APPEAL NO. 000621

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 6, 2000. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable (low back) injury on _____ (all dates are 1999 unless otherwise noted), and had disability on November 3rd, November 4th, and again from November 16th, and continuing through the date of the hearing. The appellant (carrier) appeals, contending 1) that claimant did not sustain any injury on _____, as alleged and 2) that attendance at a company-sponsored picnic has "two layers," one, attendance at the event and two, participation in recreational sporting activities. Carrier concedes attendance at the picnic was mandatory but contends that participation in a volleyball game was voluntary with no reasonable expectation that claimant would participate. Carrier requests that we reverse the hearing officer=s decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant was employed as a sales representative by the employer publishing company. It is fairly undisputed that on _____, the employer had a business meeting in the morning to finish off one project and discuss objectives of a new project after which all the employees, including claimant, were required to attend a picnic at a ranch for "camaraderie," "finish the day" and have fun. It is undisputed that employees were playing volleyball, and throwing horseshoes, frisbees and a football. This case is somewhat unusual in that the employer and carrier agree that attendance at the picnic was mandatory and required.

Claimant testified that he went to the picnic and went to a sand volleyball court, began playing volleyball and on the next to last point in a game fell landing on his low back. Claimant stated that he had had some back problems before and that on occasion he had gone to a chiropractor for adjustments that had helped him. Claimant testified that he felt a sharp pain in his back when he fell and then he stayed at the picnic for another hour and a half before going home because of back pain. Claimant testified that he did not work on November 3rd or 4th because of his back pain; that he called in for his supervisor, Mr. M, who was not available; and that he left a message with the secretary, Ms. K, or with a temporary secretary, Ms. L. Claimant said that he took over-the-counter medication for pain relief. Claimant testified that he returned to work on November 5th and that he continued to work in pain as well as he could until November 15th, when he reached for his briefcase, or some books, in the back seat of his car and experienced back spasms and increased pain. Claimant said that he sought medical care and made an appointment with Dr. TL the next day.

A progress note dated November 16th from Dr. TL recited a history of a new job delivering telephone books and that claimant "developed acute pain lifting several days ago."

Dr. TL diagnosed low back strain, and two other non-related conditions. At the bottom of the typed progress note there was a handwritten entry dated November 23rd that claimant called the doctor=s office (on November 23rd) and informed them that this was a workers= compensation case and that he wanted the chart to reflect that he was injured playing volleyball at the company picnic. Claimant testified that when he initially told Dr. TL that this was a workers= compensation case, Dr. TL told him that he did not do workers= compensation and that he did not want to hear anymore about a work-related injury. Claimant said that he told the doctor to do what he could. Claimant subsequently sought treatment from Dr. T. Dr. T=s records, beginning December 2nd, note the volleyball incident, had an impression of low back pain with degenerative disc changes and Dr. T=s opinion that based on history "it certainly sounds as though this is a work related injury."

Carrier introduced contrary and contradictory evidence including that claimant had prior back problems, had seen a chiropractor some weeks prior to the volleyball incident for a backache, that claimant had produced no witnesses that saw him fall, that Mr. M had played volleyball "all day" but had not seen claimant playing volleyball, that neither Ms. K nor Mr. M had gotten a message that claimant had been hurt on _____ at the picnic (claimant says that only shows it must have been Ms. L that he spoke with), that claimant did not mention a back injury on November 8th when he and Mr. M were on a sales call, that claimant only mentioned back pain on November 19th without reference to work and that claimant had not claimed a work injury until November 23rd.

The hearing officer, in his Statement of the Evidence, concludes:

> After considering all of the evidence and testimony I conclude that the claimant sustained an injury on _____. In reliance upon the three-pronged disjunctive test found in **Mersch v. Zurich Insurance Company,** 781 S.W.2d 447 (Tex.App.-Fort Worth 1989, writ denied) I conclude that his injury is compensable. **Mersch** held that injuries sustained during participation in employer sponsored social activities are not compensable unless either: 1) participation is expressly or impliedly required by the employer, ... The claimant in this case falls under the first exception because his attendance at the event in question was mandatory. The carrier argues that while the claimant=s attendance at the picnic may have been mandatory, his participation in volleyball was not, and that any injury sustained while participating in such an unauthorized activity would become non-compensable. I decline to adopt this strict interpretation of the **Mersch** standard, or to add that restriction to Section 406.032(D) of the [1989] Act. Furthermore I find that the claimant=s injuries are at least a producing cause of his inability to earn his pre-injury wage on November 3, 1999, November 4, 1999 and then again from November 16, 1999 through the date of this hearing.

Carrier appeals with its first point being that claimant had not sustained an injury playing volleyball at the picnic on _____, citing the evidence that it presented to the contrary. Whether or not claimant was playing volleyball as he testified and whether or not he was injured, and the inferences to be drawn from the testimony and medical reports, are strictly factual determinations for the hearing officer to resolve. We have many times noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The evidence was in conflict and the hearing officer=s decision is supported by sufficient evidence.

On the second point, carrier presents a rather unique innovative argument that Section 406.032(D) and Mersch, *supra*, should be applied not only to the picnic but also to all the activities at the picnic, including volleyball. Section 406.032(D) provides that the carrier is not liable for compensation if the injury:

> (D) arose out of voluntary participation in an off-duty recreational, social, 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[.]

The Mersch test mentioned previously is similar to the statutory standard in Section 406.032(D) and carrier concedes that only the requirement that "participation was expressly or impliedly required by the employer" is applicable here.

The picnic was undisputedly required by the employer but carrier argues "that there are two levels of recreational activity involved in this case," one being the picnic itself and the other being the voluntary participation in other activities such as the volleyball game. First, we will note that we find no authority, and carrier cites none, that divides a "recreational, social or athletic activity" into subcategories. Carrier=s argument is essentially that claimant may have been required to attend the picnic but anything he did at the picnic (other than perhaps stand or sit) was not in the course and scope of "attending" the picnic. We do not find carrier=s citation to various Appeals Panel decisions applicable as they involve voluntary activities outside the employment. Secondly, even were one to adopt carrier=s "two level" theory (which we expressly decline to do) the exception of noncompensability applies, unless there "is a reasonable expectancy" of an employee being required by the employment, (*i.e.,* attending the picnic) to also participate in the activity, volleyball. It seems that playing volleyball at a required picnic was reasonably contemplated because a sand volleyball court, with net and ball, was

available and the supervisor, Mr. M, played "all day" stating "nobody beat us. I was hoping they would, but they didn=t." It would appear that there was at least an implied invitation to play volleyball and try to beat the boss. We decline to adopt carrier=s theory of a two (or more) level recreational activity theory.

Carrier=s appeal on the disability issue is entirely predicated on a finding of no compensable injury. In that we are affirming the hearing officer=s decision that claimant sustained a compensable injury in the course and scope of employment, we also affirm the hearing officer=s findings on disability.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O=Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge