APPEAL NO. 000062

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 28, 1999, a contested case hearing was held. With regard to the only issue before him, the hearing officer determined that appellant (claimant) was not in the course and scope of employment at the time of the claimed left ankle injury.

Claimant appeals certain of the hearing officer's findings, contending that the hearing officer erred in finding claimant's attendance at a certain park "was not mandatory," that claimant was required "to hold herself in a state of readiness of work" and that claimant's pay would have been docked if she had not attended the event. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The self-insured school district (self-insured) responds that the park meeting "conveys the idea of 'fun' and 'leisure' at the 'meeting' not school business" and urges affirmance.

DECISION

Reversed and rendered.

This case essentially involves a question of law and the background facts are largely undisputed. Claimant was employed as a school psychologist by the self-insured. _____ (all dates are 1999) was an "in service" or staff development day for claimant and the self-insured. The staff met at one of the schools from about 8:30 a.m. to 10:00 a.m. Afterwards, there was a PSDS (psychological, social and diagnostic services) "meeting" at a park. In evidence is a memo from the self-insured's executive director of student and family services that after the morning meeting "the staff members had the option of going to the office to complete paper work or they could attend an end of year activity at [the park]." Claimant testified that she understood that going home was not an option and a memo from the payroll department said, in part, "If on that particular day [_____] she was absent a halfday or a day she would have been dock [her pay would have been docked]." Also in evidence is a flyer announcing the "PSDS End of Year 'MEETING,'" giving directions to the park, having the words "Leisure" and "Fun" and showing drawings of a baseball player and a fisherman catching a fish. Claimant testified that she went to the park as directed, that she got out of her car and that when she was walking across the parking lot, carrying a bottle of water and a picnic basket, she stepped in a pothole and severely sprained her ankle. The hearing officer, in his Statement of the Evidence, comments that there is no question that claimant was injured. Claimant testified that she continued to the pavilion where the PSDS meeting was being held, had lunch and then engaged in discussions about peer review, recent cases and handling of certain situations. Claimant testified that about two-thirds of the PSDS employees were at the meeting and that there may have been a softball game going on. The self-insured had apparently rented or reserved the premises for the day or at least that afternoon.

Both claimant and the self-insured cited an Appeals Panel decision or two which they believed supported their position. The hearing officer, in the Statement of the Evidence, commented:

> The event was not mandatory; employees had the option to return to the office and do paperwork. Claimant estimated that about 2/3 of the employees attended the picnic. The only benefit to the employer was the health and morale of employees. No program or training session was held, and casual conversations among co-workers about their cases, when such discussions were not even required, do not rise to the level of a benefit to the employer. The event was not held on or near the workplace. Thus, the event does not meet any of the three tests required to bring the off-premises recreational or social activity within the course and scope of employment.

We cannot agree that attendance was not mandatory. As claimant points out, if an employer gives an employee the option of performing task A or task B, and the employee chooses task B, for whatever reason, and is injured performing that task, it is no defense to say that the task was not mandatory because the employee could have chosen task A. Claimant testified, and is supported by some documentary evidence, that she did not have the option of going home and that if she did not choose either task A, to go to the office to perform paperwork, or task B, to go to the picnic meeting, her pay would have been docked.

Although not mentioned by the parties, Section 406.032(D) provides that the carrier is not liable for an injury if the injury:

> (D) 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 [Emphasis added.][.]

As indicated above, the executive director's memo gives the employees an option of attending the PSDS end of year meeting or "going to the office to complete paper work." Consequently, this at least impliedly required attendance at the park meeting or a return to the office to do paperwork.

The hearing officer apparently gave weight to the fact that the park (or at least pavilion) "was only rented for the day" and was "not adjacent or near to the employer's place of business." (We do not believe that is particularly controlling.) In doing so, the hearing officer refers to the fact that "the event does not meet any of the three tests required to bring the off-premises recreational or social activity within the course and scope of employment." We believe the hearing officer may have been referring to the case of Mersch v. Zurich Insurance Co., 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ den'd). In Mersch, the employee was injured at a company-sponsored picnic while playing softball. Mersch cited several Texas Workers' Compensation cases and stated that injuries sustained by an employee while engaged in a recreational or social activity sponsored by the employer are not in the course and scope of employment, unless:

> (1) participation in such activity is expressly or impliedly required by the employer; (2) or the employer derives some benefit from the activity, other than the health and morale of the employee; (3) or where the injury takes place at the place or immediate vicinity of employment while the employee is required to hold himself or herself in readiness for work, and activity takes place with the employer's express or implied permission.

We note that the requirements in Mersch are in the disjunctive, meaning that if any one of the situations is met, then the injury would be compensable. We have already commented that claimant's testimony, the executive director's memo and the memo from the payroll department directly require claimant to either attend the park meeting or return to the office to do paperwork, with the failure to do either resulting in claimant having her pay docked. Consequently, we do not need to address whether the self-insured derived some benefit other than the health and morale of the employees or whether the injury takes place in the immediate vicinity of employment while the employee is required to hold herself in readiness for work.

We would further note that Mersch does not require the activity to be "mandatory," only that the activity "is expressly or impliedly required by the employer." We hold that the great weight and preponderance of the evidence to be that attendance at the park meeting, if not expressly required by the executive director's memo, was certainly implied with the alternative being to go to the office and do paperwork or risk having their pay docked. We hold that the hearing officer's findings that the park event was not mandatory to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, we reverse the hearing officer's decision and render a new decision that claimant was in the course and scope of her employment at the time she sustained her left ankle injury.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge