APPEAL NO. 971330

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 February 27, 1997. The issues at the CCH were whether the appellant's (claimant herein) injury arouse out of voluntary participation in an off-duty social activity not constituting part of the claimant's work, whether the claimant timely reported an injury to the employer and whether the claimant had disability. The hearing officer determined that the claimant was not in the course and scope of her employment at the time of injury, that the claimant did not timely report her injury without good cause for not doing so and that the claimant did not have disability. The claimant appeals, arguing that she was furthering the affairs of her employer at the time of the injury and that she had good cause for not timely reporting her injury. The respondent (carrier herein) replies that the evidence established that the claimant was not in the course and scope of employment and did not have good cause for not timely reporting an injury to the employer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that she suffered an injury while at home when on _____, she lifted a cooler of meat into her car. The meat was for the company picnic. The claimant worked for a correctional facility and testified that as the warden's secretary she felt she was required to participate in the preparation for the company picnic. The claimant testified that she felt that this requirement was implied and even though she had a choice of whether or not to participate she felt that to keep a good relationship with the boss and to maintain the morale of the facility she really had no choice. The warden testified that the claimant's participation in preparation of the picnic was entirely voluntary.

The claimant treated with Dr. M, D.C., a number of times between June 11, and July 5, 1996. None of the medical reports from these visits mention the cooler incident. The claimant testified that on July 5, 1996, Dr. M told her that her problems were more serious than he had thought and they discussed possible reasons for her condition, determining that she was injured while lifting the cooler into her car on _____. The claimant then reported her injury to the employer.

The hearing officer's Findings of Fact and Conclusions of Law include the following:

FINDINGS OF FACT

2. The claimed injury to Claimant's neck and left shoulder occurred on _____, while Claimant was voluntarily participating in an off duty social activity not constituting Claimant's work related duties.
3. On _____, Claimant did not injure any part of her body while working

for Employer.

4. On or before June 30, 1996, Claimant did not tell or otherwise notify anyone holding a supervisory or management position with Employer that she claimed a work-related injury.

5. Neither Employer nor any person in a supervisory or management position with Employer had actual knowledge of the injury claimed by Claimant on or before June 30, 1996.

6. In delaying reporting that she claimed an injury in excess of thirty days from _____, Claimant did not exercise the degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances.

7. The inability of Claimant to obtain and retain employment at wages prior to _____, at any time since _____, is because of something other than any injury she sustained while working for Employer.

CONCLUSIONS OF LAW

2. Carrier is not liable for the claimed injury of _____, because it occurred outside the course and scope of employment.

3. Claimant did not sustain an injury in the course and scope of employment on _____.

4. Claimant did not timely report an injury to Employer.

5. No good cause exists under the Texas Workers's Compensation Act for Claimant's failure to timely notify Employer of the occurrence of a work-related injury.

6. Claimant has not had disability at any time since _____.

The claimant argues that hearing officer erred in finding that the claimant was not in the course and scope of her employment. The claimant first argues that she was in the course and scope of employment under the doctrine that participation in social activities may be within the course and scope of employment and specifically cites our opinion in Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993. In Appeal No. 93484, we found that a claimant who fell on the employer's premises while trying to catch a football during a break was in the course and scope of his employment. In Appeal No. 93484, we relied upon the test expressed in Mersch v. Zurich Insurance Company, 781 S.W.2d 447 (Tex. App.-Forth Worth 1989, writ denied) (hereinafter Mersch) in determining whether the claimant's participation in a social or recreational activity was

within the course and scope of employment. We in fact specifically relied upon the third prong of the disjunctive three-prong test of Mersch. The third prong of that test does not apply here, because as we explicitly stated in Appeal No. 93484, one requirement of the third prong of the Mersch test is that the injury take place at or near the place of employment. In Appeal No. 93484 the injury took place on the employer's premises; in the present case, the injury took place at the claimant's home. This distinguishes Appeal No. 93484 from the present case.

Nor do we find that the claimant met the other two prongs of the Mersch test which state that either the employee's participation in the social or recreation activity be expressly or impliedly required by the employer or that the participation further the affairs of the employer other than morale. There was conflicting evidence as to whether the claimant's participation in the company picnic was impliedly required. The hearing officer found that it was not and we will not overturn his finding supported by the evidence under the same rationale as we affirmed a finding under similar evidence in Texas Workers' Compensation Commission Appeal No. 951091, decided August 10, 1995. It is the province of the hearing officer to resolve conflicts in the evidence. As for furthering the affairs of the employer other than morale, the claimant's own testimony showed that morale was the purpose of the picnic.

Finally, this case is readily distinguishable from Texas Workers' Compensation Commission Appeal No. 91111, decided January 30, 1992. In that case, the claimant was found to be in the course and scope of his employment when loading equipment he regularly used at work into his truck while at home. It was clear that this was part of his regular job duties which involved traveling from place to place cleaning service station restrooms. In the present case, it is clear that the claimant's work as a secretary normally does not involve loading meat into her car. More instructive to the case at hand are our decisions in Texas Workers' Compensation Commission Appeal No. 941047, decided September 19, 1994, and Texas Workers' Compensation Commission Appeal No. 941705, decided February 6, 1995.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The 1989 Act provides that a determination by the Texas Workers' Compensation Commission (Commission) that good cause exists for failure to provide notice of injury to an employer in a timely manner or actual knowledge of the injury by the employer can relieve the claimant of the requirement to timely report the injury. Section 409.002. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact it is job related (emphasis added). DeAnda v. Home Ins. Co., 618 S.W.2d 529, 533 (Tex. 1980). Thus, where the employer knew of a physical problem but was not informed it was job related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). Also, the actual knowledge exception requires actual knowledge of an injury. Fairchild v.

Insurance Company of North America, 610 S.W.2d 217, 220 (Tex. Civ. App.-Houston [1st Dist.] 1980, no writ). The burden is on the claimant to prove actual knowledge. Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.).

In the present case, the hearing officer found as a matter of fact that the claimant did not report to the employer that her neck and shoulder conditions were work related until more than 30 days after her injury. He also found that the employer did not have actual knowledge of an injury and that the claimant did not have good cause for not timely reporting. All of these determinations turned on factual findings by the hearing officer. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. When reviewing such findings, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not find that to be the case here.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011 (16).

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge