APPEAL NO. 92536

On August 19 and 24, 1992, a contested case hearing was held. The hearing officer determined that the claimant, DH, who is the respondent, was acting in the course and scope of her employment when she was injured on _____, while employed by the employer. Although there would appear to be issues relating to the nature of injury, and whether subsequent disability was caused by the results of the fall at work, the sole issue tendered to the hearing officer for decision was whether the claimant was engaged in horseplay, or in an off-duty social or recreational activity, when injured.

The carrier has appealed and argues that it was error for the hearing officer to hold that the claimant was not involved in horseplay, or otherwise engaged in a deviation from employment, at the time of her injury. Respondent replies that the decision of the hearing officer is supported by the evidence. Respondent notes that if there was participation in a social or recreational event, that the employer's consent was implied.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

At the time of her injury, the claimant was a supervisor in the customer service section of the employer. She was responsible for from 10 to 20 workers. Although most workers for employer worked from 8:30 a.m. to 5:00 p.m., the claimant's section was on duty from 10:00 a.m. until 7:00 p.m. Annually, the employer sponsored an Employee's Appreciation Day for employees, a social occasion held on the weekend. _____, the day before the planned social occasion, was a Friday, and according to several witnesses, festivities started on an informal basis during that day. There was squirt gun play, alcohol, water balloons, casual dress and other frivolity. Although employees were expected to participate only when off duty, no one was reprimanded for participation during work hours.

At sometime around 6:00 p.m. that Friday, several employees grabbed the company president, (Mr. J), outside and carried him off to throw into the fountain. According to the claimant, she heard a commotion and screaming in the hallways and, concerned about a possible emergency, went out to investigate. According to other witnesses, the claimant could see Mr. J being carried to the fountain and expressed a desire to get a closer look. In any case, the claimant went outside and stood on a platform area in front of the building for two or three minutes. According to her, the now-wet Mr. J charged toward her and told her he was going to throw her in the fountain. She ran from him and fell down a small flight of stairs, injuring and visibly bruising her knee.

Mr. J denied that he specifically chased claimant, although he stated he charged generally at a crowd of people who fled. Mr. J said that the employer neither permitted nor discouraged participation in Friday's activities. He confirmed that no one was disciplined for their actions that Friday.

A few of her coworkers saw the claimant the next day at the company dance, where she was observed at one point dancing the "Twist." The claimant worked until August 16, 1991, when she was terminated for what is described in the personnel director's statement as not following company policy by basically using company property to her own use. As the hearing decision itself notes, the claimant is off from work due to depression and psychological problems. She argues that these stem from the accident. There is some indication in her medical records that she experienced similar problems prior to _____, although not immediately prior to that date.

The carrier argues that it is not liable because of exceptions set out the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.02(3) and (5) (Vernon's Supp. 1992) (1989 Act), and that the claimant had deviated from furtherance of the employer's business at the time of the accident.

Whether or not an employee was a voluntary participant in horseplay at time of injury is a question for the trier of fact. United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex App.-Amarillo 1982, no writ). The facts support the hearing officer's observation that the claimant was not an actor in horseplay, but a bystander and victim of it. *See also* Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850 (Tex. Civ. App.-Amarillo 1958, no writ). His finding that the horseplay exception does not apply is supported by the evidence.

We also agree with the hearing officer that the exception set forth in Art. 8308-3.02(5) does not apply here. First of all, there is question as to whether the frivolities around the work place on _____ can be said to constitute an "off duty" recreational or social event. Secondly, claimant was still "on duty" and there was evidence she had left her office to investigate apparent disruption at the workplace. Mr. J's testimony and his own participation in the events leading to the accident are also indicative, as the hearing officer notes, of implied consent to participate, even if claimant's activity could be said to constitute a deviation.

A compensable injury that takes place at the place or immediate vicinity of the employment, while the employee is required to hold herself in readiness for work, and where the employer impliedly or expressly gives permission for the activity, is compensable as occurring within the course and scope of employment, even if no specific duty incident to employment is being discharged. Mersch v. Zurich Insurance Company, 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ denied). At the time of her fall, the claimant was still on her shift. The record indicates a general relaxation at the work place that day, for which no one was punished. The company president was himself an active participant. All facts support the hearing officer's determination that, if there had been a deviation from employment by claimant, there was an implied permission for same (referred to somewhat inaccurately in the hearing decision as a "waiver" of deviation). Where there is implied permission during work hours for an activity undertaken at the place of employment, such

as here, that activity may be found not to be a deviation but within the course and scope of employment.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

There being sufficient evidence to support the decision of the hearing officer, we affirm his decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge