APPEAL NO. 030033
FILED FEBRUARY 21, 2003

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 11, 2002. The hearing officer determined that the injury of appellant (claimant herein) was not sustained in the course and scope of employment and is not compensable. Claimant appealed this determination on sufficiency grounds. Respondent self-insured (carrier herein) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that claimant's on-the-job injury is not compensable pursuant to Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied). Claimant testified that he worked that morning changing heavy batteries on a bus. He said that he went to the restroom, started to lift the toilet seat lid, and dropped it because he felt a severe burning pain in his back. The hearing officer found that claimant sustained his injury in the restroom, noting the lack of evidence that he sustained an injury while performing his work duties. The hearing officer determined that claimant sustained an injury while using the restroom within the course and scope of his employment. The hearing officer also determined that the injury is not compensable under Bratcher, *supra*.

The hearing officer did not err in determining that claimant was in the course and scope of his employment while using the restroom, pursuant to the comfort doctrine. *See* Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985). The hearing officer also did not err in applying the positional risk test of Bratcher, and determining that the injury was not compensable. Claimant's claimed injury is not compensable because, under the positional risk test, the injury did not arise out of claimant's employment. The hearing officer could find that the risk was one that claimant would have encountered irrespective of his employment. *See* Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993. Further, there was also no condition of employment that placed the employee in harm's way. *See* Appeal No. 93956. Claimant said that there was nothing unusual about the toilet.

Claimant contends that he satisfied the positional risk test of Bratcher because the employer's equipment, the toilet, was involved in the injury and "placed claimant in harm's way." Claimant said that he felt the pain as he started to lift the toilet seat lid and dropped it. Again, however, claimant said there was nothing unusual about the toilet. The hearing officer was to consider whether "the employment brought the employee in contact with the risk that in fact caused his injuries." Bratcher, at 722 (citing Walters v. American States Ins. Co., 654 S.W.2d 423 (Tex. 1983)). The hearing officer could find

from the evidence that it was claimant's personal movements that caused the injury rather than that it was due to a condition of the toilet or the bathroom. The hearing officer could find from the evidence that the conditions and obligations of employment had not placed claimant in harm's way. *See* Walters, *supra*.

Claimant cites Yeldell, *supra*, in support of his position. In Yeldell, the employee was making a personal phone call and the phone cord became entangled with a coffee urn, causing the employee to sustain burn injuries. There was evidence that the burns were actually caused when the cord and urn became entangled. However, in the case before us, the hearing officer could find that the toilet seat was not a cause of the injuries. The connection to the employment in Yeldell was that the employer's urn and coffee actually caused the injury.

Claimant also cites Texas Employers Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.). In that case, the employee was at a drilling rig to which he was assigned. He went to a trailer house to eat dinner and choked to death on a piece of steak. The company trailer house was provided for employees as a place to sleep and eat when required to be at the well site during crucial drilling stages. The court stated that there was evidence that the employee, at the place of injury and at the time he sat down to eat his meal, was then engaged in an act incident to his employment; that is, the act of eating his meal at the trailer house and this was the connection to the work. Most courts which have considered the question regard an employee whose work entails travel away from the employer's premises as being in the course of his employment when the injury has its origin in a risk created by the necessity of sleeping or eating away from home, except when a distinct departure on a personal errand is shown. The employee in Prasek, *supra*, was at the drilling rig for extended periods and Prasek is distinguishable for that reason.

We affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JM
(ADDRESS)
(CITY), (ZIP CODE) 77656.

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Judy L. S. Barnes
Appeals Judge

CONCURING OPINION:

I concur in this case, but note that there is the danger that the comfort doctrine could be read out of existence through the application of Bratcher, *supra*.

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Chris Cowan
Appeals Judge

DISSENTING OPINION:

I must respectfully dissent. I believe that the claimant was in the course and scope of his employment at the time of his injury under the personal comfort doctrine. *See* Yeldell, *supra*. I do not understand the hearing officer's application of Bratcher, *supra*, to the present case. To me the whole point of the Bratcher decision was that the bursting of the aneurysm was inevitable. I do not find evidence of inevitability here. Nor do I think there has to be anything unusual about the toilet to make it an instrumentality of the employer. I would reverse the decision of the hearing officer and render a new decision that the claimant's injury was in the course and scope of the claimant's employment and is compensable.

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Gary L. Kilgore
Appeals Judge