APPEAL NO. 990252

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 January 15, 1999. The issues concerned whether the respondent, who is the claimant, sustained an injury in the course and scope of employment on _____, and whether she had disability as a result of that injury.

The hearing officer found that claimant sustained injury to her right knee and had disability therefrom for the period from September 13, 1998, until January 10, 1999.

The appellant (carrier) appeals, and argues that, notwithstanding that claimant was on the job when injured, she was further required to prove that an instrumentality of the employer was involved. The carrier argues that just because a "condition developed at work" does not make that condition compensable. The claimant responds by pointing out that the hearing officer's factual determinations are not against the great weight of the evidence, and further that "positional risk" should not be applied broadly to remove from compensability those injuries that occur while the employee is furthering the employer's affairs. The claimant finally points out that to require the involvement of an employer's "instrumentality" to make an injury compensable injects notions of negligence and fault into workers' compensation "strict liability" underpinnings.

DECISION

Affirmed.

The claimant was employed as a licensed vocational nurse by (employer) on _____, when she turned to leave her workstation to make her rounds of patients. (All dates are 1998 unless the contrary is indicated.) She said as she turned to the right to leave the counter, her left foot slipped slightly, she "planted" her right foot to maintain balance, and her knee locked. She had severe pain in her knee and went to the emergency room (ER), where she was diagnosed with a sprain and taken off work for a few days with crutches. Claimant ended up having arthroscopic surgery on December 8th for a questionable foreign body, which was reported from a September 16th MRI. When she had the surgery done, a tear in her lateral meniscus was also found.

Claimant agreed that she had a mild case of osteoarthritis; however, she stated that this condition would not lead to tearing of her meniscus. At the time of the CCH, claimant was working light duty, filling in when needed as a ward clerk, beginning on January 11, 1999. She was off work from September 1st through January 11, 1999, as a result of her injury and subsequent surgery.

Claimant said she was wearing athletic shoes on the day of the accident. She said the floor was tile or linoleum. The carrier asked claimant why slipping was not mentioned on the ER intake form or when she spoke briefly with the adjuster. Claimant said that she

did not think about it in the ER because she was occupied with her pain, and she noted in her interview with the adjuster that she did not think about it when she gave the statement.

Claimant's doctor, Dr. P, recorded on his September 28th report that the claimant had a rotational movement injury to the knee. Claimant again said she did not specify slipping to Dr. P because she was attempting to give him the basics of the accident history.

Claimant had an x-ray of her knees taken on August 22nd. She said this was diagnostic only; she did not go in as a result of swelling. However, no further testimony was brought out about why she had the x-ray done. Claimant's medical records indicate that she is overweight.

The facts in this case are not really in dispute, although there was a conflict over whether the claimant "slipped" or merely turned. The hearing officer resolved this fact in favor of a slip, and his finding is sufficiently supported. The thrust of the appeal brief is largely a legal argument--that the claimant was not in the course and scope of employment if the injury arose from what is "essentially walking" and therefore an activity common to the public at large, with no "instrumentality" of the employer being involved. Workers' compensation law is not tort law; the employee need not prove that the employer was in some way negligent, or the premises defective, in order to recover for injuries that are encountered in the course and scope of employment or arise from that employment, while the business of the employer is being furthered. We do not agree, as the carrier urges, that an injury arising from an activity that could also be experienced outside of work is, per se, noncompensable for that fact alone. As the claimant points out in her response, Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ) defines course and scope of employment as 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 the employee which engaged in or about furtherance of the affairs and business of the employer. Section 401.011(12), the definition of "course and scope of employment," is to the same effect. Neither indicates that such an activity may be held not to be within the course and scope if it parallels something that could be done at home or at play. We note that the Appeals Panel has previously rejected a variant of the same argument that injuries that could be sustained by the general public are not compensable. *See* Texas Workers' Compensation Commission Appeal No. 951576, decided November 10, 1995.

As we also stated in Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995:

> In many, if not most, instances an accident could either occur at work or away from work, and, as a result, the fact that an accident could have occurred at some other location does not mean that an on-the-job injury becomes noncompensable under the positional risk test. In addition, the use of the word "would" by the Bratcher [Employers' Casualty Company v. BratcherU, 823 S.W.2d 719 (Tex. App.-El Paso 1992, no writ) court in

> describing the "but for" test is indicative of the inevitability of the injury as opposed to the possibility that it could occur elsewhere. The purpose of the positional risk test is to ensure that there is some connection between the work and the risk of injury. That connection is present in this instance because claimant was at his regular duty station performing his work duties at the time of his injury. That is, "the employment brought the employee in contact with the risk that in fact caused his injuries." Bratcher, 823 S.W.2d at 722 (citing Walters v. American States Ins. Co., 654 S.W.2d 423 (Tex. 1983)). Accordingly, we dismiss carrier's assertion that claimant's injury is noncompensable under the positional risk doctrine.

As the hearing officer notes in his decision, there have been certain, unusual cases in which some activities undertaken at work (such as repetitive injuries incurred during mere walking) have been held by some Appeals Panels to be not compensable. There have been a very few, such as Texas Workers' Compensation Commission Appeal No. 972235, decided December 17, 1997, that appear to overrule the course of prior Appeals Panel decisions. They did not, however, expressly overrule prior decisions. Since many of the cases urged by the carrier as dispositive were written, the Texas Supreme Court has made clear that the long-standing doctrine of liberal construction of the workers' compensation act applies to the 1989 Act. Albertson's Inc. v. Charles Sinclair, 42 Tex. Sup. Ct. 358 (Feb. 4, 1999) (*per curiam*); *See also* The Kroger Co. v. Keng, 976 S.W.2d 882, 890 (Tex. App.-Tyler 1998, n.w.h.). We are therefore disinclined to further undertake the erosion in this case of the definition of "course and scope of employment" and adopt a strict construction which would, in effect, have the worker moving in and out of the course and scope of employment throughout the work day, depending on whether the activity undertaken is one which could also be undertaken elsewhere. We would point out that to do so would also be inconsistent with the Appeals Panel's unequivocal adoption of the "personal comfort" doctrine to extend compensability to activities that are arguably all equivalent to those which would be undertaken outside of work, and which do not appear as tied to performance of actual business as the departure from a workstation in order to undertake the next work activity.

In response to the argument that an activity arising out of employment can nevertheless be found to be not compensable under the "positional risk" doctrine, we apply the sound discussion of the "positional risk" considerations set forth in Texas Workers' Compensation Commission Appeal No. 981267, decided July 27, 1998. *Compare* Texas Workers' Compensation Commission Appeal No. 941056, decided September 21, 1994, in which an injury from a sneeze was held not compensable; even in this decision, there is nothing indicating a broader interpretation than that put forth in Bratcher, *supra*, should be embarked upon under the 1989 Act.

Even assuming that Appeal No. 972235, *supra*, and Texas Workers' Compensation Commission Appeal No. 980631, decided May 14, 1998 (Judge Kilgore dissenting), could be decided the same way today, in light of the Supreme Court's clarification of the doctrine of liberal interpretation that must be applied to the 1989 Act, the hearing officer has

correctly noted that this case is distinguishable, with the claimant pivoting in her workstation area as she was performing her work activities. We do not agree that some further contact with an "instrumentality" was required to bring this injury within the course and scope of employment, beyond the slip on the employer's floor surface. We would observe that the requirement of an instrumentality of the employer as an element of compensability has generally come about when a fall results from an underlying, idiopathic physical condition, which was not proven in this case. *See* Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex 1948).

We accordingly affirm the hearing officer's decision and order, based upon his interpretation of "course and scope of employment" which is legally supported by the doctrine of liberal interpretation, and is factually supported by the record herein.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge