APPEAL NO. 990896

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 March 16, 1999. The issues concerned whether the claimant (respondent), sustained an injury in the course and scope of employment on _____, and whether he had disability as a result of that injury.

The hearing officer found that claimant injured his back and had disability beginning August 19, 1998, and continuing through the date of the CCH.

The appellant (carrier) appeals and argues that notwithstanding that claimant was on the job when injured, he was further required to prove that the activity he was undertaking at the time, bending over, exposed him to a greater risk of injury than that encountered by the average worker in general. The carrier argues that he could have hurt his back bending over at home just as likely as at work. The carrier argues that the event-causing injury was innocuous and not injurious and that claimant's back pain is a continuation of back problems he had prior to his asserted date of injury. The carrier says that claimant intentionally misrepresented his preexisting back problems on two occasions and thus his testimony at the CCH, upon which the hearing officer's decision is based, could not be credible. There is no response from the claimant.

DECISION

Affirmed.

The claimant was employed by (employer) and assigned to work at the location for (Client Company). He said that the night of _____, he had been carrying racks of tools back and forth and hanging up tools through much of the night. He said that he bent over to pick up some more tools to hang and his back went out at this time. He finished his shift, but called in the next day and was sent to a doctor, Dr. T. He was taken off work. He changed treating doctors to Dr. H.

Claimant agreed he was in a truck accident in 1990, which, while it injured his lower back, primarily affected his neck, ribs, and head. He was last treated for his back by Dr. Y in July 1994 and returned to work in 1996. He said he was able to do work involving lifting, and did not have back problems. He did not remember if he discussed this prior injury with Dr. H. However, he disputed that it would have been necessary to do so because there was a long period of time that he had no back problems and Dr. H was treating his current back problem (although he referred him to two other doctors for various evaluation and treatment). The claimant also agreed that he had not disclosed this on his preemployment physical questionnaire because it would not affect his ability to work for the employer. When the hearing officer said that this had the appearance that he was trying to hide the fact of his prior back injury, the claimant denied that this was the motivation in either case.

The claimant had not had recommended and approved pain injections at the time of the CCH because he did not like the idea of a needle being stuck in his spine.

Claimant had not worked or tried to work anywhere since August 18, 1998, because of the injury and his doctor's opinion that he should not work. He said that Dr. T wrote on his records that he had a herniated disc after claimant discussed his 1990 accident with him, so he was not trying to hide the fact of the earlier injury.

Dr. T's Initial Medical Report (TWCC-61) noted a diagnosis of back strain and sciatica. He noted that claimant was diagnosed with multiple herniated discs as a result of a 1990 accident. The claimant said that he was referring to herniations in his neck in the conversation with Dr. T. A September 3, 1998, MRI report showed central disc bulging at L5-S1 with no nerve root compression and some degenerative changes. Claimant continued to be treated conservatively. An off-work slip dated March 5, 1999, from Dr. H noted that claimant is still to be off work but would be scheduled for a functional capacity evaluation.

All of the evidence in this case concerning whether the claimant injured himself on _____, or suffered the effects of a 1990 injury were for the hearing officer to determine. Although claimant experienced pain when he bent over while working, he also stated that this happened after he had been carrying racks of tools for a time. It was essentially undisputed that since the two years before his injury claimant did not experience low back pain that prevented him from working. Even if the hearing officer believed that claimant had some underlying back condition, he could believe from this record that it was aggravated by the claimant's activities. The burden is on a carrier who wishes to assert that the inability to work relates to an earlier injury to prove that it was indeed the "sole cause."

The major 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 an activity he could as likely have performed at home (bending over), which is an activity common to the general and working public at large. We reject the contention that a worker who is performing work when injured assumes the further burden of proving that the activity in which he was engaged when hurt does not parallel one that could have occurred outside of employment. As we stated in Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999:

> 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.

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 while 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 during personal activities on another premises. 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 9, 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. Bratcher, 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.

There have been a very few cases, 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 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. Sinclair, 984 S.W.2d 958 (Tex. 1999). *See also* The Kroger Co. v. Keng, 976 S.W.2d 882, 890 (Tex. App.-Tyler 1998, no pet.). 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 workday, 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 bending over to pick up tools being sorted and hung as part of the work task. It is worth pointing out 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.

A claimant's testimony alone is sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). The hearing officer could choose to believe the claimant's testimony and the medical evidence presented on the impact of the back strain. We affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge