APPEAL NO. 011785
FILED SEPTEMBER 10, 2001

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 July 2, 2001. He held that the respondent (claimant) injured his right shoulder in the course and scope of his employment and had disability from that injury from April 6, 2001, through the date of the CCH.

The appellant (carrier) has appealed, arguing that since the activity undertaken and the injury incurred could have taken place outside of work, the injury is not compensable. The carrier further argues that there is no proof of "injury," and that without a compensable injury there can be no disability. The claimant responds that the carrier's appeal was untimely. The claimant also urges affirmance.

DECISION

We affirm.

We note that a copy of the appeal was timely filed by facsimile transmission on July 31, 2001, the deadline pursuant to Section 410.202(a) as amended. The hearing officer did not err in holding that the claimant sustained a compensable injury and had disability. The facts are essentially undisputed; the claimant worked on an assembly line, and several of the parts he needed to use were located on a shoulder high rack in front of him, necessitating reaching for these parts. On _____, as he reached for one part, he felt a popping and sharp pain in his right shoulder. A coworker's statement said that he saw the claimant first pick up the part in question and thereafter hurt his shoulder. He worked with assistance the rest of the day, and was subsequently put on restrictions by his doctor due to a shoulder sprain. The claimant worked in the employer's light-duty program until the carrier denied the claim, at which time he was told that this program was no longer available for him and he had to go on short-term disability.

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 (reaching), 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. We cannot subscribe to an interpretation of the 1989 Act that would move a worker in and outside of the zone of coverage, depending upon whether the activity he undertook at the time of injury was also one that could be performed outside of work. *See* Texas Workers' Compensation Commission Appeal No. 990896, decided June 4, 1999.

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 the 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 the claimant's injury is noncompensable under the positional risk doctrine.

Because the carrier has appealed the disability finding as part of its contention that the claimant's injury was not compensable, and we have affirmed the hearing officer's decision to the contrary, we likewise affirm the disability determination.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

STEVEN BISBEE
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DALLAS, TEXAS 75231.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge