

APPEAL NO. 992270
FILED DECEMBER 1, 1999

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 8, 1999, a contested case hearing (CCH) was held in [City], Texas, with [hearing officer] presiding as hearing officer. The issues concerned whether the respondent, who is the claimant, sustained a compensable injury on [date of injury]; whether he was injured by voluntary participation in an off-duty activity not constituting part of his work-related duties, thereby relieving the appellant (self-insured) of liability; and whether he had disability from his injury. The self-insured's position on the first two issues was that the claimant was not employed by the school district, a self-insured employer, on the date of his knee injury.

The hearing officer did not expressly address the claimant's employment status on the date of injury. The hearing officer found that self-insured was liable because the claimant was injured in furtherance of the affairs of the employer and that he was not hurt in an off-duty activity. He further found that the claimant had disability for the period from March 27 through September 8, 1999.

The self-insured has appealed, urging that the decision is wrong as a matter of law because a compensable injury must happen to one who holds the status of employee, which the claimant did not because he had resigned his position two weeks before his accident and was not engaged in an activity incident to his termination or resignation at the time of his injury. The self-insured argues that the finding as to voluntary participation is nonsensical because the claimant was not an employee. Finally, the self-insured urges that the dependent finding of disability is erroneous. The claimant generally responds that the factual findings of the hearing officer should not be set aside absent a great weight and preponderance against the decision. The claimant addresses the termination issue by noting that he merely resigned "on paper."

DECISION

The decision being erroneous as a matter of law, we reverse and render.

The claimant testified that he had been a volunteer basketball coach at [School T], operated by the self-insured. He also had entered into a set contract with the school district to act as a part-time coach for another elementary basketball team; this contract ran for a set period from October 15, 1998, through February 20, 1999, for an average of 10 hours per week. The claimant said that the end date of the contract represented the end of the regular season. Schedules from prior years are consistent with the end of the regular basketball season being at or around this date in February.

The claimant agreed that on or about February 10, 1999, he entered into a contract of hire with School T. He was described as a teachers' aide. The claimant said that he never was a teachers' aide, however, and that this characterization was the idea of the principal, [Ms. O], as a way of getting him paid. The claimant said that he worked from three to six o'clock p.m. at least two and often three times a week as a coach, prior to March 12th. Apparently, there were second thoughts about this arrangement because the claimant said that Ms. O told him there may be a conflict and he therefore completed papers to resign his position on February 24, 1999, with an effective date of March 12, 1999. This resignation was duly processed and approved by the district, whose records indicate that his last day of employment was March 12, 1999. The claimant recited the reason for resignation as the possible conflict, apparently with his duties to the other school, although that contract and his duties there had concluded. The claimant testified that Ms. O also told him that she may have put herself "in a precarious position." The claimant said he had "been a volunteer before" and was not one to walk away from the kids at School T, who were the champions and could therefore participate in tournaments. He said he agreed to continue, but he had an understanding that Ms. O would "do right" by him and pay him for his time.

On [date of injury], the claimant drove the team in his private van to a tournament that was sponsored by "Project Seed." An official for the school district, [Ms. M], testified that it was her understanding that Project Seed was jointly sponsored by the [City] and private businesses for the purpose of fund-raising activities, although school gymnasiums were used. The claimant apparently was playing in a coaches game which was a component of this event, when he injured his right knee, ultimately requiring surgery. He said he had not been able to work since then, including his usual job of selling advertisements for a publication. The claimant said his medical bills were paid through his wife's regular health insurance.

Ms. M testified that paraprofessionals such as the claimant were paid monthly by the school district and that a check stub the claimant put into evidence, dated April 7, 1999, would represent payment for the period from March 8 through April 7, 1999, although it was her understanding that none of that amount represented payment after March 12, 1999. This showed that the claimant was paid for six hours. The claimant had answered the self-insured's interrogatories by stating that he had not been paid for the tournament. He testified that when he reviewed his last check stub, it occurred to him that maybe he had been paid for it after all. He was unable to testify as to how long a pay period would be represented in a check stub. Ms. M said that, to her knowledge, there were no informal agreements entered into by the school district to allow someone to stay on, and be paid, after a resignation.

Because the school district is a self-insured political subdivision, the applicable statute is Section 504.001 *et seq.* of the Labor Code. Section 504.001(2) defines "employee" as:

- (A) a person in the service of a political subdivision who has been employed as provided by law; or
- (B) a person for whom optional coverage is provided under Section 504.012 or 504.013.

The referenced provisions in Section 504.001(2)(B) relate to coverage of volunteers and trustees of a self-insurance fund for whom coverage is optional with the political subdivision.

Recognizing the importance and prevalence of volunteers in school districts, the Legislature extended immunity from civil liability to such persons. Section 22.053(b) of the Texas Education Code defines "volunteer" to mean:

. . . a person providing services for or on behalf of a school district, or on the premises of the district or at a school sponsored and school related activity on or off school property, who does not receive compensation in excess of reimbursement for expenses.

Thus, it is recognized that persons who are not being paid wages by the school district may nevertheless be rendering services that "further" the business of the district or performing the duties that could also be performed by employees.

As the self-insured points out, however, the definition of "course and scope of employment" set out in Section 401.011(12), applicable to political subdivision through Section 504.002(1), requires also that the injured person qualify as an "employee." Consequently, the hearing officer either made an implied finding that the claimant was an "employee" of the school district on [date of injury], or he failed to apply the entire definition of course and scope. As his discussion accepts that the claimant's resignation was effective March 12th, he also stated that the claimant was "acting in his capacity as an employee," so it appears that he impliedly found that the claimant was an employee.

An implied finding that the claimant was an employee of the school district on [date of injury] is against the great weight and preponderance of the evidence in this case, which essentially compels the conclusion that, on the day he was injured, the claimant was an unpaid volunteer for the school district. The claimant's testimony, as well as that of Ms. M, supports the conclusion that the six hours he was paid with the April 7, 1999, check represented the services rendered in the period from March 8th

through March 12th. The fact that he was furthering the interests of the district is neither inconsistent with his volunteer status, nor does it trigger liability of the self-insured for workers' compensation benefits. It was part of the claimant's burden of proof in this case to show he was an employee, as defined in Section 504.001(2), which would include evidence that he was an optionally covered volunteer. Because the claimant was not an employee on [date of injury], the self-insured is not liable for workers' compensation coverage, as matter of law. Although it is questionable that the benefit tournament qualified as a regular school activity, the regular season being over, we need not address this question as the claimant's volunteer status resolves the issue of compensability in this case.

We therefore reverse Conclusion of Law No. 4, in which the hearing officer held that the self-insured was liable because the claimant was injured in the course and scope of employment, and render a decision that the claimant was not an employee on his date of injury and, consequently, the self-insured is not liable. We further render the decision that because there is no compensable injury, there is no disability.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge