

APPEAL NO. 050415
FILED APRIL 4, 2004

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 January 10, 2005. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) did not sustain a compensable injury on _____, and that the claimant did not have disability. The claimant appealed, arguing that the injury and disability determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust. The claimant additionally argued that the hearing officer's application of the law was in error. The respondent (self-insured) responded, urging affirmance of the disputed determinations.

DECISION

Reversed and rendered

The claimant testified that on _____, she was in the restroom facilities of the self-insured and as she was pulling her clothing down she felt her right leg go weak and slipped, falling to the floor, sustaining injuries to multiple body parts. Although the claimant testified she did not notice that the floor was wet, she did describe the floor as slippery. The claimant testified that she had been walking with the assistance of a cane, sometimes two, prior to _____, due to a weakness in her leg. We note that it is well settled that an employer takes an employee as it finds him or her for purposes of workers' compensation, "defects" and all. See Texas Workers' Compensation Commission Appeal No. 981309, decided July 31, 1998.

The self-insured contends that any injuries sustained by the claimant in her fall are not compensable, relying on the positional risk test discussed in Employers' Casualty Company v. Bratcher, 823 S.W. 2d 719 (Tex. App.-El Paso 1992, writ denied). However, the claimant contends that the injuries sustained are compensable under the personal comfort doctrine. The Supreme Court of Texas has described the "personal comfort" doctrine in the following terms

An employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as 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

Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243, 245 (Tex. 1985).

The hearing officer specifically found that on _____, the claimant sustained an injury in the course and scope of her employment. However, the hearing officer then specifically found that there was no causal connection between the claimed injury and the claimant's employment. We disagree with the hearing officer's rationale that this case is a Bratcher, *supra*, type situation. The purpose of the positional risk test 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. See Texas Workers' Compensation Commission Appeal No. 020329, decided March 28, 2002, and Texas Workers' Compensation Commission Appeal No. 010357, decided March 21, 2001. In this instance, the evidence does not establish that the claimant's injuries due to falling would have inevitably occurred due to the weakness in her leg. Rather, the evidence establishes that the claimant's injuries occurred when she lost her balance and fell in the restroom on _____, while in the course and scope of her employment. As such, the hearing officer erred in determining that the claimant's injury was not compensable under Bratcher. Therefore, we reverse the hearing officer's determination that the claimant did not sustain a compensable injury on _____, and render a new determination that the claimant sustained a compensable injury on _____.

The hearing officer's conclusion that the claimant did not have disability was premised on her conclusion that the claimant did not sustain a compensable injury. The hearing officer found that as a result of the claimed injury, the claimant has been unable to obtain and retain employment at wages equivalent to the preinjury wage from August 24, 2004, continuing to the date of the CCH. Therefore, we reverse the hearing officer's determination that the claimant did not have disability resulting from a compensable injury sustained on _____, and render a new determination that the claimant did have disability from August 24, 2004, through the date of the CCH.

The hearing officer's determinations that the claimant did not sustain a compensable injury on _____, and did not have disability are reversed and we render new determinations that the claimant sustained a compensable injury on _____, and had disability from August 24, 2004, through the date of the CCH.

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

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Margaret L. Turner
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Veronica L. Ruberto
Appeals Judge