APPEAL NO. 032347
FILED OCTOBER 16, 2003

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 July 14, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimed injury did not arise out of voluntary participation in an off-duty recreational or athletic activity not constituting part of the claimant's work-related activities, therefore, the apellant (carrier) is not relieved from liability; and that the claimant had disability beginning _____, and continuing through the date of the CCH. The carrier appealed, arguing that the medical evidence does not support the hearing officer's determinations and that the claimant was not in the course and scope of her employment because the injury arose out of the claimant's voluntary participation in an off-duty recreational or athletic activity. The claimant responded, urging affirmance.

The claimant did not appear at the hearing, due to the serious nature of her injury, but was represented by her attorney of record.

DECISION

Affirmed.

The employer's representative testified that the employer encouraged its employees to participate in a wellness program that was initiated to increase employees' health, increase employee retention, reduce employee stress, and lower employees' healthcare insurance premiums. The employer paid for the employees' health club membership dues and gave time off to employees to participate in the program. The health club then provided written reports on the participants to the employer. It was undisputed that the claimant was a participant in the wellness program.

The claimant's husband testified that on _____, the claimant returned home after an early morning workout session at a local health club and complained about an abdominal workout machine that was mispositioned, causing her head to be at a lower angle than usual. The claimant developed a severe headache, but decided to go to work rather than seek medical attention. After losing consciousness at work, she was transported by ambulance to the emergency room. In a report from Dr. M dated May 5, 2003, the claimant's CT scan was reported to have shown an "intracerebral hemorrhage which bled in to the ventricles of the brain causing them to be obstructed and creating [an] exceedingly high pressure situation threatening herniation of the brain." In the same report, Dr. M opined that "the hemorrhage was caused by straining and attempting to do physical exercises." Dr. M noted that tests were performed to rule out other causes of hemorrhage such as aneurysm or rupture of an abnormal blood vessel and concluded that the hemorrhage was "purely a result of sudden and severe

strain while performing physical exercises." The evidence reflects that the claimant underwent an emergency procedure to relieve pressure on the brain and externally drain spinal fluid and blood. The claimant has been unable to work since _____.

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 hearing officer cited Texas Workers' Compensation Commission Appeal No. 982340, decided November 13, 1998, in which the Appeals Panel recognized the three-pronged, disjunctive test enunciated in Mersch v. Zurich Insurance Company, 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ denied), for determining whether participation in the off-duty recreational, social, or athletic 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; (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. The hearing officer was persuaded that the evidence showed that the employer impliedly required the claimant's participation in the wellness program and that the employer derived some tangible benefit from the activity. Therefore, the hearing officer determined that the claimant was in the course and scope of her employment when the injury occurred.

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. Texas Workers' Compensation Commission Appeal No. 941269, decided November 8, 1994. 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)). Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed. In that the carrier's appeal on the issue of disability is premised entirely on the fact that claimant had not sustained a compensable injury, by affirming the hearing officer's decision on the compensable injury, we also affirm the finding on disability.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge