

APPEAL NO. 020329  
FILED MARCH 28, 2002

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 December 5, 2001. The record closed on December 19, 2001. The hearing officer resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_, and that he did not have any disability because there was no compensable injury. The claimant appealed, arguing that at the time of his injury he was in the course and scope of his employment under the personal comfort doctrine. The respondent (carrier) replied, urging affirmance.

DECISION

Reversed and rendered.

The hearing officer determined that the claimant was not in the course and scope of his employment at the time of his injury. She resolved conflicts in the evidence and determined that the claimant was not lifting a table, as he had claimed, at the time of his injury. Rather, the hearing officer determined that the claimant was sitting at a table talking to a coworker and stretching his neck at the time of the injury. In his appeal, the claimant accepts the hearing officer's determination in that regard but argues that he was still within the course and scope of his employment at the time of his injury under the personal comfort doctrine. The hearing officer accepts that the claimant's activity of stretching his neck fell within the personal comfort doctrine. However, she further determined that the claimant's injury was not compensable under the positional risk test, citing Employers' Cas. Co. v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied). Specifically, the hearing officer determined that the claimant's activity of stretching his neck was a personal movement and a risk that the claimant confronted irrespective of his employment.

We disagree with the hearing officer's rationale that this case is a Bratcher-type situation. The purpose of the positional risk test in Bratcher is to ensure that there is some connection between the work and the risk of injury. Texas Workers' Compensation Commission Appeal No. 001413, decided August 1, 2000. In Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995, the Appeals Panel noted that in many 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 is not compensable in accordance with the positional risk test. In Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999, the Appeals Panel noted that it did not agree with a carrier's argument that an injury arising from an activity that could also be experienced outside of work is, per se, not compensable due to that fact alone. The use of the word "would" by the court in Bratcher in describing the "but for" test is indicative of the inevitability of the injury, as opposed to the possibility that it could occur elsewhere. In this instance, the evidence does not establish that the claimant's neck injury due to stretching would have

inevitably occurred. Rather, the evidence establishes that the claimant's act of stretching his neck at work on \_\_\_\_\_, resulted in an injury on that day. That is, the evidence failed to demonstrate that such an injury would have necessarily occurred at some future point when the claimant was stretching his neck. As such, the hearing officer erred in determining that the claimant's injury was not compensable under Bratcher.

We reverse the hearing officer's decision and render a new decision that the claimant's injury is compensable. The hearing officer's disability determination is dependent upon her determination that the claimant did not sustain a compensable injury. However, in Finding of Fact No. 4, the hearing officer found that the claimant could not obtain and retain employment at his preinjury wage, as a result of his neck injury, from January 9 to April 11, 2001. Accordingly, we reverse the determination that the claimant did not have disability and render a new decision that he had disability from January 9 to April 11, 2001. Accrued and unpaid benefits should be paid in a lump sum with interest.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MARCUS CHARLES MERRITT  
6600 CAMPUS CIRCLE DRIVE EAST  
IRVING, TEXAS 75063.**

\_\_\_\_\_  
Elaine M. Chaney  
Appeals Judge

CONCUR:

\_\_\_\_\_  
Thomas A. Knapp  
Appeals Judge

\_\_\_\_\_  
Terri Kay Oliver  
Appeals Judge