APPEAL NO. 93956

On September 14, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The only issues to be decided at the hearing were whether the appellant (claimant) sustained an injury in the course and scope of her employment on (date of injury), and whether she has disability. The hearing officer determined that the claimant did not prove that she sustained a lower back injury in the course and scope of her employment on (date of injury), that she did not have disability, and denied benefits under the 1989 Act. The claimant disagrees with the decision. The respondent (carrier) asserts that the claimant's appeal was not timely filed and that the decision is supported by the evidence. The claimant's appeal was timely filed. The decision was originally sent to the claimant at a wrong address and was returned to the Texas Workers' Compensation Commission (Commission) undelivered. It was remailed to the correct address on October 7, 1993, and the claimant's appeal, postmarked October 26, 1993, was received by the Commission on October 28, 1993. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) the claimant is deemed to have received the decision on October 12th, and under Rule 143.3(c) the appeal is presumed to be timely filed since it was mailed on or before the 15th day after the date of receipt of the decision and was received by the Commission not later than the 20th day after the date of receipt of the decision.

DECISION

The decision of the hearing officer is affirmed.

The issue from the benefit review conference (BRC) was whether the claimant sustained an injury in the course and scope of her employment on (date of injury). By agreement of the parties the hearing officer added the issue of disability.

The claimant has worked for the employer, Walmart, as a cashier for about three years. She testified that on March 26, 1993, she "pulled something" in her back when she was helping someone "scoot" a microwave oven at her home. She said she did not go to a doctor and missed only one day of work. On Saturday, (date of injury), the claimant was at work when she said she experienced back pain. The claimant described the onset of her pain as follows:

> Okay. I wanted to go to the bathroom and everyone else was busy and couldn't let me go. And I asked a second time and they let me go. I had been on the different register than normal and lifting and tugging at different heavy things. And when I went to the bathroom and started to pull up my pants, I could not get up. It took me at least five minutes or more to even straighten up. And when I left there, I went sort of bent over up to the front. And I reported it to [FN] who is the CSM [Customer Service Manager].

The claimant said that prior to going to the bathroom she had lifted bags of dog food weighing between 25 and 50 pounds each but had not experienced any back pain. The claimant said that lifting the dog food "could have caused it." The claimant testified that she first felt back pain at work when she started to pull up her pants in the bathroom.

The claimant further testified that she worked in a "slumped" over position on and off the rest of the day; that at lunch she told several coworkers and again told FN, her supervisor, that she had hurt her back; that when she got home she had a swollen red spot on her lower back; that she did not hit her back on anything at work; that she was scheduled to be off the next day which was a Sunday; that on Monday, April 19th she went to work and made a written report of injury; that on April 19th she saw (Dr. R) who took her off work; that she has been unable to work since (date of injury) due to back pain; that Dr. R referred her to (Dr. D); that she has lower back pain almost every day; and that the back pain she experienced scooting the microwave oven at home was "up higher" on her back than the back pain she experienced at work on (date of injury).

The carrier presented the testimony of the claimant's supervisor and several coworkers. They testified to the effect that prior to (date of injury) the claimant had mentioned hurting her back at home on March 26th moving a microwave oven and that on (date of injury) the claimant told them she hurt her back pulling up her pants in the bathroom at work. In a written report to the employer dated April 19th, the claimant wrote "[w]ent to the bathroom--tried to pull up pants and pull (sic) muscle in lower back."

Dr. R indicated in a medical record that he saw the claimant on April 19, 1993, and that the claimant reported that she "got up off commode and hurt her back." Dr. R took the claimant off work. An April 23, 1993, CAT scan of the claimant's lumbar spine was reported to be "unremarkable." On May 5th Dr. R diagnosed "low back pain/strain." In a note dated June 26, 1993, Dr. R said that the claimant had not been treated for low back pain by him in the last five years and that she had been treated for low back pain on one occasion on March 16, 1987 but had no further symptoms according to her chart record. In a Report of Medical Evaluation (TWCC-69) dated June 29, 1993, Dr. R diagnosed a low back sprain, did not indicate that the claimant had reached maximum medical improvement, and stated that the claimant had been referred to Dr. T "for impairment." In a report dated July 16, 1993, Dr. R stated to the effect that he had no knowledge of any microwave incident in March 1993. Dr. R further stated that he felt that the claimant's problems were related to the "commode incident" which the claimant told him happened on (date of injury).

In a report dated May 19, 1993, Dr. D recited that on March 26, 1993, the claimant was lifting a microwave oven "at work" and felt a "stab in her lower back" and that she contacted Dr. R by telephone. The claimant said at the hearing that the microwave incident happened at home and that she did not contact any doctor. Dr. R said in a report that he had no record of such a call. Dr. D further stated that the claimant returned to work two days later feeling significantly better and then several weeks later while at work she went to the toilet, bent to pull up her pants and felt "sudden severe onset of right low back pain with a slight twisting incident." Dr. D opined that claimant's low back pain was likely due to

inflammatory causes.

The hearing officer made the following pertinent findings of fact and conclusions of law:

## FINDINGS OF FACT

3.The claimant experienced the onset of acute lower back pain while in the bathroom at work on (date of injury).

4.The claimant's pain in her back was not caused by an incident at work or by a repetitive trauma injury at work.

5.The claimant did not injure her lower back on (date of injury), while working for her employer.

6.The claimant injured her back on March 26, 1993, while moving a microwave oven at home.

7.There is insufficient evidence to prove that the injury on March 26, 1993 was the "sole producing cause" of the claimant's current lower back pain.

8.The claimant did not prove that her inability to obtain and retain employment after (date of injury), is due to a compensable injury on (date of injury).

## CONCLUSIONS OF LAW

2.The claimant did not prove that she sustained a lower back injury in the course and scope of her employment on (date of injury).

3.The carrier did not prove that a pre-existing or subsequent injury or condition was the sole producing cause of the claimant's lower back pain and other lower back symptoms experienced on (date of injury).

4.The claimant did not prove that she had disability after (date of injury).

In arriving at his decision, the hearing officer stated:

The claimant experienced the acute onset of lower back pain at work on (date of injury). The cause of the claimant's back pain is unknown. There is some speculation that the injury may have occurred while the claimant was lifting heavy bags of dry dog food; however, the claimant is not able to identify with any certainty a specific work related incident that caused her injury. It is possible that the cause of the claimant's lower back pain was work related; it is equally possible that the cause of the pain was not work related.

In her appeal, the claimant simply states that she wishes to appeal the order of the hearing officer. Given the rather speculative nature of the claimant's testimony which attempted to link her claimed back injury to lifting dog food at work, we do not find that the hearing officer erred in failing to find a causal connection between lifting dog food and the claimed back injury. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a).

The claimant's testimony concerning the onset of back pain while pulling up her pants in the employer's bathroom presents a more complex problem in view of the hearing officer's findings that: 1) the claimant experienced the onset of acute lower back pain while in the bathroom at work on (date of injury); 2) the claimant's back pain was not caused by an "incident at work;" and 3) the claimant did not injure her lower back on (date of injury) while working for her employer. We first point out that pain does not necessarily equate to an "injury" which is defined as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm, and includes an occupational disease. Section 401.011(26). However, Dr. R diagnosed a sprain or strain and it has been held that sprains and strains can be compensable injuries. *See* Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.).

Section 401.011(11) provides that a "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(12) provides that "course and scope of employment" means "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include [exceptions regarding transportation and travel omitted]."

In a recent Texas case, Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied), the court held that: 1) under the personal-comfort doctrine a toolpusher did not go outside the scope of his employment when he entered a bathroom and suffered an aneurysm because the toolpusher was required to be on call to supervise the employer's operations as long as the drilling rig was operating and needed time to eat, sleep, and go to the bathroom; and 2) under the positional-risk test, rupture of the aneurysm while the employee was using the bathroom did not arise but for the employee's work and, therefore, was not compensable; the employee would have confronted the risk irrespective of any type of employment.

In Bratcher, the employee was found collapsed in the bathroom of the company house trailer; it appeared he was using the bathroom and that he fell across the edge of the bathtub. His underwear was around his ankles and he had just completed a bowel movement. Efforts to resuscitate were unsuccessful. An autopsy was performed. One doctor opined that the predisposing event of the fatal subarachnoid hemorrhage may have been an increase in intracranial pressure that occurred at the time of voiding. This doctor

concluded that the manner of death was natural, rather than work related. Another doctor opined that the employee died from a ruptured berry aneurysm in a blood vessel at the base of the brain, that such aneurysms are believed to result from either a congenital and/or acquired weakness in the vessel wall, and that while exertion is not required for aneurysmal rupture, the most likely precipitating cause for rupture of the aneurysm in the employee's case was straining during defecation. The trial court granted summary judgment for the claimants and the carrier appealed. On appeal, the court concluded that the evidence raised a fact issue as to the precipitating cause for the rupture of the aneurysm, but did not view the evidence as so definite and clear as to establish the issue as a matter of law. Thus, the trial court erred in granting summary judgment for the claimant. However, the court did not reverse and remand for a trial; instead the court reversed and rendered judgment for the carrier. In doing so, the court discussed the concept of accidental injury, the personal comfort doctrine, and the positional risk or "but for" test.

In regard to "accidental injury," the court said that the courts of this state have recognized that the Workers' Compensation Act was not intended to provide health insurance, but was designed to provide compensation for incapacity flowing from an accidental injury. We note that under the 1989 Act, the concept of "disability" as set forth in Section 401.011(16) is used.

In regard to the personal comfort doctrine, the Court cited Larson's Workmen's Compensation Law, Vol. 1A, Sec. 21.53 for the proposition that accidents occurring while an employee is on his way to or from toilet facilities, or while he is engaged in relieving himself, arise within the course of employment. The court also cited Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2nd 243 (Tex. 1985). In Yeldell, an employee, while at her duty station, had a telephone cord become entangled with a coffee urn that overturned and spilled hot coffee on her. She had just completed a telephone call to her daughter. In holding that the injury was sustained in the course of her employment, the Supreme Court of Texas said:

> An employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger; such acts are considered incidental to the employee's service and the injuries sustained while doing so arise in the course and scope of his employment and are thus compensable.

The court also cited Texas Employers Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e). In the Prasek case, the employee left the drilling rig to which he was assigned and went to a trailer house to eat dinner. He choked on some food and died. His death was held to have been sustained during the course of his employment.

Concerning the positional risk or "but for" test, the court in the Bratcher case said (we

quote at length due to the unusual nature of the claim before us):

> Thus, we conclude that Mr. Bratcher did not go outside the scope of his employment when he entered the bathroom of the trailer provided by his employer and there would be compensation coverage, unless application be given to the positional risk test, sometimes referred to as the "but for" test. That test focuses the court's inquiry upon whether the injury would have occurred if the conditions and obligations of employment had not placed the claimant in harm's way. *See* Walters v. American States Insurance Company, 654 S.W.2d 423 (Tex. 1983) and North River Insurance Company v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ). This doctrine was noted in Walters but never mentioned in Prasek. In Prasek, the Court did note that Mr. Prasek was under no pre-existing condition. Mr. Bratcher did have a pre-existing condition. The test is perhaps best illustrated by the concurring opinion of Judge Johnson in Otto v. Moak Chevrolet, Inc., 36 Or. App. 149, 583 P.2d 594 (1978). In that case, it was alleged that the claimant went to the women's restroom, relieved herself, and while she was pulling her underwear and slacks back up in an ordinary manner, her back went out. The majority opinion acknowledged that Oregon gives effect to the personal comfort doctrine, but said there was no causal connection between the injury and the employment. The concurring opinion said:
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> > Here the activity of going to the bathroom was "incidental" to the employment, but the injury was not a "risk of * * * the employment." Jordan v. Western Electric, *supra*, 1 Or. App. [441] at 443, 463 P.2d [598] at 600 [(1970)]. The act that caused the injury was claimant's personal movements performed while using the toilet - a risk that claimant confronted irrespective of her employment.
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> Otto, 583 P.2d at 598. *See also* Larson's Workmen's compensation Law, Vol 1A, Sec. 21.53, n. 13.1 which cites Sacks v. Industrial Commission, 13 Ariz. App. 83, 474 S.W.2d 442 (1970); Southern Bell Telephone v. McCook, 355 So.2d 1166 (Fla. 1977), and the Otto case as holding that injuries connected with the use of the toilet, while having occurred in the course of employment, did not arise out of the employment. In the McCook case, the Court said:
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> > We cannot . . . convert the workmen's compensation statute into a mandatory general health insurance policy which does not limit the burden on industry to those ailments produced even remotely by the hazards of injury.
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> McCook, 355 So. 2d at 1169.
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> In the Walters case, the Court cited cases in which the courts had awarded compensation benefits on the positional risk theory because the employment

> brought the employee in contact with the risk that it in fact caused his injuries. In that case, the employee ((claimant)) was found shot to death after leaving on a trip with his employer ((employer)) to meet a potential client. The Court noted that "*[b]ut for* (employer)'s order that (claimant) accompany him to the business conference, (claimant) would not have left town with (employer) on the Saturday of the deaths [emphasis added]." Walters, 654 S.W.2d 427. Likewise, in Yeldell, but for her employment, the claimant would never have had contact with the cord on the telephone and the resulting burns from the coffee pot.

> In this case, the aneurysm could have burst at any time. The injury did not arise but for him being at work, rather it was due to a personal defect which proved to be fatal from a strain totally unrelated to the deceased's employment. It cannot be said that but for Mr. Bratcher being assigned to a rig as a toolpusher he would not have gone to the bathroom on the occasion in question. Instead the risk was one Mr. Bratcher would have confronted irrespective of any type of employment. In the Walters case, Mr. (claimant) left town with his boss only because of his employment. Mr. Bratcher did not go to the bathroom only because of his employment.

The court sustained the carrier's point of error that the trial court had erred in denying its motion for summary judgment, reversed the judgment of the trial court, and rendered judgment that the claimants take nothing.

We observe that the court in Bratcher, *supra*, quoted with approval and relied upon the case of Otto, *supra*, which is factually similar to the instant case--an employee strains her back pulling up her pants after using the toilet in a restroom at work. Applying the rationale in Bratcher, *supra*, to the facts of the instant case, we hold that under the personal comfort doctrine, the claimant in this case did not go outside the scope of her employment in using the bathroom provided by her employer, but that her claimed injury is not compensable because, under the positional risk test, the injury did not arise out of her employment--the risk was one the claimant would have encountered irrespective of her employment. We distinguish this case from our decisions in Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991, and Texas Workers' Compensation Commission Appeal No. 91037, decided November 20, 1991. In each of those decisions we affirmed a hearing officer's decision that the employee sustained a compensable injury when the employee slipped and fell on a wet bathroom floor at work and sustained a back injury. While not discussed in our decisions, we observe that a condition of employment--the wet bathroom floor--placed the employee in harm's way. Since the claimant in the instant case did not sustain a compensable injury, she could not have disability as defined in Section 401.011(16).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge