APPEAL NO. 001002

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 April 17, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the course and scope of employment. The appellant (carrier) appeals this determination, contending that claimant was "merely" standing up when he sustained a non-compensable idiopathic injury. The file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant sustained a compensable ankle injury in the course and scope of employment. Carrier asserts that: (1) ordinary walking or standing is not compensable; (2) the hearing officer misstated the evidence by stating that claimant stumbled; and (3) the injury could have happened anywhere and is not compensable under the "positional risk" test.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Regarding whether the hearing officer misstated the evidence, in his transcribed statement, claimant said that he stood up in the break room at the end of his break, that his foot had fallen asleep and "crumbled," he stumbled about, and that his foot began to swell. At the hearing, carrier's attorney stated that claimant's ankle "gave way" as he stood up and in its brief, carrier stated that claimant "twisted" his ankle. In medical records, Dr. H also stated that claimant "twisted" his ankle. We conclude that the hearing officer did not "misstate or misinterpret" the evidence when she stated that claimant stumbled or tripped.

Carrier also contends that claimant was doing "ordinary walking" or "mere standing" at the time of his injury and that injuries during standing, an ordinary life activity, are not compensable. Given the evidence as set forth above, we reject the contention that claimant was merely standing. Further, this is not a repetitive trauma/occupational disease case. *Repetitive trauma* injuries associated with mere ordinary walking or ordinary standing are generally not compensable. *See* Texas Workers' Compensation Commission

Appeal No. 960307, decided March 25, 1996. The definition of occupational disease does exclude from that definition an "ordinary disease of life to which the general public is exposed outside of employment . . . ." Section 401.011(34). This case, however, involves twisting an ankle, a specific injury and not an occupational disease. The cases regarding repetitive walking or standing do not apply and the issue of what type of "ordinary standing" the ordinary public does is not relevant. *See* Appeal No. 960307.

Regarding whether claimant was in the course and scope of employment, the hearing officer determined that the ankle injury was compensable under the personal comfort doctrine. The hearing officer could and did find from the evidence that claimant was concluding an employer-authorized break at the time of his injury. The fact that an injury occurs on the employer's premises does not automatically mean that it is a compensable injury. *See* Director, State Employees Workers' Comp. Div. v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ). However, an employee in the course of his employment may perform acts of a personal nature at work that a person might reasonably do for his health and comfort, such as resting, 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. *See* Yeldell v. Holiday Hill Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985). The hearing officer could conclude that claimant was not outside the course and scope of his employment at the time of his injury in the break room.

Carrier next asserts that "this accident could have happened anywhere." The Appeals Panel has previously stated that just because an injury, such as twisting an ankle, could also happen outside of work, this does not mean that it is not compensable based on that fact alone. Texas Workers' Compensation Commission Appeal No. 991312, decided August 5, 1999. In many instances an accident could have happened at work or away from work. The fact that an accident could have occurred at some other location does not mean that a work injury becomes non-compensable under the "positional risk" test. The use of the word "would" by the court in Bratcher [Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied,] in describing the "but for" test is indicative of the inevitability of the injury as opposed to the possibility that it could occur elsewhere. Claimant did not sustain a spontaneous sprain that just appeared because it was "inevitable." He sprained his ankle because he stumbled and it twisted or "crumbled."

In the Texas Supreme Court case Yeldell, *supra*, the injured worker spilled coffee on herself, which could have happened anywhere, yet was not inevitable. In Texas Employers' Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.), the injured worker in that case choked to death on a piece of steak while eating in a company trailer house which was provided for employees as a place to eat while at the oil field well site. A person could choke on food anywhere, but that does not mean it is inevitable. In Texas Workers' Compensation Commission Appeal No. 941693, decided January 27, 1995, the employee sustained a compensable ankle injury while playing basketball on his break at work. A broken ankle during an athletic activity is

something that can happen outside of an employer's premises but, again, it is not inevitable. In Bratcher, *supra*, the employee's berry aneurysm ruptured while the employee was using the bathroom. The court said, "the risk was one Mr. Bratcher would have confronted irrespective of any type of employment."

The hearing officer in the case before us did not find that claimant had a condition, like the employee in Bratcher, that would inevitably cause an injury. The hearing officer found that claimant stumbled and hurt his ankle. There was some evidence that claimant's foot was more prone to go to sleep because of a prior back injury, but the hearing officer did not find that this was the case. In any case, the hearing officer could compare the facts in Bratcher to those she confronted and conclude that they were significantly different. If we interpreted Bratcher the way carrier does, no injury sustained during a comfort break would be compensable. We have reviewed the record and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge