in the building for the presentation.

Also in evidence is a July 23, 1997, statement from Ms. D stating that, as chairman of the math department at the high school, she gave to each department member a copy of "a flyer" which came from the principal's office requesting that they all attend an *Algeblocks* workshop on March 27, 1996, in the building, from 4:00 to 6:00 p.m., and that she, claimant, and several other teachers did attend.

An August 6, 1997, handwritten statement from Mr. A states that he was the principal of the high school during the 1995-1996 school year; that as part of the math staff development, the math department was instructed to attend the *Algeblocks* workshop on March 27, 1996; that the high school had performed poorly in the math TAAS scores and it was essential that math teachers attend as many workshops as possible to increase student achievement; and that he authorized the distribution of the company letter and fully supported claimant's attendance. In his recorded statement of June 10, 1998, Mr. A stated that it was not mandatory that claimant attend the workshop and that attendance was not required by the self-insured, but that he, as the principal of the high school who was making efforts to raise the TAAS scores, "very much encouraged" and "more or less required" his math faculty to go, and that claimant "was being supportive by going there."

In evidence is a portion of the self-insured's Administrative Procedures, namely, Article Five - Employee Procedures, 572.680, entitled "Inservice and Staff Development," which states, in part, that teachers "may be required during the school year to attend staff development sessions," and that the "planning of such staff development programs shall be developed through a cooperative effort of the teachers and the Administration."

A June 24, 1996, memorandum from Ms. R stated that attendance at the training session in *Algeblocks* offered by the company on March 27, 1996, "was voluntary" and was open to all of the self-insured's algebra teachers.

The self-insured's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated May 1, 1996, reflects that the self-insured disputed the claim for the reasons that there is no injury in the course and scope of employment; that there is no medical documentation to support a causal connection to the workplace; that there is no injury or accident "as defined in the Act"; that claimant reported that she was on the highway on the way home when she was rear-ended by another party; that claimant's alleged injury did nor arise from an on-the-job injury; and that claimant did not have disability because she did not have a compensable injury and had no medical evidence to support disability. We observe that although a "coming to and going from" work defense is raised by the self-insured in the TWCC-21 (*see* Section 401.011(12)(A) and (B)), it was not a disputed issue at the BRC or the CCH.

Claimant appeals findings that her participation in the workshop was voluntary and that she was not injured in the course and scope of employment, and "conclusions that the injury sustained in an automobile accident did not occur while she was in the course and scope of her employment, that the claimed injury arose out of her voluntary participation in an off-duty activity not constituting part of her work-related duties, thereby relieving the self-insured of liability for compensation, that she did not sustain a compensable injury, and that she did not have disability.

In his discussion of the evidence, the hearing officer states that the company letter does not reflect that teacher attendance was mandatory; that, although claimant testified that attending the function was part of her staff development, the self-insured's Administrative Procedures state that staff development is a function of the self-insured and is mandatory; that the company letter does not indicate that staff development credit would be given and claimant could not verify she received any credit; that, although Mr. A encouraged teachers to attend, attendance was not mandatory; that claimant's's injury arose out of voluntary participation in an off-duty activity not constituting a part of her work-related duties; and that, as a result, she was not in the course and scope of employment when she had the accident on her way home.

A compensable injury is defined as an "injury that arises out of and in the course and scope of employment for which compensation is payable . . . ." Section 401.011(10). 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; . . . " Section 406.032(1)(D).

The Appeals Panel has had a number of occasions to review cases involving the application of Section 406.032(1)(D) and has both affirmed and reversed and rendered. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 93843, decided

November 3, 1993; Texas Workers' Compensation Commission Appeal No. 941269, decided November 8, 1994; Texas Workers' Compensation Commission Appeal No. 951781, decided December 13, 1995; Texas Workers' Compensation Commission Appeal No. 960515, decided April 26, 1996; Texas Workers' Compensation Commission Appeal No. 981313, decided August 3, 1998; Texas Workers' Compensation Commission Appeal No. 982340, decided November 13, 1998. In the latter case, there was discussion in both the majority opinion and the concurring opinion as to whether the so-called common-law Mersch test (referring to Mersch v. Zurich Insurance Company, 781 S.W.2d 447, 450 (Tex. App.-Fort Worth 1989, writ denied) is still controlling, given the subsequent enactment of Section 406.032(1)(D)).

The Appeals Panel has recognized that whether or not an injured employee's participation in an off-duty recreational, social, or athletic activity is a reasonable expectancy of the employment is a question of fact for the hearing officer to resolve. Appeal No. 941269, *supra*. Further, the hearing officer is the sole judge of the weight and credibility of the evidence Section 410.165(a)); the fact finder resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)); and the Appeals Panel does not disturb appealed fact findings of a hearing officer unless they are against the great weight and preponderance of the evidence (In re King's Estate., 150 Tex. 662, 244 S.W.2d 660 (1951)).

We are constrained to reverse the decision and order of the hearing officer and remand for further consideration and findings of fact by the hearing officer, based on the evidence of record, because there are no findings of fact applying Section 406.032(1)(D) to the evidence and the hearing officer's discussion indicates that he may have decided the matter simply on the question of whether or not claimant's attendance at the function was voluntary or mandatory. There is no finding of fact concerning whether the event claimant attended was an off-duty recreational, social, or athletic event, nor were there any findings of fact concerning whether claimant's attendance at the event, assuming it was the type of event covered by Section 406.032(1)(D), was a reasonable expectancy of or expressly or impliedly required by her employment.

According to documents accompanying the record but not in evidence, the Texas Workers' Compensation Commission received on December 31, 1998, claimant's requests for subpoenas for the testimony of Dr. F (concerning claimant's continuing medical problems) and of Ms. D and Mr. A (concerning whether attendance at the workshop was mandatory). Concerning the request for Dr. F's testimony, claimant's request stated that Dr. F could not voluntarily testify but could testify via telephone. A Commission hearing officer denied this request for the stated reason that no good cause was shown. Concerning the requests for Ms. D and Mr. A, claimant's requests stated, respectively, that they "may not" and "possibly" will not appear voluntarily. The same hearing officer denied the request for Ms. D, stating that no good cause was shown and that there was no showing that the proposed testimony could not be presented by statement or deposition. The request for Mr. A was denied for the stated reason that good cause was not shown and

that the request did not meet the requirements for obtaining a subpoena. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12(d) provides that the hearing officer may deny a request for a hearing subpoena upon a determination that the testimony may be adequately obtained by deposition or written affidavit. Claimant did not renew her requests for subpoenas at the hearing or otherwise mention them and did introduce into evidence her medical records and written statements from Ms. D and Mr. A. We do not find an abuse of discretion in the denial of claimant's requests for subpoenas. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

We reverse the decision and order of the hearing officer and remand for such further consideration of the evidence of record and for such further findings of fact and conclusions of law as are appropriate and not inconsistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge